

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

First Majestic Silver Corp.

v.

United Mexican States

(ICSID Case No. ARB/21/14)

Procedural Order No. 5 on Production of Documents

Members of the Tribunal

Prof. Giorgio Sacerdoti, President of the Tribunal

Prof. Stanimir A. Alexandrov, Arbitrator

Prof. Yves Derains, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

21 September 2023

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1. In accordance with the procedural calendar of 25 July 2023, on 21 August 2023, the Parties submitted to the Tribunal their respective completed Redfern Schedules containing the Parties' reasoned requests for document production to each other (the "Requests"), their objections (the "Objections") and their replies to those Objections (the "Replies").

The criteria followed by the Tribunal to decide on the Requests: the IBA Guidelines

2. The Tribunal has carefully examined the Parties' Requests and their respective Objections and Replies, as set forth in their Redfern Schedules, as well as their introductions, or comments, to their Requests and that of the other Party to which they Object. The Tribunal's decision on the Requests which have been met by objection from the other Party are set forth in the "Tribunal Decision" column of the Parties' Redfern Schedules, which are annexed to the present Procedural Order (Annex A, being the Claimant's Requests, and Annex B being the Respondent's Requests)
3. The Tribunal considers that some general explanations are appropriate to clarify the reasons which have guided the Tribunal in its decision.
4. First, the Tribunal recalls that, according to Procedural Order No.1 ("PO1"), para.15.1: "*Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("the IBA Rules") shall guide the Tribunal and the Parties in relation to the production of documents in this case*".
5. Relevant provisions of the IBA Rules, relied upon by the Parties, are the following (underlining added to the provisions which the Parties have invoked):

Article 3 ("Documents")

[...]

3. A Request to Produce shall contain:

(a) *(i) a description of each requested Document sufficient to identify it, or*

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; [...]

(b) *a statement as to how the Documents requested are relevant to the case and material to its outcome; [...]*

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3.

6. In turn, Article 9 ("Admissibility and Assessment of Evidence") states the following in relevant part:

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

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2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;*
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (see Article 9.4 below);*
- (c) unreasonable burden to produce the requested evidence;*
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;*
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;*
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or*
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.*

Requests concerning the issuance of APA (and previous relations) and its follow-up are not relevant or material for the present case (IBA 9(2)(a))

7. In its decisions on the various objections the Tribunal has been guided by the above provisions.
8. Having examined the Claimant's and the Respondent's Requests and Objections, the Tribunal observes that most of them, which are those to which the Parties appear to have devoted special attention, relate, in the Claimant's case, to the issuing of the APA by the SAT, subsequent investigations made by the SAT as to the regularity of its issuance, the reasons for the SAT starting the *Juicio de Lesividad* (impugning retroactively the validity of the APA). As to the Respondent, the requests of documentation pertain to the contractual arrangements concerning the ownership of PEM from 2004 on, the various agreements concerning the transfer prices for the sale of the silver produced by the San Dimas mine in the course of the years, starting from before the APA, and internal documents of the Claimant and its predecessors in this respect.
9. The Tribunal believes that all such documents and the facts and events to which they relate (in particular the internal process of determination of the decisions of SAT, and the decision-making process within the Claimant, PEM and its predecessors) are not relevant to the case and not material to its outcome, because those facts and events are not the subject matter of the present arbitration.

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10. The subject matter of the present arbitration has been most recently restated as follows by the Claimant at paras.11-12 of its “Explanatory Memorandum” of August 7, 2023, annexed to Respondent’s introduction to its Redfern Schedule of 21 August 2023:

“(11) In this arbitration, Claimant is challenging the Respondent’s illegal attempts to retroactively revoke the APA beginning in 2015, and subsequent illegal enforcement measures of Respondent notwithstanding that the APA is still valid under Mexican law. Respondent’s requests aimed at relitigating the validity of the APA including the fixed price of ████████ accepted by the SAT as being comparable to an uncontrolled price (i.e., arm’s length price) are therefore not “relevant to the case and material to its outcome,” as required by the IBA Rules.

(12) Nowhere in its pleadings has Claimant challenged measures of the SAT that relate to a period prior to 2015. Furthermore, the Claimant’s dispute with Mexico relates to measures taken and not taken in relation to the denial of access to remedies to PEM and the Claimant (under normal avenues of redress under Mexican law and international taxation treaties), and its enforcement measures taken in the face of an APA issued in 2012 that remains valid at this time pending final adjudication by the Courts of Mexico.”

11. The Claimant goes on arguing that:

“Nonetheless, Respondent has included numerous document production requests aimed at relitigating the validity of the APA, including the fixed price specifically approved by the SAT pursuant to the APA (which has remained valid for in excess of ten years). Its various arguments as to the validity of the APA and attempts to retroactively revoke it and issue reassessments for the years 2010 to 2014, should only be pursued in the courts of Mexico (if permitted by those courts). These requests for documents concerning the validity of the APA (and in particular the amounts established as applicable fixed price) should not be relitigated in these international arbitration proceedings.”

12. The Claimant submits in this respect:

“that the Respondent should not be permitted to abuse and misuse the documentary production process allowed by the Tribunal based on Procedural Order No. 1, to engage in an exercise to bolster, through “fishing expeditions”, its position in the domestic law proceedings under the guise of seeking documents relevant to this international arbitration under the provisions of NAFTA.”

