

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

**FIRST MAJESTIC SILVER CORP.**

Claimant

and

**UNITED MEXICAN STATES**

Respondent

**(ICSID Case No. ARB/21/14)**

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DECISION ON THE RESPONDENT'S PRELIMINARY OBJECTION TO JURISDICTION

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***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

December 20, 2023

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## **I. RELEVANT PROCEDURAL HISTORY**

1. This arbitration was initiated on March 1, 2021, when the Claimant submitted its Request for Arbitration (“**Request for Arbitration**”).
2. On April 25, 2022, the Claimant filed its Memorial on Jurisdiction and the Merits (“**Memorial**”).
3. On November 25, 2022, the Respondent filed its Counter-Memorial on the Merits and Memorial on Admissibility and Jurisdiction (the “**Counter-Memorial**”).
4. Currently, the proceedings on the merits are ongoing; according to the calendar agreed by the Tribunal with the Parties, the Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility is due to be filed on January 15, 2024.

### **A. Claimant’s Request for Provisional Measures and the Tribunal’s Decision on Claimant’s Request**

5. On January 4, 2023, the Claimant filed a Request for Provisional Measures (“**PM Request**”), requesting that the Tribunal recommend four provisional measures, the third one being:

*c) Future VAT refunds payable to PEM: The requested order would require the SAT to make all VAT refunds that have accrued to PEM after the date of the filing of the Request for Arbitration, and all future VAT refund payments, to be made fully accessible to PEM. Furthermore, the order would require that these VAT refunds remain free from SAT’s seizures or freezing of bank accounts.<sup>1</sup>*

6. In respect of this request, the Claimant explained that in accordance with Mexican law, PEM is entitled to VAT refunds which are periodically paid by SAT to PEM’s bank accounts. The Claimant further explained that the equivalent of about [REDACTED] of such refunds (partly made after the filing of the Request for Arbitration), were deposited in PEM’s bank accounts that were blocked or seized by SAT as a result of certain tax

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<sup>1</sup> PM Request, para. 19.

enforcement and collection measures against PEM.<sup>2</sup> The Claimant clarified that it was not asking that the freezing of the accounts be lifted (since this would run counter to the prohibition contained in the last sentence of Article 1134 NAFTA). Rather, it was requesting that future refunds not be deposited in such frozen accounts, because SAT has “continued depositing the VAT refunds into frozen bank accounts without any direction or authorization from PEM.”

7. On February 10, 2023, the Respondent submitted its Response to the PM Request (the “**PM Response**”). According to the Respondent, SAT has paid in full all VAT refunds due to PEM in the bank accounts that the Claimant or PEM had specified to that effect.<sup>3</sup>
8. Furthermore, the Respondent submitted that:

*Para que PEM pueda recibir tales recursos, únicamente debe indicar en la solicitud de devolución, la cuenta bancaria a la cual se tiene que realizar el depósito correspondiente. Claramente, esta no es una situación que requiera la intervención del Tribunal.<sup>4</sup>*

9. On May 29, 2023, the Tribunal issued its Decision on Claimant’s PM Request (the “**PM Decision**”). In its examination of the Claimant’s request concerning the VAT refunds, the Tribunal stated, *i.a.*, the following:<sup>5</sup>

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

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<sup>3</sup> Decision on PM, para. 42, referring to the Claimant’s Request for Provisional Measures, January 4, 2023 (“**PM Request**”), paras. 80-81 and original footnote 27 of the Decision on PM: “These measures are described by the Claimant at para. 97 of the Request, especially at para. 97 (ii) and (v), and appear to be the result of SAT [REDACTED]”

[REDACTED] The Claimant indicates that, on average, these VAT refunds payable in the future amount to [REDACTED] per month.”

<sup>3</sup> PM Response, para. 37.

<sup>4</sup> PM Response, para. 38.

<sup>5</sup> PM Decision, paras. 127-134 (footnotes omitted except otherwise indicated).

