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 REPLY TO RESPONDENT'S REQUEST FOR REVOCATION OF RECOMMENDATION OF PROVISIONAL MEASURES

July 21, 2023

Counsel for Claimant:

Riyaz Dattu
Timothy J. Feighery
Lee M. Caplan
Maya S. Cohen
Jodi Tai

ARENTFOX SCHIFF LLP
1301 Avenue of the Americas
42nd Floor
New York, NY 10019 USA

1717 K Street NW
Washington, DC 20006 US

TABLE OF CONTENTS

GLOSSARY **4**

I. INTRODUCTION 5

II. RELEVANT FACTS 10

A. Claimant has Entitlement to the VAT Refunds 10

1. Respondent has repeatedly acknowledged that Claimant is entitled to its VAT refunds 10

2. Respondent inaccurately claims that Claimant has been denied its VAT Refunds because it failed to make a guarantee application to the SAT 11

3. Respondent's blocking of PEM's bank accounts has served as a collection measure and an attempt to prioritize its claim to taxes not yet owing 17

B. Respondent has Made Repeated Inaccurate Representations to the Tribunal 18

1. Respondent has inaccurately stated that Claimant need only designate a new bank account to access its VAT Refunds 18

2. Respondent has incorrectly stated that Mexican courts have suspended the blocking of PEM's bank accounts 21

3. Respondent has engaged in making multiple inaccurate statements to the Tribunal in relation to facts on other issues before the Tribunal during the Hearing 22

C. Claimant Filed a Request for Arbitration to Protect its Rights 23

D. Without Access to its VAT Refunds Claimant Continues to be Irreparably Harmed 23

III. LEGAL ARGUMENT 24

A. Lack of Changed Circumstances 26

B. The Tribunal Did Not Fail to Consider A Material Fact in the Prior Record 30

C. Necessity of Provisional Measures Still Exists 31

D. Claimant Would Suffer Irreparable Harm if the Decision were to be Revoked 32

IV. REQUESTED RELIEF 33

APPENDIX **35**

Respondent has Engaged in Making Multiple Inaccurate Statements to the Tribunal in Relation to Facts on Other Issues Before the Tribunal During the Hearing 35

A. Imminence of Collegiate Court decision on the Amparo 35

B. PEM cannot seek a stay of the Amparo proceeding 36

C. PEM cannot automatically appeal a Collegiate Court decision to the Supreme Court 37

D. The APA clearly provided for the USD [redacted] fixed price of silver 39

E. A Ruling on the APA Affects the Collection of Tax Reassessments for Fiscal Years 2010, 2011 and 2012 40

GLOSSARY

TERM	DEFINITION
2010 reassessment	Tax assessment issued by the SAT on August 8, 2019, for the 2010 fiscal year
APA	Advanced Pricing Agreement
Claimant	First Majestic Silver Corp.
Decision	Decision on Request for Provisional Measures, dated May 26, 2023
MAP	Mutual Agreement Procedure
NAFTA	North American Free Trade Agreement
NOI	Notice of Intent, dated March 31, 2023
PEM	Primero Empresa Minera, S.A. de C.V.
Revocation Request	Respondent's Request for Revocation, dated June 19, 2023
Respondent	Government of the United Mexican States
Respondent's Response	Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023
SAT	Servicio de Administración Tributaria
TFJA	Tribunal Federal de Justicia Administrativa
VAT	Value Added Tax

I. INTRODUCTION

1. First Majestic Silver Corp. ("**Claimant**") on its own behalf and on behalf of Primero Empresa Minera, S.A. de C.V. ("**PEM**"), hereby provides its comments in response to the Government of the United Mexican States ("**Respondent**")'s Request for Revocation ("**Revocation Request**") dated June 19, 2023.[1]

2. The Revocation Request relates to the following Decision made by the Tribunal on May 26, 2023:[2]

> RECOMMENDS … 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*.[3]

3. Claimant respectfully asks the Tribunal to dismiss the Respondent's Revocation Request in relation Tribunal's Decision on Claimant's Request for Provisional Measures ("**Decision**"), and order immediate and full compliance by Respondent.

4. Claimant will address each of the grounds relied upon by Respondent to seek revocation of the Decision and will demonstrate that none of the arguments made by Respondent for seeking revocation have any merit.

5. Additionally, Claimant also requests that the Tribunal assess whether Respondent made submissions that were either intentionally or unintentionally misleading or inaccurate.

---

[1] *See, generally First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Request for Revocation of Recommendation for Provisional Measures ("Revocation Request"), dated June 19, 2023.

[2] *See, generally First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Decision on Request for Provisional Measures, dated May 26, 2023 ("Decision").

[3] Decision, ¶ 143(1) (emphasis added).

Claimant's comments herein will lay out the relevant facts to permit the Tribunal to make its assessment on the questionable veracity of many of Respondent's claims made during the Hearing.[4]

6. Some examples of inaccurate or contradictory statements (with many additional instances discussed further below) made by Respondent on key issues relevant to this Revocation Request are as follows:

a) Respondent unequivocally admitted throughout the Hearing that Claimant is legally entitled to its Value Added Tax ("**VAT**") refunds as of April 2020; it nevertheless continues to deny Claimant access to the amount equal to the VAT refunds including by filing the Revocation Request:

i. Respondent not only confirmed that Claimant is legally entitled to VAT refunds but also repeatedly stated that it was not necessary for Claimant to seek the Tribunal's intervention by way of provisional measures relief in order to access the VAT refunds to which it has full entitlement. According to Respondent, all that was required was for PEM to open a new bank account and direct the SAT to deposit the VAT refunds into the newly opened bank account.[5]

ii. The foregoing position conveyed to the Tribunal was patently inaccurate and misleading when made and continues to be inaccurate as evidenced by Respondent's ongoing refusal to provide the refunded amounts to PEM, and as further evidenced by the filing of this Revocation Request.[6]

---

[4] *See, generally, First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Transcript, Request for Provisional Measures Hearing, dated March 13, 2023 ("Transcript"), p. 62.

[5] *See infra* S. II(A).

[6] *See infra* SS. II(A)-(B).

iii. Respondent repeatedly refused during the Hearing to provide a commitment that Claimant could rely on the representations made at the Hearing, stating that it was up to the Servicio de Administración Tributaria ("**SAT**") to decide whether the SAT would make the amount of VAT refunds accessible to PEM. This obfuscation clearly indicates that Respondent's position at the Hearing was to advance a certain position at the Hearing which would be retracted when it came to SAT following through on this apparent commitment.[7]

b) During the Hearing Respondent also claimed that the blocking of PEM's bank accounts as of April 20, 2020, was caused by PEM's failure to offer a guarantee to the SAT. Respondent's statements concerning PEM's unwillingness to offer a guarantee is patently incorrect as we discuss in some detail further below. PEM has and continues to be willing to provide a guarantee to the SAT.[8]

7. Respondent continues to take positions, even after the Hearing, that lack evidentiary and legal support. In its Revocation Request, Respondent argues that the bringing of another claim under the North American Free Trade Agreement ("**NAFTA**") by First Majestic provides grounds for the Revocation Request. This is a specious claim as Claimant promptly made it apparent to Respondent and shortly thereafter to the Tribunal that it was intending to make a "legacy investment" claim pursuant to NAFTA Chapter 11 to protect and secure its legal rights to the VAT refunds, depending on the outcome of its Request for Provisional Measures.[9]

---

[7] *See infra* S. II(B)(1).

[8] *See infra* S. II(A)(2).

[9] As this Tribunal has confirmed in its Decision, the Claimant's claim for VAT refunds is not part of the current arbitration proceedings (ICSID Case No. ARB/21/14). The recently filed NAFTA claim has been filed to protect

8. Claimant notified the Tribunal on April 3, 2023, that it had served Respondent on March 31, 2023, with a Notice of Intent ("**NOI**").[10] This notification was made nearly two months before the Tribunal made its Decision on May 26, 2023.