13. It is clear from the above that the issuance of the APA, the underlying contractual arrangements, the economic situation of the owners of the mine, the subsequent challenge by SAT of the APA by the *Juicio de Lesividad*, and any contacts or dealings between the Claimant (or PEM) and SAT are not a subject matter of this arbitration. Evidence in respect of those facts, relations, administrative and judicial actions are not relevant for the present case. The present arbitration is not a duplication of the *Juicio de Lesividad*, nor a review proceeding of same or of the validity of the APA.

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The Claimant's Objections to the Respondent's Request

14. The Tribunal considers that all issues concerning the validity of the APA, the data and analysis made at the time to support its issuance, the action taken by SAT to challenge it with the *Juicio de Lesividad* are not relevant to the present case nor material to its outcome.
15. Therefore, the Tribunal denies all Requests by the Respondent objected to by the Claimant under the following headings in its Redfern Schedule, which pertain to the issuance of the APA and its challenge by SAT with the *Juicio de Lesividad*: II. Respondent's Allegations that APA was improperly issued; III. Respondent's Allegations that PEM refused To Cooperate in a Verification; IV. *Juicio de Lesividad*: documents on reasons for SAT to initiate proceedings; how SAT will implement decision of FCAJ, why it was requested to move to the Supreme Court; V. Mexico's APA Program; VI. Mexico's Experiences with Streaming Agreements; VII PRODECON; VIII. First Majestic's Acquisition of PEM.
16. As to other Requests, see the Tribunal Decision column in the Claimant's Redfern Schedule, attached as Annex A.

The Respondent's Objections to the Claimant's Requests

17. For the same reasons, based on the object of the present arbitration being principally the alleged breach by Mexico of the minimum standard of treatment (Article 1105 NAFTA) through the retroactive revocation of the APA, all Requests by the Respondent (based or not on the claim that the APA was obtained improperly), pertaining to the issuance of the APA, the streaming agreements, acquisition contracts and the Claimant's conduct, are also not relevant and not material.
18. The Tribunal denies therefore the Respondent's Requests concerning (1) the acquisition of the San Dimas mine in 2010; (2) discussions with SAT concerning the *Juicio de Lesividad*; (3) documents relating to the Streaming Agreements; and (4) Silver Sale Transactions from 2004 to 2010.

Several Requests of the Parties lack specificity (IBA Article 3(a)(ii))

19. Example: Claimant's Request IV(5)(i): "*Documents including copies of emails, notes, memoranda, analysis, and reports, which were prepared or relied upon by the SAT officials to reach the decision to initiate the Juicio de Lesividad proceeding*".
20. Example: Claimant's Request II(3)(ii): "*Please provide all documents (other than those provided to the SAT by PEM), whether internally prepared or sourced by the SAT, that the SAT relied upon in issuing the APA*".
21. Example: Respondent's Request 3(13): "*Documentos y comunicaciones que se refieran a las estrategias o estructuras fiscales implementadas en el periodo 2010-2020 que involucren a Primero Empresa Minera, S.A. de C.V.*"

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Requests of documents that entail an “unreasonable burdensome to produce” or are confidential

22. The Tribunal marks in the relevant column of the Parties’ Redfern Schedules the requests which are being denied as being unduly burdensome (such as those concerning documents older than 10 years) or involving internal exchanges within governmental entities for the purpose of issuing administrative acts, which are confidential according to the applicable Mexican legislation.

Request by the Respondent of production of documents that are referred to in the Claimant’s Witness Statement of [REDACTED] ([REDACTED]-0000) and in the Claimant’s Expert Statement by Secretary ([REDACTED]-0000)

23. The Respondent requests that documents relied upon in the above referred witness and expert statements be produced. This conforms to the principle that the basis of any statement be disclosed in order that its truthfulness may be evaluated. This obligation cannot however extend to any other document or information they may have relied on. In any case, the witness and the expert could be cross-examined in the hearing and their statements would be tested there. If any of their statements is found wanting because of the lack of supporting evidence, this will go to the detriment of the Claimant.

Procedural Economy

24. To conclude, in taking the above positions on the production of documents, the Tribunal is mindful of the criterion of procedural economy (IBA Rule 9(2)(g)) and thus aims to avoid the production of most-likely irrelevant documents which would add to the current production already amounting to thousands of pages of documental evidence filed by each Party in order to support its case.

For the sake of clarity, the justifications for the rejection of any Request are marked as follows in the Tribunal Decision column of the Redfern Schedules attached as Annexes A and B:

NR = Not relevant to the case or not material to its outcome

LS = Lack of specificity

PR = privilege, confidentiality, or legal impediment

UB = Unreasonable Burden

DP = Document, or equivalent evidence, in the possession or control of the requesting party

PE = Procedural Economy

DN = Document not in possession of requested party

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For and on behalf of the Tribunal,

A handwritten signature in blue ink, appearing to read "G. Sacerdoti", is written on a light blue rectangular background.

Prof. Giorgio Sacerdoti
President of the Tribunal
Date: 21 September 2023