128. After having examined the Claimant's Request and the Respondent's Response, the exact factual situation has remained unclear to the Tribunal. The Claimant has specified that it 'is not seeking to have the freezing of PEM's bank accounts undone including the funds that were on deposit at the time of the seizure, which could be viewed as directed at a measure being challenged in this arbitration,' contrary to the prohibition of Article 1134 of the NAFTA. The Respondent, on the other hand, has stated that VAT refunds are paid into accounts that the taxpayer indicates to the tax authorities in charge to make such payment. It is up to PEM therefore to indicate to these authorities (apparently SAT) on which accounts it wishes to have the VAT refunds deposited, given that such refunds are per se available to PEM.<sup>6</sup>

129. In this context, the Tribunal observes that the Claimant's request concerns future deposits and not the amounts already deposited in the past.<sup>7</sup> On the other hand, the unblocking of these previously deposited amounts would not be a proper object of a provisional measure because it would be a sort of anticipation of a decision on the merits on this issue.

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

131. The Tribunal must say that the factual situation has not been fully clarified by the Parties. According to the Respondent, past deposits were made on those accounts because those were the accounts indicated by PEM for such purposes.<sup>8</sup>

132. Indeed, the Respondent at the Hearing stated that it is for PEM to indicate to the tax authorities the accounts in which it intends to

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<sup>6</sup> Original footnote 119: Response, paras. 34-39. Specifically, "la demandada tiene conocimiento que no se le ha negado ninguna de las solicitudes de devolución que PEM ha presentado mensualmente," at para. 36.

<sup>7</sup> Original footnote 120: See Request, para 80. The Claimant's request concerns however "payments of VAT refunds owed to PEM as to the filing of the Request for Arbitration" as well as "all future payments" (at para.78). The Tribunal considers however that a provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, in order not to aggravate the dispute and to maintain the status quo, cannot cover actions by the Respondent that predate the relevant request (4 January 2023).

<sup>8</sup> Original footnote 122: See Response, para. 33. According to the Respondent, those accounts had been blocked by SAT in order to ensure payments allegedly due by PEM under the (re-) assessments, although tax collection under the latter have been judicially suspended as a result of PEM's challenges against them, see Counter-Memorial, para. 260; Hearing Transcript, p. 104.

receive VAT refunds.<sup>9</sup> It is not clear to the Tribunal whether this means that since the amounts of VAT to be refunded in the future pertain to PEM and PEM can freely use them, if PEM indicates to SAT other unblocked accounts in which it wishes to have the tax refunds deposited, SAT will do so.

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

134. In light of the principles recalled above<sup>10</sup> governing the issuance of provisional measures intended to avoid the aggravation of the dispute and maintain the status quo while the arbitration is pending, the Tribunal grants the following provisional measure: the Tribunal recommends to the Respondent not to block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request (4 January 2023) and those accruing to PEM in the future while the arbitration is pending and until the final decision of the dispute, and to make such payments into accounts to be indicated by PEM and to be maintained freely available to PEM.<sup>11</sup>

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.<sup>12</sup>

10. In light of the foregoing, the Tribunal unanimously decided as follows:

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<sup>9</sup> Original footnote 123: See Transcript pp. 75-76: "in connection with VAT refund procedures, we have explained that it is the Claimant itself who has the possibility of choosing the bank accounts in which it wishes refunds to be made. This obviously does not require the Tribunal's involvement."

<sup>10</sup> Original footnote 124: See above Section IV.A.

<sup>11</sup> Original footnote 125: The Tribunal considers appropriate to remind here that although provisional measures under Article 47 of the ICSID Convention are labelled "recommendations", ICSID tribunals have consistently held that such provisional measures have a binding effect on the Parties, see Schreuer et al., 3<sup>rd</sup> ed., Commentary to Article 47, para. 21, CL-0085, with reference to relevant case law at paras. 21-32, concluding at para.32 that "there is now almost universal acceptance that provisional measures have binding force." The Tribunal shares this view, based also on Article 1134 of the NAFTA on "Interim Measures of Protection," which authorizes tribunals to issue orders and not only recommendations to this effect.

<sup>12</sup> Emphasis added.