9. Respondent throughout the period after March 31, 2023, was fully aware that Claimant's NOI concerned amounts equivalent to PEM's entitlement to VAT refunds, and a claim would be filed depending on the Tribunal's Decision.

10. Respondent was also advised that the timing for the filing of its NOI was dictated by the expiry date contained in the "legacy investment" provisions of the USMCA, and Claimant's need to preserve its rights and entitlement to the VAT refunds.

11. The copy of the NOI served on Respondent is included in the record as C-0048.[11] Since then, Claimant has filed its Request for Arbitration with the ICSID Secretariat in advance of the July 1, 2023 deadline.

12. It is therefore clear that Respondent had almost two months to raise its concerns with this Tribunal concerning the recently initiated NAFTA claim, and its relevance to the Claimant's Request for Provisional Measures, by seeking leave and providing facts and argument that it considered relevant in connection with Tribunal's decision. It chose not to do so.

13. However, having received an adverse decision in relation to the Tribunal's Decision in connection with providing access to PEM to its refunded amounts starting January 4, 2023, it has now opted to file its Revocation Request.

Claimant's legal interests and is limited to the refusal of Respondent to permit PEM access to the entirely of VAT refunds to which it has full entitlement. As we also discuss further below, the two proceedings are independent of each other except that compliance by Respondent with the Decision will act to limit the amount of losses claimed for VAT refunds as of January 4, 2024 (based on the Decision of this Tribunal).

[10] *See First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Letter from Riyaz Dattu to Tribunal, dated April 3, 2023.

[11] *See* Notice of Intent, dated March 31, 2023, **C-0048**.

14. As we discuss below, the Tribunal should fully dismiss the Revocation Request, which amounts to an appeal of an aspect of the Decision on which Respondent was unsuccessful. It should be recalled that the Tribunal was giving effect to Respondent's acknowledgment and statements at the Hearing that PEM should be able to open a new bank account (which would not be blocked) for the deposit of the VAT refunds.

15. As previously noted, Respondent's misleading positions taken at the Hearing included many other instances of highly contradictory and inaccurate statements. These contradictions and inaccuracies are highly relevant for the making of the Tribunal's decision in this Revocation Request. The Tribunal is entitled to use its full discretion in deciding on the extraordinary remedy which is contained in the Revocation Request. A pattern of making inaccurate statements on the various issues that were before the Tribunal when making its Decision, is an important factor that should be considered in relation to the Revocation Request.

16. Furthermore, the assessment by the Tribunal of the reliability of representations and submissions made by Respondent at the Hearing is of considerable value for the ongoing arbitration proceedings including when making the final Award.

17. Claimant requests that based on the comments provided herein to the Revocation Request, this Tribunal should reject and dismiss the Revocation Request and order immediate compliance with its Decision. Furthermore, it should take note of the many inaccurate and misleading statements made by Respondent both in relation to the Revocation Request and for the entirety of the arbitration proceeding.

II. RELEVANT FACTS

A. Claimant has Entitlement to the VAT Refunds

1. Respondent has repeatedly acknowledged that Claimant is entitled to its VAT refunds

18. Respondent has repeatedly acknowledged Claimant's entitlement to its VAT refunds. Specifically, at the Hearing and in its Response to Claimant's Request for Provisional Measures, dated February 10, 2023 ("**Respondent's Response**") Respondent stated:

- "Respondent is aware that none of the refund requests that PEM has submitted on a monthly basis has been denied."[12]
- "PEM has not been denied any of the VAT refunds that it has requested month after month."[13]
- "Claimant has acknowledged that SAT has not denied VAT refunds."[14]

19. Considering Respondent's acceptance that Claimant is entitled to VAT refunds, it is extremely troublesome to Claimant that Respondent is now seeking to revoke the Decision of the Tribunal, that requires Respondent to provide access to PEM to its VAT refunds as of January 4, 2023.

20. By bringing this Revocation Request, the Respondent has unilaterally refused to comply with the Decision and has denied Claimant the remedy ordered by the Tribunal.

21. Indeed, throughout the Hearing and on a repeated basis, Respondent took the position that in view of the agreed upon position of the parties that Claimant had an entitlement to the VAT refunds, it was unnecessary for the Tribunal to rule on Claimant's request.[15] Rather,

---

[12] *First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023 ("Respondent's Response"), ¶ 36.

[13] Respondent's Response, ¶ 78.

[14] Transcript, p. 62.

[15] *See, e.g.,* Transcript, p. 61.

according to Respondent, PEM should have simply opened a new bank account and asked the SAT to redirect its refunds to the new bank account.[16]

22. However, having received an adverse decision on the VAT refunds portion of Claimant's Request for Provisional Measures, Respondent has surprisingly chosen to challenge the only aspect of the Tribunal's Decision on which it was not successful. This amounts to an appeal of the decision in relation to the VAT refunds, which is not contemplated by any of the applicable provisions of the ICSID Convention, the ICSID Arbitration Rules, and the NAFTA.

2. <u>Respondent inaccurately claims that Claimant has been denied its VAT Refunds because it failed to make a guarantee application to the SAT</u>

23. Respondent has represented to the Tribunal that Claimant's bank accounts were blocked due to PEM's failure to provide a guarantee to the SAT. Again, we respectfully request that the Tribunal assess the accuracy of these representations, which in our view are patently false.

24. While Claimant has outlined the facts surrounding the guarantee application in Claimant's Memorial, filed on April 26, 2022,[17] in view of the position taken by Respondent in relation to the blocking of the bank accounts, Claimant has restated in this submission the relevant facts.

25. On August 8, 2019, the SAT assessed an alleged tax deficiency of a total amount of MXN [redacted] for the fiscal year 2010 (the "**2010 reassessment**").[18]

26. In response, relying on the applicable domestic law dispute resolution process, PEM filed an administrative appeal on September 25, 2019, before the legal department of the SAT.[19]

---

[16] *See, e.g.,* Transcript, p. 61.

[17] *See, e.g.,* Chronology of Key Events, dated April 26, 2022, **C-0002, pp. 6-13**.

[18] *See* Administrative Appeal, No. RL2019008326, dated September 25, 2019, pp. 1, 3, **C-0002, p. 1677**.

[19] *See* Administrative Appeal, No. RL2019008326, dated September 25, 2019, p. 1, **C-0002, p. 1677**.

This administrative appeal against the tax reassessment was unlawfully declared inadmissible by the SAT on December 5, 2019.[20]

27. This was followed by PEM filing an annulment complaint before the Online Chamber of the Tribunal Federal de Justicia Administrativa ("**TFJA**") against the assessment and the administrative appeal dismissal on December 13, 2019.[21]

28. In addition, PEM resorted to international remedies. In early November 2019, PEM filed two Mutual Agreement Procedure ("**MAP**") requests with the competent tax authorities of ███ and █████ in relation to the 2010 reassessment.[22] PEM would thereafter file a MAP request with the tax authorities of ████[23]

29. Based on the filing of the MAP requests on January 3, 2020, pursuant to the applicable avoidance of double taxation treaties, the TFJA accepted PEM's annulment complaint against the 2010 tax reassessment and granted PEM a provisional injunction against the execution by the SAT of the 2010 tax deficiency.[24]

30. As a result of the pending MAP requests, PEM was not required under Mexican law to offer a guarantee to the SAT at that time.

---

[20] *See* Official Letter, No. 900-09-02-2019-10302, dated December 5, 2019, p. 10, **C-0002, p. 1848**.