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

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

3. *RESERVES* for the Award the decision on the allocation of costs resulting from the Request.<sup>13</sup>

**B. The Respondent's Request for the Revocation of Provisional Measures and the Tribunal's Decision on the Respondent's Request**

11. Shortly after the issuance of the PM Decision, on June 19, 2023, the Respondent sought the revocation of the provisional measure granted by the Tribunal (the "**Revocation Request**").<sup>14</sup>
12. The Revocation Request was grounded on the fact that on March 31, 2023, the Claimant had served the Respondent with a Notice of Intent ("**NOI**"), by which it notified the Respondent of its intention to initiate a second arbitration (which was later formally commenced on June 29, 2023, and was registered as ICSID Case No. ARB/23/29, the "**Second Arbitration**" or, as defined by the Claimant, the "**VAT Arbitration**").
13. The Respondent noted that this Second Arbitration had the following object:

13. [...] *Las acciones del SAT* [REDACTED] *es ilegal conforme a las leyes mexicanas y contraviene las disposiciones del Capítulo 11 del TLCAN y, en consecuencia, constituye una disputa en términos del TLCAN.*<sup>15</sup>

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<sup>13</sup> PM Decision, para. 143.

<sup>14</sup> PM Revocation Request, para. 2.

<sup>15</sup> PM Revocation Request, para. 4 with reference to NOI, para. 13, R-0201.

14. More specifically, the Respondent pointed to the Claimant’s allegation in the NOI that:

*[l]as restricciones [REDACTED] a las devoluciones de IVA supuestamente son violatorias de los Artículos 1102 (Trato Nacional), 1103 (Trato de Nación Más Favorecida), 1105 (Nivel Mínimo de Trato), 1109 (Transferencias) y 1110 (Expropiación y compensación) del TLCAN.<sup>16</sup>*

15. The Respondent explained that, in its view:

*la medida provisional dictada en este procedimiento afectaría el desarrollo de la nueva reclamación referida en la NOI 2023 de dos maneras. Primero, interfiere con el proceso de consultas derivado de la NOI 2023, pues la medida provisional de facto suspende la medida que se reclama en este potencial nuevo procedimiento. Segundo, siguiendo el mismo razonamiento del párrafo 129 de la Decisión sobre Medidas Provisionales, el efecto de la medida provisional dictada sobre devoluciones del IVA futuras podría ser una especie de anticipación de una decisión sobre el fondo de la nueva reclamación, lo cual afectaría el debido proceso.<sup>17</sup>*

16. The Respondent further explained that the provisional measure granted in the present arbitration would prejudice the Second Arbitration because the provisional measure relates to the same facts (the payment by SAT of VAT refunds in PEM’s blocked accounts) that the Claimant challenges in the Second Arbitration as being in breach of NAFTA.
17. On September 1, 2023, the Tribunal issued its Decision on Respondent’s Request for the Revocation of Provisional Measures (the “**Decision on the Revocation Request**”), rejecting it.
18. The Tribunal reasoned, *i.a.*, that the initiation of the Second Arbitration does not change the fact that the VAT refunds to which PEM is entitled have been deposited (and continue to be deposited notwithstanding the provisional measure)<sup>18</sup> in accounts that are not freely

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<sup>16</sup> PM Revocation Request, para. 20.

<sup>17</sup> PM Revocation Request, para. 7.

<sup>18</sup> See Claimant’s Reply to Respondent’s Request for Revocation of Recommendation of Provisional Measures, July 21, 2023, para. 52, referring to a letter of Claimant’s counsel of June 15, 2023, seeking compliance with the PM Decision, C-0060.

accessible to PEM, thus aggravating the dispute and prejudicing the *status quo, pendente lite, i.e.*, as highlighted in the PM Decision.

19. In reaching this conclusion, the Tribunal noted in the PM Decision that, “(43) based on statements made by Claimant itself,<sup>19</sup> 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.”<sup>20</sup>
20. The Tribunal noted that its Decision of May 26, 2023, limited the provisional measure to VAT refunds paid or to be paid after the date of the Claimant’s PM Request (January 4, 2023). Additionally, the Tribunal stressed that the order was provisional, to remain in force until the present dispute was decided, as required by Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.
21. In Decision of September 1, the Tribunal has stated *i.a.* the following:

*(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. <sup>21</sup> Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.<sup>22</sup>*

*(46) 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*

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<sup>19</sup> Original footnote 48: See PM Decision, para. 43, referencing PM Request, paras. 24, 80-81.

<sup>20</sup> Original footnote 49: See PM Decision, paras. 42 and 135, referencing PM Request, paras. 80-81.

<sup>21</sup> Original footnote 50: More exactly the claims of First Majestic in its Request for Arbitration in the case registered under ICSID Case No. 23/28 (R-0202) are the following: ‘86. As a result of the Government of Mexico’s refusal to pay to PEM ██████████ to date and amounts equal to future VAT refunds that belong to PEM, First Majestic and its investments in Mexico and its returns on its investments, have been severely injured in violation of Articles 1102, 1103, 1104, 1105, 1109, 1110 of the NAFTA. 87. First Majestic, therefore, requests on its behalf and on behalf of its investments, monetary compensation estimated at this time at a minimum of ██████████

<sup>22</sup> Emphasis added.

*prejudice to the status quo represented by the unavailability of the VAT refunds for PEM.*

*(47) 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.<sup>23</sup>*

*(48) 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.*

*(49) For the same reason, the Tribunal cannot agree with Respondent where it submits that '[e]s evidente que, si este Tribunal no puede ordenar la suspensión de medidas que son objeto del presente arbitraje ARB/21/14, mucho menos puede recomendar o suspender medidas que serán objeto de un procedimiento independiente cuya resolución corresponderá a otro tribunal.'<sup>24</sup>*

*(50) The provisional measure that the Tribunal granted in its PM Decision is obviously limited to the context of the present case. This Tribunal has no jurisdiction on ICSID Case No. ARB/23/28 and is not competent to pass any judgement on its object, or the claims and defenses made or to be made in those proceedings, and even less to issue orders on matters subject to the jurisdiction of the tribunal in ICSID Case No. ARB/23/28. Based on the evidentiary filings of the Parties in the present case and their arguments, this Tribunal is just taking note for the purpose of these proceedings, as facts, of the existence of ICSID Case No. ARB/23/28, based on the information that the Parties have supplied to this Tribunal.*

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<sup>23</sup> Original footnote 51: *Reply to Revocation Request*, paras. 82-86.

<sup>24</sup> Original footnote 52: *Revocation Request*, para. 34.

### C. The Preliminary Objection

22. While proceedings on the Revocation Request were pending, on July 28, 2023, the Respondent filed its Preliminary Objection on Jurisdiction (the “**Preliminary Objection**”).
23. On September 1, 2023, as authorized by the Tribunal, the Claimant submitted its Response to the Preliminary Objection (the “**Response**”).
24. The Tribunal having allowed the Parties to file a second round of briefs, on September 9, 2023, the Respondent filed a Reply on the Preliminary Objection (the “**Reply**”), and on November 6, 2023, the Claimant filed a Rejoinder on the Preliminary Objection (the “**Rejoinder**”).

## II. THE PARTIES’ REQUESTS FOR RELIEF

25. The Respondent requests that the Tribunal:

*i) Suspend the proceedings of Case CIADI No. ARB/21/14 and analyze this objection to the jurisdiction of the Tribunal as a preliminary issue, in conformity with Rule 41 of the Rules of Arbitration of CIADI of 2006;*

*ii. Determine that it does not have jurisdiction to know the Case CIADI No. ARB/21/14 and, as an alternative, that it does not have jurisdiction to know the claim related to the blocking of accounts and/or the access to the VAT refunds and/or the deposit of VAT refunds in frozen accounts;*

*iii. Condemn the Claimant to pay the costs of this phase of jurisdiction<sup>25</sup>*

26. In response, the Claimant’s requests the Tribunal to:

*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*

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<sup>25</sup> Reply, para. 91.