[21] PEM also filed an (1) administrative appeal before the legal department of the SAT on September 25, 2019, which was declared inadmissible on December 5, 2019; and (2) an annulment complaint before the Online Chamber of the TFJA against the assessment and the administrative appeal dismissal on December 13, 2019, this was admitted and a provisional injunction against the execution of the 2010 tax deficiency was granted on January 3, 2020. For a full summary of the chronology of events surrounding the guarantee application *see* **C-0002, pp. 6-7**; *see also* Annulment Complaint, No. 19/3171-24-01-02-02-OL, dated December 13, 2019, pp. 1-280, **C-0002, p. 1862**.

[22] *See* MAP Request for Fiscal Year 2010, dated November 1, 2019, pp. 1-16, **C-0002, p. 4089**; *see also* MAP Request for Fiscal Year 2010, dated November 6, 2019, pp. 1-21, **C-0002, p. 4105**.

[23] *See* MAP Request for Fiscal Year 2010, dated April 24, 2020, pp. 1-18, **C-0002, p. 4750**.

[24] *See* Admission Resolution of the Claim and Provisional Suspension, dated January 3, 2020, p. 13, **C-0002, p. 2142**.

31. On February 14, 2020, Respondent unilaterally dismissed the MAP requests and was thereafter able to overturn the injunction.[25] The illegality of these actions is discussed at length in Claimant's Memorial.[26]

32. These events were repeated for the 2011 and 2012 tax reassessments.[27]

33. Once the injunctions were overturned (due entirely to the refusal of the SAT to proceed with the MAP requests), PEM agreed to offer a guarantee to cover the tax deficiencies to avoid the attachment of its assets.[28]

34. After receiving PEM's guarantee application, the SAT requested additional documentation not required under Mexican law. As shown in the table below, PEM cooperated with the SAT's demands and provided the documents requested.

Table 1: Additional Documentation or Requirements Requested by the SAT not Provided by Law

Additional Documentation or Requirements Requested by the SAT not Provided by Law	Relevant Comments	PEM'S Response
Financial statements for 2016, 2017, 2018, 2019 and 2020.	The Federal Tax Code only requires financial statements that reflect the situation of the company and not the last 5 years.	Filed.
Balance sheet for 2016, 2017, 2018, 2019, and 2020.	The Federal Tax Code only requires the balance sheet that reflects the situation of the	Filed.

[25] *See* Official Letters Nos. 900-06-01-00-00-2020-000098, 900-06-01-00-00-2020-000102 and 900-06-01-00-00-2020-000103, dated February 14, 2020, pp. 2-3, **C-0002, p. 2148**.

[26] *See, e.g.,* Claimant's Memorial, S. III.J, K.

[27] For a full summary of the fact on the domestic and international proceedings surrounding each tax reassessment *see* **C-0002, pp. 6-13**.

[28] *See* Writ, No. 900-06-04-00-2019-000545, dated May 27, 2021, p. 1, **C-0002, p. 2157**.

	company and not the last 5 years.	
Original for comparison and legible copies of the invoices of all the goods of the negotiation offered as a guarantee of the fiscal interest that prove the ownership of the same	The Federal Tax Code refers only to "documentation proving ownership of the good" and only requires specifying the invoice number, not that the original and copy be exhibited for comparison.	An integration was conducted at the invoice level of about 80% of the total invoices. Samples of invoices (both originals and copies) were provided, as well as sales contracts where acquired assets are listed.
Original appraisal in which it includes general information of the company, such as type of articles, number of establishments, market to which it focuses, and number of workers, with a description of all its assets and liabilities, identifying them with the invoice number, quantity, brand, model, color, serial number, engine number, plates, type of material, as well as a photographic report of a minimum of three photographs of each good and record the invoice number, prepared by a public broker, or expert with a professional appraiser issued by the Ministry of Public Education.		Filed.
Declaration under oath to tell the truth of whether the asset offered as a guarantee of the tax interest has any limitation of exception.		Declaration made.
Declaration under oath to tell the truth of whether the business conducts operations and if it has workers and also		Declaration made.

manifest the periodicity of income of the negotiation: daily, weekly, biweekly, bimonthly, quarterly, semi-annual or annual.		
Declaration under oath to tell the truth if it has branches, agencies, offices, factories, workshops, facilities.		Declaration made.
That in the event that the guarantee offered is accepted, the information and documentation exhibited is analyzed, in the terms in which it does, in order to evaluate the effectiveness of the same, for which it would be necessary to carry out the intervention of the negotiation, which is unfeasible, given that, from the study carried out, it is possible to warn that the percentage established in the Tax Code of the Federation for the Recovery of Secured Credit.	The authority confuses the requirements for the acceptance of the administrative attachment as **a form of guarantee** (contained in articles 141, section V of the Federal Tax Code, 85 and 87 of its Regulations, as well as table 32 and file 134 / CFF, of Annex 1-A of the Miscellaneous Tax Resolution for 2021) **with the various provisions governing the attachment of negotiations during an administrative enforcement procedure** (Articles 164, 165, 167 and 172 of the Federal Tax Code).	
That WHEATON PRECIOUS METALS INTERNATIONAL LTD and THE BANK OF NOVA SCOTIA have priority over their assets and taking into account the amount of the guarantees granted in their favor, the total value of the company indicated in the appraisal would not cover such amounts, hence it would be insufficient to cover the amount of the tax assessments to be guaranteed. **With the foregoing, it does not comply with article 85, section II of the Regulations**	The authority confuses the requirements for the acceptance of the administrative attachment as a form of guarantee, contained in articles 141, section V of the Federal Tax Code, 85 and 87 of its Regulations, as well as table 32 and file 134 / CFF, of Annex 1-A of the Miscellaneous Tax Resolution for 2021, with the provisions governing the guarantee of pledge or mortgage. The defendant authority sought to substantiate the requirements of Article 81 of the Regulations of the Federal Tax Code, an article which is obviously	

of the aforementioned Code, in relation to the various numeral 81, of the same regulatory system, in that the goods offered are free of encumbrance.	inapplicable, since the requirements contained in the aforementioned paragraph are only applicable to the type of pledge or mortgage guarantee and not to the administrative attachment.	

35. Importantly, the guarantee was required to cover potential liability for the tax reassessments for fiscal years 2010 and 2011 amounting to MXN $[REDACTED].[29] Claimant provided a guarantee of its business assets amounting to a value of MXN $[REDACTED],[30] almost five times the amount requested by the SAT.

36. On September 24, 2021, the SAT arbitrarily rejected the guarantee application.[31] In its rejections, the SAT acknowledged that the requirements it had imposed on the acceptance of the guarantee were in excess of what is legally required but nonetheless deemed them to be necessary.[32] Claimant challenged the SAT's rejection of the guarantee application before the Online Chamber of the TFJA on March 18, 2022.[33] That proceeding is currently pending.

37. It is therefore clear that Respondent has advanced facts regarding the guarantee application in the Hearing before the Tribunal that were incorrect. Claimant at all times complied and cooperated with the SAT's burdensome requests that far exceeded the scope of what is

[29] The figure adjusted for inflation is: MXN $[REDACTED].

[30] *See* Dictamen Valuatorio Para Determinar el Vaor Razonable de Mercado de la Sociedad "Primero Empresa Minera", S.A. De C.V., Conjuntamente Con el de la Acciones Representatives de su Capital Social, dated March 31, 2021 **C-0049**.

[31] *See* Guarantee Rejection Letter, No. 400- 24-00-02-00-2021-003061, dated September 24, 2021, p. 15, **C-0002, p. 2173**; *see also* Guarantee Rejection Letter, No. 400-24-00-02- 00-2021-003062, dated September 24, 2021, **C-0050**; Guarantee Rejection Letter, No. 400-24-00-02-00-2021- 003063, dated September 24, 2021, **C-0051**.

[32] *See* Guarantee Rejection Letter, No. 400-24-00-02-00-2021-003061, dated September 24, 2021, p. 15, **C-0002, p. 2173**.