*entitlement measures are exclusively within the jurisdiction of the tribunal that is to be 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.*<sup>26</sup>

### **III. THE BIFURCATION REQUEST**

27. In its Preliminary Objection, the Respondent requests that the Tribunal suspend the proceedings on the merits and address its jurisdictional objection as a preliminary matter in accordance with AR 41. The Respondent submits that the proceedings should be bifurcated, with the proceedings on the merits suspended and the Preliminary Objection decided immediately because, in its view, the Preliminary Objection: (a) is *prima facie* serious and substantiated; (b) may be examined separately from the merits; and (c) if accepted, may resolve all or a significant part of the dispute.<sup>27</sup>
28. The Claimant submits that there are no grounds for bifurcating the proceedings, since the Respondent's objection is not *prima facie* serious or substantiated and bifurcation would not result in a material reduction of the next phase, so that the Respondent's arguments should be joined to the merits.<sup>28</sup>
29. The Tribunal is deciding on the Respondent's jurisdictional objection in the present Decision and, therefore, the Respondent's suspension request is moot.
30. Nevertheless, the Tribunal believes that it is appropriate to explain its decision to deal with the jurisdictional objection immediately, without suspending the proceedings on the merits, since the Parties have discussed rather extensively the issue in their briefs.<sup>29</sup>

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<sup>26</sup> Rejoinder, para. 115.

<sup>27</sup> Preliminary Objection, para. 10.

<sup>28</sup> Response, paras. 115-137.

<sup>29</sup> The Parties agree that following ICSID tribunal's case law, three conditions must be met in order to bifurcate: (1) that the objection is *prima facie* serious and substantial; (2) that it can be examined without entering or prejudging the merits of the case; (3) that it may dispose of the totality or a substantial part of the dispute. While the Parties basically agree on these criteria, they are at odds whether the three conditions are met, see Preliminary Objection, paras. 10-13; Response, paras. 115-127.

31. According to Arbitration Rule 41(3) (of the 2006 version, which is applicable in the present case), “[u]pon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the Parties may file observations on the objection.”<sup>30</sup>
32. Thus, AR 41 gives tribunals ample discretion to decide whether to suspend the proceedings on the merits or not, depending on the circumstances of each case. When deciding, tribunals must be guided by consideration of fairness and procedural efficiency.<sup>31</sup>
33. In the present case, the objection is narrow, based on just one ground and does not require examining the merits to be decided. Given its narrow scope, the Tribunal considers that it can be addressed concurrently with the ongoing proceedings on the merits, without the need for suspension and without placing an undue burden on any of the Parties.
34. The Parties have not asked for an oral phase in relation to the jurisdictional objection, nor does the Tribunal believe that such a phase is required – it is optional pursuant to Rule 41(4). In the view of the Tribunal, an oral hearing is not necessary. The Parties have stated their arguments on the objection in two rounds of briefs, as they have requested, and the Tribunal considers that these briefs have fully presented the Parties’ respective arguments. Finally, the proceedings on the merits are in no way prejudiced by the parallel briefing or by the Tribunal’s deliberations and decision on the objection.
35. The Tribunal therefore proceeds to examine below the substance of the Preliminary Objection.

#### **IV. THE PARTIES’ POSITION ON THE PRELIMINARY OBJECTION**

##### **A. The Respondent’s position**

36. In its essence, the Respondent’s argument is clear and simple. The Respondent submits that in the Second Arbitration “*se reclaman medidas que también forman parte de la*

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<sup>30</sup> Emphasis added.

<sup>31</sup> Christoph H. Schreuer, *Schreuer’s Commentary on the ICSID Convention*, Cambridge University Press, 3rd Ed., dated 2022, p. 792, ¶ 152, CL-85; see also Response, para. 184.