[33] *See* Administrative Appeal, No. 19/3171-24-01-02-02-OL, dated March 18, 2022, pp. 1-18, **C-0002, p. 5759**.

prescribed under Mexican law. Nonetheless, the SAT arbitrarily dismissed Claimant's guarantee application thereby maintaining blocking measures on PEM's bank accounts.[34]

38. Recently, on July 14, 2023, following the making of the Decision, PEM has again filed a new guarantee application for fiscal years 2010, 2011, and 2012, in order to gain access to its blocked bank accounts and VAT refunds.[35] The SAT has not yet issued a decision on the new guarantee application notwithstanding offers made by PEM to meet face-to-face so as to resolve any of SAT's concerns, which offer has been refused.

3. Respondent's blocking of PEM's bank accounts has served as a collection measure and an attempt to prioritize its claim to taxes not yet owing

39. By blocking PEM's bank accounts, Respondent has peremptorily imposed collection measures against PEM while the Advanced Pricing Agreement ("**APA**") remains valid. This is contrary to the applicable Mexican laws.[36]

40. Respondent claims that the SAT has blocked PEM's bank accounts "in order to protect the tax interest that should be paid,"[37] and that "the preventative attachment of these five bank accounts … does not mean that the assets have become property of the Tax Authority."[38]

41. However, as opposed to imposing a lien on titles for land parcels or mining concessions (which has occurred as of April 2020)[39]—where the owner can still retain possession and exclusive use of the property for its business activities, pending the final decision on the tax

---

[34] *See* Guarantee Rejection Letter, No. 400-24-00-02-00-2021-003061, dated September 24, 2021, p. 15, **C-0002, p. 2173**.

[35] *See* Guarantee Application (fiscal year 2010), dated July 14, 2023, **C-0052**; *see also* Guarantee Application (fiscal year 2011), dated July 14, 2023, **C-0053**; Guarantee Application (fiscal year 2012), dated July 14, 2023, **C-0054.**

[36] *See supra* Table 1.

[37] Transcript, p. 71.

[38] Transcript, p. 71.

[39] *See First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Claimant's Request for Provisional Measures, dated January 4, 2023, ¶ 97(vii) ("The SAT has also encumbered and seized other assets of PEM including 36 plots of land and 110 mining concessions.").

reassessments—the blocking of bank accounts results in a measure that wholly deprives the rightful owner of the entitlement to possess and use of those monies.

42. Put in another way, by blocking PEM's bank accounts the SAT has fully denied Claimant access to vital funds necessary to operate its investment in Mexico. This is particularly so, considering that the SAT continues to deposit funds amounting to approximately USD [redacted] each month into an account that is blocked.

43. The impact of bank account being blocked, as opposed to a lien on land parcels or mining concessions, is far more damaging to the day-to-day operations of PEM.

44. The blocking of PEM's bank accounts is also an unlawful collection measure taken in advance of the determination of liability of PEM to taxes owing (as the APA continues to be valid).[40] Furthermore, the blocking of now close to [redacted], as security against taxes that may become owing (and not currently owed due to the APA's validity) is a clear attempt by the SAT to unlawfully seek priority in collection over the secured creditors of PEM.

B. Respondent has Made Repeated Inaccurate Representations to the Tribunal

1. Respondent has inaccurately stated that Claimant need only designate a new bank account to access its VAT Refunds

45. Respondent stated, both in its Reply to Claimant's Request for Provisional Measures and throughout the Hearing, that the Tribunal's intervention was not necessary in relation to accessing the VAT refunds. If PEM wanted access to the VAT refund it need only designate an unfrozen bank account for deposit by SAT of VAT refunds. Specifically, Respondent stated:

- "[I]t **need only indicate the bank account** to which the corresponding deposit is to be made, in the refund request."[41]

---

[40] *See* Claimant's Memorial, S. III L.3.

[41] Respondent's Response, ¶ 38 (emphasis added).

- "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**."[42]

- "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."[43]

- "**In order for PEM to receive those funds, it need only indicate the bank account to which the corresponding deposit is to be made, in the refund request**. Clearly, this is not a situation that requires the Court's intervention."[44]

46. During the Hearing, Claimant repeatedly informed the Tribunal that it did not believe many of Respondent's representations to be accurate.[45]

47. In particular, Claimant's counsel explained to the Tribunal that Claimant had been advised by Mexican law experts that opening and designating a new account would not be feasible. This is due to the fact that PEM's banks were under a direction from the SAT to block any new accounts opened by PEM.[46]

---

[42] Transcript, p. 61 (emphasis added).

[43] Transcript, p. 80 (emphasis added).

[44] Respondent's Response, ¶ 38.

[45] *See, e.g.,* Transcript, p. 116.

[46] *See* Art. 156B, Tax Code of the Federation, dated November 12, 2021. ("The tax authority shall block bank deposits, insurances or any other deposit in domestic or foreign currencies made into any type of account held by a taxpayer in financial entities, savings and loan cooperatives, or investment and securities companies, excepting deposits that a person has made into his individual savings account for retirement, including voluntary contributions up to the amount of the contributions made in accordance with the relevant law, pursuant to the following:

I. Final and binding tax liabilities.

II. In the case of contested, unsecured tax liabilities, blocking shall be performed in the following cases:

a) A taxpayer is not located at his domicile or vacates the place where his tax domicile is found, without filing the notice of change of domicile with the Federal Taxpayer Registry.

b) The tax interest is not adequately secured because the offered guarantee is insufficient.

c) The guarantee offered is insufficient ant the taxpayer did not extend it as required by the authority.

48. In order to establish whether Respondent's position was genuine and could be relied upon, Claimant's counsel requested Respondent's counsel to "commit[] to the fact that if [PEM] open[s] up a bank account and move[s] the funds … that [Respondent] will not see that as illegality."[47]

49. However, Respondent refused to commit to Claimant that it could open a new bank account and thereafter it would be able to designate that account for the deposit of the VAT refunds, and that new account would not be blocked by the SAT.[48]

50. Respondent nevertheless persisted in providing multiple assurances to the Tribunal that it was due to Claimant's failure to open a new bank account and identify this account to the SAT that the refund amounts had been rendered inaccessible to PEM.[49]

51. Respondent has since the Hearing continued to act in direct contradiction to its representations made at the Hearing: that PEM could avoid the sequestration of the monies being held in a blocked bank account by opening a new bank account and designating that new account for deposit of the VAT refunds payable by the SAT.

52. Included as C-0060 is a letter sent by Claimant's counsel to Respondent seeking compliance with the Decision.[50] Claimant has not received a response.

53. In summary, despite repeatedly stating at the Hearing that the Tribunal's intervention was not necessary (as Claimant had the means to access its VAT refunds by opening a

---

d) Goods have been attached, but the value thereof is insufficient to satisfy the tax interest or such value is unknown."), **C-0055**.

[47] Transcript, p. 116.

[48] *See* Transcript, p. 116 ("we think it is completely inappropriate for Claimant's representative to present demands, tax demands in a hearing on Provisional Measures under the NAFTA. It's the fourth time we here that request, and we think that it is inappropriate.").

[49] *See, e.g.,* Transcript, p. 61.

[50] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated June 15, 2023, **C-0060**.

new bank account), Respondent has refused to comply with the Tribunal's Decision, and is now seeking to revoke the Decision (which effectively provides for what Respondent represented at the Hearing was an appropriate course of action to resolve the matter of the sequestered VAT refunds).

54. Respondent's assertions and representations that Claimant need only designate an unfrozen bank account to receive its VAT refunds was not only false, but also could be viewed as constituting obvious misrepresentations made to the Tribunal to achieve the outcome desired by Respondent. As we explain further below, this course of action of making inaccurate statements was a consistent pattern throughout the Hearing.

2. Respondent has incorrectly stated that Mexican courts have suspended the blocking of PEM's bank accounts

55. During the Hearing, Respondent further stated, again incorrectly, that the blocking of the bank accounts had already been suspended as a result of PEM's challenge in the Mexican courts. Therefore, according to Respondent, Claimant was in a position to obtain access to its VAT refunds without a recommendation from the Tribunal pursuant to the Request for Provisional Measures.