*reclamación que está conociendo este Tribunal, lo cual viola el compromiso asumido por First Majestic en la renuncia que presentó conforme al Artículo 1121 del TLCAN para poder iniciar el presente procedimiento (Caso CIADI No. ARB/21/14).”<sup>32</sup>*

37. According to the Respondent, in the Second Arbitration the Claimant:

*reclama... violaciones basadas en las mismas medidas reclamadas en el arbitraje ARB/21/14 y que, en ambos procedimientos reclama esencialmente los mismos daños. Por lo tanto, existe el riesgo de decisiones incongruentes y doble compensación, que es precisamente lo que el Artículo 1121 busca impedir.<sup>33</sup>*

38. Respondent further submits that:

*la violación de esta ‘condición previa’ al arbitraje invalida el consentimiento de México para arbitrar la controversia, y, por consiguiente, este Tribunal carecería de jurisdicción para conocer del presente arbitraje.<sup>34</sup>*

39. Respondent thus argues that Article 1121(2) NAFTA, and the Claimant’s waiver, would be breached if the Claimant submits to the Second Arbitration the same claims of breach, concerning the same measure, or one of the measures, that it has submitted in the present arbitration.

40. To demonstrate that this is the case, the Respondent points to para. 158 of the Claimant’s Memorial in the present arbitration, where the Claimant states the following:

*A non-exhaustive list of measures that form part of the dispute with the Respondent and provides the basis for the claim against the Respondent include... (k) freezing bank accounts; (l) depositing VAT refunds in frozen bank accounts thereby impeding recovery of same by PEM, and imposing restrictions and charges against other assets of PEM.<sup>35</sup>*

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<sup>32</sup> Respondent’s Objection, para. 1.

<sup>33</sup> Preliminary Objection, para. 2.

<sup>34</sup> Preliminary Objection, para. 4.

<sup>35</sup> Preliminary Objection, para. 15, underlining by Respondent. The list in para.158 goes on until the letter (q).

41. The Respondent sets forth next the standards which are applicable to Article 1121 NAFTA and waivers thereunder. First, ICSID arbitration is included within the expressions “*other dispute settlement procedures*”, and “*any proceedings with respect to the measure of the disputing Party that is alleged to be a breach*”. Secondly, the waiver is not just formal (depositing a statement of waiver), but has also a material aspect, in that it must be actually followed by the conduct of the claimant refraining from submitting other proceedings notwithstanding the waiver.<sup>36</sup> If this is not the case, the breach of the waiver results in depriving the Tribunal of its jurisdiction over the pending dispute because of the consequent loss of consent by the respondent State.<sup>37</sup>
42. According to the Respondent the subject matter or object of the two proceedings does not need to be identical. Since the purpose of Article 1121 NAFTA and of the waiver is to protect a respondent from multiple proceedings relating to the same measure, avoid contradictory decisions, and, above all, double recovery, the breach of the waiver entails the loss of the Tribunal’s jurisdiction even if the triple identity test applicable to *lis pendens* and *res judicata* issues is not met. It is enough that the two proceedings be “with respect to” the same measures.<sup>38</sup>
43. The Respondent concludes that the Claimant has breached Article 1121 NAFTA and its waiver because “*en ambos procedimientos iniciados por la Demandante se reclama el congelamiento de cuentas y/o el depósito de las devoluciones del IVA en cuentas congelados, así como daños por la presunta interferencia.*”<sup>39</sup> More specifically, the Respondent submits that the blocking of PEM’s accounts, causing the VAT refunds deposited therein by SAT to remain inaccessible to PEM, which is the object of the present arbitration, has also been challenged by the Claimant in the Second Arbitration.<sup>40</sup>
44. The Respondent thus asks the Tribunal to “[d]eterminar que no tiene jurisdicción para conocer del Caso CIADI No. ARB/21/14 y, en la alternativa, que no tiene jurisdicción para

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<sup>36</sup> Preliminary Objection, para. 37.

<sup>37</sup> Preliminary Objection, para. 45.

<sup>38</sup> Preliminary Objection, paras. 36-42.

<sup>39</sup> Preliminary Objection, paras. 63-66.

<sup>40</sup> Preliminary Objection, paras. 39, 59-63.