56. Specifically, Respondent stated:

> 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**.[1]

57. This statement is categorically false and may be viewed by the Tribunal as amounting to another brazen misrepresentation by Respondent. Again, the Revocation Request would be unnecessary if PEM is already able to access the amounts deposited as VAT refunds in

one of its blocked bank accounts. Indeed, the Mexican courts granted PEM an injunction against the SAT's collection of the 2010, 2011, and 2012 tax deficiencies, provided PEM was to provide a guarantee. However, since the SAT has rejected PEM's offer of a guarantee, the suspension granted by the Mexican courts is not in effect.

3. Respondent has engaged in making multiple inaccurate statements to the Tribunal in relation to facts on other issues before the Tribunal during the Hearing

58. Throughout the Hearing, Respondent engaged in making numerous inaccurate statements concerning:

a) the absence of imminence of the Collegiate Court hearing on the Amparo proceeding;

b) the ability of the Claimant to unilaterally seek a stay of the Amparo proceeding;

c) PEM's ability to automatically seek an appeal to the Mexican Supreme Court;

d) the contents of the APA and in particular that it did not prescribe the USD ███ prices per ounce (which it expressly does so provide); and

e) that a positive decision on the APA for the Claimant will have no impact on the ability of the SAT to collect on the claimed tax deficiencies.

59. We have set out in Appendix A relevant facts so as to permit the Tribunal to make its own assessment of the veracity of the numerous representations made by Respondent.

60. We are convinced that the Tribunal will find that Respondent engaged in multiple inaccurate statements to the Tribunal in relation to facts on many of the issues before the Tribunal during the Hearing.

61. As previously noted, the occurrence of so many instances of inaccurate and misleading statements is relevant not only to the decision of the Tribunal on the Revocation Request, but also to the entirety of the arbitration proceedings.

C. Claimant Filed a Request for Arbitration to Protect its Rights

62. On March 31, 2023, Claimant filed a NOI on Respondent for the recovery of the VAT refunds in the amount of USD [redacted]. Claimant informed the Tribunal of this filing on April 3, 2023.[51] When informing the Tribunal, Claimant specifically noted its:

> strong preference is to not pursue another claim against the Government of Mexico for the USD [redacted] and any additional amounts that accrue in the future. However, given that the decision of the Tribunal on its Provisional Measures Request is still pending, the service of the Notice was a necessary step.[52]

63. After the Tribunal rendered its Decision, Claimant filed its Request for Arbitration. Both Respondent and the Tribunal were made aware of Claimant's intention to file a Request for Arbitration. This is not a new development or unexpected event and cannot provide grounds for revocation of the Decision.

D. Without Access to its VAT Refunds Claimant Continues to be Irreparably Harmed

64. As long as Respondent continues to deposit PEM's VAT Refunds into blocked bank accounts, Claimant will continue to be irreparably harmed. Since the Tribunal's Decision, the amount of VAT refunds made inaccessible to PEM has increased to approximately [redacted]. Following the Tribunal's Decision, Claimant is entitled to almost [redacted] that has accrued between the filing of the Request for Provisional Measures on January 4, 2023, and today.

---

[51] *See First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Letter from Riyaz Dattu to Tribunal, dated April 3, 2023.

[52] *First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Letter from Riyaz Dattu to Tribunal, dated April 3, 2023.

65. As a result of PEM's inability to access its VAT Refunds, Respondent continues to severely constrain and restrict PEM's ability to operate its investment in Mexico.

III. LEGAL ARGUMENT

66. Respondent's submission ignores the extremely high threshold for justifying a reversal of the Tribunal's discretionary Decision. In its Revocation Request, Respondent refers to portions of decisions that merely outline a tribunal's authority to reopen a decision on provisional measures but offer no further guidance on the legal test to be applied when a tribunal is engaged in a review of its own decision.

67. Respondent's selective citations to sources are misleading. For example, Respondent refers to *Burlington Resources v. Ecuador* in which the tribunal found that ICSID Rule 39.3 "is the only provision in ICSID's legal framework that expressly empowers a tribunal to reconsider a decision it has issued."[53] However, the quoted excerpt does not form the basis of the decision. Instead, it is merely a comment made by the tribunal to indicate that provisional measures are different from other pre-award decisions made by tribunals. Further, in the decision, the tribunal specifically excludes procedural orders and provisional measures from the scope of its analysis. Respondent's reference to *Víctor Pey Casado v. Chile* is also unhelpful because the tribunal in that case merely noted that tribunals have the power to revoke provisional measures.[54] The decision does not offer any analysis of when tribunals may do so.

[53] *Burlington Resources, Inc. v. República del Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, dated February 7, 2017, ¶ 83, (informal English translation), **RL-0140.**

[54] *Víctor Pey Casado and Fundación Presidente Allende v. la República de Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures Requested by the Parties, dated September 25, 2001, ¶ 14 (Note: Respondent incorrectly cited ¶ 141; the intended cite appears to be ¶ 14) (" It should be added that the provisional measures, which are provisional by nature and definition (as rightly observed by the defendant), can be modified or annulled at any time by the Tribunal, have no "res judicata" force, only remain in force during the proceedings, And they "automatically void" if the Arbitration Tribunal finds itself incompetent to hear the dispute." (Informal English Translation)), **RL-0142**.

68. The applicable standard for revocation of a provisional measures recommendation is well established in the decisions of investor-State arbitration tribunals. For example, in *Nova Group Investments, B.V. v. Romania*[55], the tribunal provided clear guidance on when a tribunal may revoke a provisional measures order.

69. Specifically, the tribunal explained:

> The very nature of the provisional measures analysis involves assessments of the necessity, urgency and proportionality of particular measures at particular points in time, and ***if the underlying facts*** **have changed** that alter the prior calculus, **parties should be free to bring these changes to a tribunal's attention**. This is different, however, from simply **asking a tribunal to "reconsider" its prior decision *based on the exact same evidentiary and legal record as previously presented***. Even if an ICSID tribunal had such inherent authority - which this Tribunal considers unnecessary to decide - it **would only be appropriate to exercise it in the exceptional case where a Tribunal is persuaded that it somehow had overlooked something truly material in the prior record**, which otherwise would have led it to a different conclusion.[56]

70. In the present case, there are no new material facts or considerations that the Tribunal has not previously addressed. In fact, as discussed, Claimant notified the Tribunal of its NOI with regard to the VAT refunds claim prior to the Tribunal issuing its Decision. As a result, Respondent is merely repeating its arguments from prior submissions and hoping now for a different result.

71. As explained below, longstanding practice requires the Tribunal in the present case to consider a number of factors when considering a request to reverse a prior provisional measures recommendation: (1) whether the circumstances underlying its original decision have changed; (2) whether it failed to consider a material fact in the prior record; (3) whether the provisional measures

---

[55] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 8 Concerning Respondent's Request for Reconsideration of Procedural Order No. 7, dated April 18, 2017, **CL-0098**.

[56] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 8 Concerning Respondent's Request for Reconsideration of Procedural Order No. 7, dated April 18, 2017, ¶ 31 (emphasis added), **CL-0098**.

continue to be necessary; and (4) whether a revocation of provisional measures would cause a party irreparable harm.

A. Lack of Changed Circumstances

72. In order for a tribunal to revoke or modify a provisional orders measure, there must be changed circumstances. As evidenced in *Hydro S.r.l. v. Republic of Albania,* a decision cited by Respondent, the application of Rule 39(3) relates "mainly to circumstances where tribunals were faced with changed circumstances that meant that the provisional measures recommended by those tribunals were no longer necessary."[57]

73. In *Ioan Micula, Viorel Micula v. Romania,* the tribunal ordered provisional measures, recommending that: 1) respondent provide claimants and the tribunal with two months' notice if it intended to proceed with any tax collection measure; and 2) upon the parties reaching an agreement, respondent should lift the current garnishments over claimants' accounts.[58] When respondent continued with further enforcement actions, claimant filed for a temporary emergency order, which the tribunal subsequently granted, stating that respondent must refrain from proceeding with the garnishments of claimants' bank accounts.[59]

[57] *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures, dated September 1, 2016, ¶ 4.1 (citing cases and commentaries), **RL-0141**.

[58] *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, dated December 11, 2013, ¶ 90 ("Specifically, the Tribunal recommended that the Respondent inform the Claimants, with a copy to the Tribunal, if it intended to proceed with the seal or forced sale of the seized assets or take any other tax collection measure (including garnishments of bank accounts) that could have a similar effect, two months prior to the date in which it intends to implement such seal, sale or other measure, until this arbitration is completed or until reconsideration of the Supplemental Decision. The Tribunal also recommended that the Parties seek to reach an agreement on a mutually acceptable security or assurance to be provided by the Claimants and that, conditioned upon that agreement, the Respondent should lift the current garnishments over Starmill's accounts."), **CL-0097**.

[59] *See Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, dated December 11, 2013, ¶ 100, **CL-0097**.

74. The respondent filed a revocation application which the tribunal rejected because of the lack of changed circumstances. The tribunal found:

> Claimants had made good faith attempts to reach an agreement with the Respondent regarding a mutually acceptable security and that the provisional measures preventing garnishments … remained proportional. [The tribunal] further considered that **the circumstances … had not changed to such an extent as to warrant revocation**, suspension, or modification of the provisional measures in question.[60]

75. It is therefore clear that the existence of changed circumstances is critical factor for a tribunal's reconsideration of its order of provisional measures.[61]

76. Here, there are no changed circumstances that warrant the revocation requested. In its Decision, this Tribunal granted one of Claimant's requests for provisional measures, recommending that Respondent not block payments of VAT refunds owed by Respondent to Claimant "to avoid the aggravation of the dispute and maintain the *status quo* while the arbitration is pending…"[62] In violation of the Decision, Respondent has deposited into PEM's blocked bank account VAT Refunds accrued since January 4, 2023.

77. Not only have the circumstances not changed, they have remained the same and if anything worsened for the Claimant. The refusal of the Respondent to comply with the Decision has compounded and exacerbated the Claimant's losses which now total [redacted] in VAT refunds.

---

[60] *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, dated December 11, 2013, ¶ 111 (emphasis added), **CL-0097**.

[61] *See* Christoph H. Schreuer, Schreuer's Commentary on the ICSID Convention, Cambridge University Press, 3rd Ed., dated 2022, p. 1074, ¶ 76 ("If the circumstances requiring the provisional measures no longer exist the tribunal is under an obligation to revoke them."), **CL-0085**; *see also SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Procedural Order No. 2 Provisional Measures), dated October 16, 2022, pp. 304-305 ("It is scarcely necessary to add that this like any procedural order on provisional measures may be re-visited on the application of either party and after hearing the other party, **should circumstances change materially** during the pendency of the jurisdictional phase of this proceeding") (emphasis added), **CL-0100**.

[62] Decision, ¶ 134.

78. The growing amount of funds that remain inaccessible to Claimant only further demonstrates the need for the continuation of the Tribunal's recommendation based on the need to avoid exacerbation of the dispute and to maintain the *status quo*.

79. Respondent's argument that the NOI is a "changed circumstance" is entirely misplaced. Respondent asserts that "[t]he circumstances that existed at the time the provisional measure was granted have changed in light of the filing of the 2023 NOI and the impending request for arbitration."[63] It argues that the Tribunal's recommendation will directly affect the subject matter of the new arbitration in two ways. First, Respondent alleges "the interim measure granted by the Tribunal will interfere with a measure that is at issue in a separate proceeding from Case ARB/21/14."[64] Second, Respondent maintains that by "issuing a recommendation on a measure that is the subject of another proceeding, the merits of that new case are being prejudged, even before of having initiated arbitration."[65]

80. Neither of the arguments advanced by the Respondent have any merit.

81. There is no basis for Respondent to claim that "the interim measure granted by the Tribunal will interfere with a measure that is at issue in a separate proceeding from Case ARB/21/14."[66]

82. In fact, the contrary is the case. The Tribunal's interim measures protection and the ability of PEM to access VAT refunds as of January 4, 2023 will make unnecessary for the Claimant to seek relief in the newly filed arbitration claim under the NAFTA with respect to VAT refunds paid to PEM as of January 4, 2023.

---

[63] Respondent's Request for Revocation of Recommendation for Interim Measure, dated June 19, 2023, ("Revocation Request"), ¶ 27.

[64] Revocation Request, ¶ 32.

[65] Revocation Request, ¶ 33.

[66] Revocation Request, ¶ 32.

83. Equally, it is entirely incorrect to claim, as has been done by the Respondent, that by "issuing a recommendation on a measure that is the subject of another proceeding, the merits of that new case are being prejudged, even before having initiated arbitration."[67]

84. The current Decision has been made based on the applicable laws including the principles related to the making of provisional relief decisions. As such, its provisional relief measures are made pending the making of the final award.

85. The Respondent in asserting, that by this Tribunal making its interim decisions or when rendering its final award, it is somehow prejudging the merits of the new case, is simply absurd.

86. It is axiomatic that an arbitral tribunal's mandate is limited to the resolution of the claims presented to it. The claims in the new arbitration are not before the Tribunal in this proceeding. Importantly, the Tribunal has no authority to decide a matter in the new arbitration. The arbitration tribunal in the newly filed NAFTA claim will make its decision based on the facts presented to it and the applicable law. It will not be bound by the decisions made by this Tribunal, although it may consider the impact of this Tribunal's decision in deliberating on issues such as double-recovery and indemnification for losses suffered.

87. Respondent's concern that the consolidation of claims would give rise to "an irregular situation"[68] in conflict with Article 1134 is also entirely premature. The Claimant has made no representations to the effect that it will seek consolidation of the two proceedings. Furthermore, a request for consolidation, if a party chose to pursue it, can take many months to resolve and would not necessarily result in the consolidation of claims, if doing so were deemed

[67] Revocation Request, ¶ 33.

[68] Revocation Request, ¶ 35.

inefficient or otherwise imprudent. Accordingly, Respondent's concerns are speculative and, in any case, highly premature.

88. In sum, there are no changed circumstances to justify a revocation of the Tribunal's recommendation on provisional measures. To date, the only steps taken by Claimant were outlined in the NOI, which is the filing of a NAFTA proceeding concerning VAT refunds. The claim was filed in view of the strict July 1, 2023 deadline to file "legacy investment" claims under NAFTA. It was and continues to be a protective claim as the subject matter of entitlement to VAT refunds is not part of the claim in the current arbitration. Rather, the current arbitration concerns the measures taken by the SAT in relation to the APA and unlawful enforcement measures including the blocking of PEM's bank accounts. The Decision confirms that the SAT should not block any new bank account opened for the deposit of the VAT refunds (to which PEM has full entitlement as unreservedly admitted by Respondent).

B. The Tribunal Did Not Fail to Consider A Material Fact in the Prior Record

89. Even if this Tribunal finds that it has the discretion to review the exact same factual and legal record which has prevailed from when it rendered its Decision, Respondent bears the burden of convincing this Tribunal that there is an extreme reason its recommendation should be revoked.

90. To this point, as previously noted, the *Nova* Tribunal found that if a tribunal has issued provisional measures, reconsideration of "*the exact same evidentiary and legal record as previously presented* … would only be appropriate … where a Tribunal is persuaded that it somehow overlooked something truly material in the prior record."[69]

[69] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 8 Concerning Respondent's Request for Reconsideration of Procedural Order No. 7, dated April 18, 2017, ¶ 31 (emphasis added), **CL-0098**.

91. In this case, Respondent fails to demonstrate the existence of any material facts in the record that the Tribunal overlooked when it rendered its Decision.

92. The Tribunal was aware of the NOI as of March 3, 2023 and referenced this in the Decision. The Respondent does not refer to anything else in the record that was a material fact that was missed or overlooked.

C. Necessity of Provisional Measures Still Exists

93. For a tribunal to modify or revoke provisional measures order it must be established that the recommended provisional measures are no longer necessary.

94. In *City Oriente Limited v. Republic of Ecuador*,[70] for example, a contract was regularly performed as agreed until respondent enacted a law that demanded from the claimant an additional payment that was not originally provided for in the contract and would have forced the claimant out of business.[71] Respondent repeatedly claimed that the claimant owed additional payment, commenced an administrative proceeding that could have resulted in an expiration order and the termination of the contract, and brought criminal charges against executives of the claimant for refusing to pay.[72] The tribunal granted the claimant's provisional measures request seeking to have the respondent refrain from pursuing all criminal proceedings related to the arbitration against claimant or its officers, demanding that claimant pay any amounts related to the newly enacted law, and engaging in conduct that may affect the legal situation agreed upon under the contract.[73]

---

[70] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, **CL-0099**.

[71] *See City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, ¶¶ 17, 69, **CL-0099**.

[72] *See City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, ¶ 74, **CL-0099**.

[73] *See City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, ¶ 1, **CL-0099**.

95. After failing to implement the tribunal's decision by continuing to serve demands for payment and progressing the expiration proceedings, respondent filed a request for the revocation of the provisional measures. In its decision, the tribunal noted:

> In the cited Decision, the Tribunal concluded that the urgency requirement had been met … **If anything, fulfillment of that requirement is even firmer now**, since the expiration proceedings are progressing and Petroecuador has continued to serve demands for payment.[74]

96. In the same way, Claimant's financial situation grows graver by the day. The *City Oriente* Tribunal had previously concluded that the urgency element had been met to justify provisional measures, as this Tribunal had done in its Decision. Likewise, with the passing of time and the pressing financial burden on Claimant, the urgency of the provisional measure is "even firmer now" with Respondent continuing to deposit the VAT refunds—now nearing ████ ███—owed to Claimant into frozen bank accounts. As a result, the necessity for the existence of the Tribunal's Decision still exists.

D. Claimant Would Suffer Irreparable Harm if the Decision were to be Revoked

97. When analyzing whether to modify or revoke a provisional measures order, tribunals assess whether one party would suffer serious or irreparable harm as a result of the continuation of the provisional measures. For example, the tribunal in *City Oriente Limited v. Ecuador* when rejecting respondent's request to revoke the provisional measures ordered found:

> the Arbitral Tribunal considers that the **maintenance of the Provisional Measures does not cause irreparable harm to Respondents, while their revocation may cause such harm to City Oriente**.[75]

---

[74] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, ¶ 71 (emphasis added), **CL-0099**.

[75] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (I)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, dated May 13, 2008, ¶ 94, **CL-0099**.

98. In this case, on the one hand, Respondent would suffer no injury in depositing the VAT refunds it agrees are owed to Claimant into unfrozen bank accounts. Those amounts remain in a blocked account and are not available for the present use of the Respondent. By seeking to secure the amount equal of PEM's VAT refunds, the Respondent is seeking to retain funds for an eventuality where it is authorized to engaged in collection (which would have to be preceded by the APA being set aside and Claimant's avenues of redress being exhausted). However, any such pre-emptive collection measure taken to ensure that it has priority as against secured creditors of PEM is itself unlawful.

99. On the other hand, Claimant would be irreparably or seriously harmed, as previously demonstrated, if the provisional measures were lifted and PEM continues to be denied access to the substantial funds owed to it, now nearing almost ██████████. These funds are necessary for the basic management and administration of Claimant's business. As a result, while Claimant would suffer irreparable harm to its business without access to essential funds, Respondent would not suffer any harm (let alone irreparable harm) if it were to comply.

100. Additionally, the refusal to comply with the Tribunal's Decision has exacerbated the dispute and goes against the Tribunal's order seeking to maintain *status quo*.[76]

IV. REQUESTED RELIEF

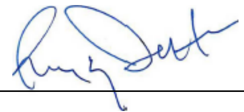
101. Claimant requests this Tribunal to take into account the foregoing evidence and legal grounds when making its decision on Respondent's Revocation Request and respectfully requests the Tribunal to dismiss Revocation Request.

[76] Decision, ¶ 133 ("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.").

102. The Tribunal should order immediate and full compliance by the Respondent of the Decision and any additional recommendation it may issue in relation to Respondent's Request.

103. Claimant will address the Tribunal on the matter of costs of this submission setting out its comments at a time when the Tribunal considers it appropriate.

Date: July 21, 2023 Respectfully submitted,



Riyaz Dattu
Timothy J. Feighery
Lee M. Caplan
Maya S. Cohen
Jodi Tai

ARENTFOX SCHIFF LLP
1301 Avenue of the Americas
42nd Floor
New York, NY 10019 USA

1717 K Street NW
Washington, DC 20006 US
Counsel for Claimant

APPENDIX

Respondent has Engaged in Making Multiple Inaccurate Statements to the Tribunal in Relation to Facts on Other Issues Before the Tribunal During the Hearing

A. Imminence of Collegiate Court decision on the Amparo

104. During the Hearing, Respondent misrepresented to the Tribunal that the Amparo decision would not be rendered for a long time. This statement was made without regard to the applicable laws.

105. As may be recalled, PEM filed an Amparo before the Collegiate Court on November 30, 2020 as a necessary protective measure to preserve the validity of the APA.[77]

106. On April 14, 2021, Respondent used its "power of attraction" to transfer the case from the Collegiate Court to the Mexican Supreme Court.[78] After close to two years of waiting for a decision, on December 8 and 9, 2022, Respondent inexplicably withdrew its power of attraction, reverting the case back to the Collegiate Court. On December 12, 2022, the Collegiate Court acknowledged receipt of the case. Claimant filed the Request for Provisional Measures on January 4, 2023, as it feared that a decision could be rendered by the Collegiate Court any day.

107. During the Hearing on May 8, 2023, Respondent countered Claimant's concerns about a looming decision by alleging that depending on the workload of the Second Collegiate Court a decision "may" be issued during 2023.

108. Specifically, during the Hearing, Respondent said:

> This amparo proceeding continues with its normal tendency. We do not know how this is going to be decided, but **we think that a decision may be issued during 2023**. This, of course, depends on the workload of the Second Collegiate Court.[79]

---

[77] *See* Amparo Lawsuit Complaint, dated November 30, 2020, **C-0002, p. 1078**.

[78] *See* Request of Power of Attraction to the Supreme Court, No. 135/2021, dated April 14, 2021, pp. 1-9, **C-0002, p. 1406**.

[79] Transcript, p. 52 (emphasis added).

109. However, Respondent's statement ignores the codified procedure contained in the Amparo law. Specifically, under Article 183 of the Amparo Law, the Collegiate Court will assign a Magistrate to draft the decision within 3 days after the admission of the Amparo and a 15-day term to file closing arguments.[80] Thereafter, the drafting of the decision shall be done within 90 business days.[81] Through a resolution on March 16, 2023 (just three days after the Hearing), the Collegiate Court notified the parties that it had assigned a Magistrate for its resolution.[82] As a result, it is clear, that contrary to Respondent's assertions, a decision on PEM's Amparo related to the APA is imminent (i.e., it could be issued any day now).[83] Respondent's position stating that "**we think that a decision may be issued during 2023**" was entirely speculative and made to lead the Tribunal into believing that the decision was not "imminent."[84]

B. <u>PEM cannot seek a stay of the Amparo proceeding</u>

110. During the Hearing, Respondent took the position that PEM could unilaterally seek a stay of the Amparo proceeding based on the Federal Civil Procedure Law. This is incorrect and Respondent's position was again misleading.

111. Article 2 of the Amparo Law provides that the Federal Civil Procedure Law can only be applied to such proceedings where there is no specific provision on the issue under the Amparo Law. The Amparo Law provides for two situations in which an Amparo proceeding can be suspended:

[80] *See* Art. 181 and 183, Amparo Law, dated April 2, 2023, **C-0056**.

[81] *See* Art. 181 and 183, Amparo Law, dated April 2, 2023, **C-0056**.

[82] *See* Resolution, Primero Empresas Minera, S.A. de C.V., Segundo Tribunal Colegiado en Materia Administrative del Primer Circuito, Amparo Directo, dated March 16, 2023, **C-0057**.

[83] The decision of the Collegiate Court was expected on July 20, 2023. It is likely that it will be issued after the summer recess.

[84] *See* Transcript, p. 52 (emphasis added).

1) Article 16 applies when the claimant or a third-party passes away. The suspension would happen if the amparo concerns personal rights of the claimant or of the third party and lasts until the executor of the will intervenes.

2) Article 102 only provides for the suspension of "indirect amparo proceedings." PEM's case is a "direct amparo proceeding."

112. Neither of the two situations under the Amparo Law apply to PEM. As a result, PEM cannot unilaterally seek a suspension of the Amparo proceedings.

113. Even if the Federal Civil Procedure Law were to apply—which is not the case—PEM would nevertheless have no ability to seek suspension of the proceedings. Specifically, under Article 365 of the Federal Civil Procedure Law, a trial can be suspended when the Court cannot function due to *force majeure*. Under Article 366 of the Federal Civil Procedure Law, a trial must be suspended when the Court has to wait for a decision to be issued by another Mexican court.[85] Again, neither of these situations apply to PEM as there is no *force majeure* nor other pending decision before a Mexican court restricting the Collegiate Court's ability to hear the Amparo. Respondent's repeated claim that PEM can easily and unilaterally suspend the Amparo is therefore another blatantly inaccurate statement.

C. PEM cannot automatically appeal a Collegiate Court decision to the Supreme Court

114. At the Hearing and in its Reply, Respondent alleged that a decision from the Collegiate Court could be automatically appealed to the Mexican Supreme Court. Specifically, Respondent stated that "In any event, if the 2nd Collegiate Court issues a decision that the Claimant does not consider favorable to its interest, the Claimant may challenge that decision through a

[85] *See* Art. 366, Federal Civil Procedure Law, dated June 7, 2021, **C-0058**.

recourse established in Mexican law called 'appeal for review.'"[86] However, Respondent's statement is grossly misleading.

115. Even if PEM were to file an appeal for review before the Mexican Supreme Court of Justice, this does not mean that its arguments will be heard as the admission of such appeal is entirely a discretionary decision of the President of the Supreme Court.

116. Furthermore, under Article 107, S. IX of the Mexican Constitution, an appeal for review is only admissible when the matter is "important and transcendent" in relation to constitutional matters.[87] The President of the Supreme Court has the full liberty to decide whether a matter is of an "exceptional interest." If the President chooses not to exercise discretion to hear the appeal for review, no further right of review exists under Mexican law. Additionally, only 2.7% of Amparo's filed are resolved by the Supreme Court.[88]

117. As a result, contrary to Respondent's allegations, there is no automatic right of the appeal for PEM if the Collegiate Court rejects PEM's filing. Furthermore, it is highly likely that the President of the Supreme Court would in the exercise of a discretionary decision refuse to hear the appeal (particularly as it rejected the case for its consideration when the Court was asked to do under the "power of attraction" based on requests from one Member of the Mexican Supreme Court and the Minister of Public Credit).

[86] Respondent's Response, ¶ 156; *see also* Transcript, p. 55 ("In either case, the SAT could challenge the Judgment issued by the Collegiate Court through a remedy called 'the appeal for review,' Recurso de Revisión.").

[87] *See* Art. 107, s. IX, Constitution of the United Mexican States, dated June 6, 2023, ("Regarding the direct constitutional adjudication, the review resource is appropriate to challenge the sentences concerning the unconstitutionality of general provisions, or make a direct interpretation of a constitutional provision, or failed to rule on these issues, provided that the Supreme Court of Justice considers that such rulings create an important and transcendent criterion. In the constitutional adjudication, only the constitutional issues shall be analyzed."), **MS-0022**.

[88] *See* Statistics of the "Appeal Amparo Directo" in the Mexican Supreme Court of Justice for NAFTA preliminary hearing, dated March 12, 2023, p. 2, **C-0059**.

D. The APA clearly provided for the USD [redacted] fixed price of silver

118. Respondent alleged in the Hearing that the APA did not specifically indicate the USD [redacted] fixed price per ounce of silver. This is categorically false. The APA specifically references the USD [redacted] price as the appropriate transfer pricing based on the existence of the Streaming Agreement. The APA provides as follows:

> Finally, a profitability analysis was conducted by analyzing the difference in revenue that PEM could obtain by selling silver at a spot price, in relation to the estimated revenue from selling silver at a fixed price of $[redacted] dollars per ounce, *taking into consideration the savings in the purchase price of the mine*. With this, the total profits that the company would receive in the period from January 2012 to October 2029 were calculated. The analysis is shown below:
>
> […]
>
> In the table above, it can be observed that the profits estimated for PEM for the period of January 2012 to October 2029 is of $[redacted].
>
> From the aforementioned analysis, it can be concluded that the operation carried out by PEM results in a profitable business, since the above estimations show that if PEM's business keeps operating under the same conditions and circumstances*, it will obtain profits throughout the term of the silver sale agreement entered into with its foreign related party STB*."
>
> […]
>
> Considering the above, this Central Administration, acting within its competence:
>
> First: That the present resolution will be applicable for tax years 2010, 2011, 2012, 2013 and 2014 with respect to the silver sale operations carried out between Primero Empresa Minera, S.A. de C.V. and its foreign related party STB.
>
> SECOND. That at the request of Primero Empresa Minera, S.A. de C.V., it is hereby confirmed that the silver sale operation carried out between STB and PEM for tax years 2010 and 2011 is obtaining similar profits to those obtained between independent parties in comparable operations, as established by article 215 of the Mexican Income Tax Law.[89]

[89] *See* SAT PEM Ruling, No. 900-08-2012-52885, dated October 4, 2012, p. 33 (emphasis added), **C-0002, p. 43**.

119. It is therefore extremely clear that the APA did in fact expressly provide for the transfer price of USD ███ price per ounce of silver. Respondent when making representations to the Tribunal at the Hearing, that the APA did not provide for the USD ███ was engaged in providing inaccurate information.

E. A Ruling on the APA Affects the Collection of Tax Reassessments for Fiscal Years 2010, 2011 and 2012

120. Finally, Respondent incorrectly stated that a ruling on the APA from the Collegiate Court would not affect the collection of the tax reassessments for fiscal years 2010, 2011, 2012, and 2013. This position is false.

121. While the *Juicio de Lesividad,* the annulment suits for fiscal years 2010, 2011, and 2012 and administrative appeal for fiscal year 2013 are different procedures to be decided independently, the decision in the *Juicio de Lesividad* will undoubtedly impact the related procedures. This is as the 2010 – 2013 the tax reassessment make adjustments on the silver sale operations conducted with Silver Trading Barbados based on a method without regard to the APA.[90] If the APA is upheld as valid, then the SAT's 2010 – 2013 tax reassessments will be deemed illegal. As a result, the annulment suits and administrative appeal related to the 2010-2013 tax reassessments will no longer necessary.

[90] *See, e.g.,* Claimant's Memorial, ¶¶ 106-107.