*conocer de la reclamación relacionada con el bloqueo de cuentas y/o el acceso a las devoluciones de IVA y/o el depósito de devoluciones de IVA en cuentas congeladas.”*<sup>41</sup>

45. Finally, in its Reply the Respondent rejects the Claimant’s argument that the measures that it challenges in the two arbitrations, *i.e.* the blocking of the accounts and the deposit of the VAT refunds in such blocked accounts, are distinct. The Respondent asserts that also the deposit of VAT refunds in blocked accounts is an object of the present arbitration, pointing out that it has been mentioned in the Claimant’s Memorial.<sup>42</sup> Moreover, the Claimant has not complained in the Second Arbitration that VAT refunds have not been paid, but rather of “*the failure of the SAT to make these refunds available to PEM*”<sup>43</sup>. In the Respondent’s view, when the Claimant complains in the Second Arbitration of SAT’s refusal to let PEM access the VAT refunds, it effectively complains of the blocking of those accounts, which is a claim made in the present arbitration.<sup>44</sup>
46. The Respondent objects to the preliminary and procedural arguments raised by the Claimant against the Preliminary Objection. The Respondent also denies that this Tribunal, in explaining the reasons for granting the provisional measure, has determined that only the enforcement measures (“*Medidas de Ejecución*”) but not the entitlement measures (“*Medidas de Derecho*”) are subject to the present arbitration. This is because, according to the Respondent, the Tribunal only referred to future VAT refunds when it determined that the prohibition of Article 1134 NAFTA was not a bar against granting the provisional measure requested by Claimant.<sup>45</sup> In the Respondent’s view, this temporal limitation is an indication that the Tribunal believed that the payment of the VAT refunds in a blocked account until January 4, 2023, was a measure challenged by the Claimant in the present arbitration against which no provisional measure is admitted in conformity with Article 1134 NAFTA.

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<sup>41</sup> Reply, para. 91.

<sup>42</sup> Reply, para. 15, with reference to para.158(k) of Claimant’s Memorial.

<sup>43</sup> Reply, paras. 21-22 quoting para. 31 of the Request for Arbitration in the Second Arbitration, R-202.

<sup>44</sup> Reply, paras. 29-31.

<sup>45</sup> Reply, para. 71.

## **B. The Claimant's position**

47. In its Response, the Claimant opposes the Respondent's objection to jurisdiction. The Claimant denies that the Second Arbitration relates to the same measure(s) that are part of the present arbitration, distinguishing between what it defines as "enforcement measures", which in its view are subject to the present proceedings, from "entitlement measures" which are subject to the Second Arbitration.<sup>46</sup>
48. Preliminarily, the Claimant asks the Tribunal to dismiss the Preliminary Objection on a number of procedural grounds, namely: that the objection is "Without Serious Merits"; because of Res Judicata/Estoppel; and because of the Respondent's "Vexatious Conduct", all of them raised also in connection with the Respondent's references to the (then still pending) proceedings for the revocation of the provisional measure.<sup>47</sup>
49. On the merits of the Preliminary Objection, the Claimant submits that Mexico's enforcement measures, that is, the imposition of the "blocking" and the refusal to lift the "blocking" of PEM's accounts, is the subject of the present arbitration only and are being adjudicated exclusively by this Tribunal.<sup>48</sup>
50. According to the Claimant, the Second Arbitration is not directed at challenging the SAT measures blocking the bank accounts:<sup>49</sup> what the Claimant has submitted to the Second Arbitration is its entitlement to VAT refunds, a right that SAT (the Respondent) has acknowledged is unquestionably due to PEM, but that SAT is denying, by refusing to make the refunds effectively available to PEM in freely usable accounts, even to the point of refusing to comply with the provisional measure ordered by the Tribunal to this effect.<sup>50</sup>
51. Indeed, according to the Claimant, the Respondent has not complied with the Tribunal's Decision recommending that VAT refunds, including future monthly payments, not be deposited in PEM's blocked accounts.<sup>51</sup>

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<sup>46</sup> Response, paras. 5-8.

<sup>47</sup> Response, paras. 41-92, 138-166.

<sup>48</sup> Response, paras. 66-67, referring to paras. 26-28 of the Request for Arbitration in the Second Arbitration, R-202.

<sup>49</sup> Response, para. 68.

<sup>50</sup> Response, paras. 63, 68, 75, 82, 85, 106-108.

<sup>51</sup> Rejoinder, para. 15.

52. Further, the Claimant argues that the damages claimed in the two arbitrations are different, so that the risk of double compensation does not exist:

*Whether Respondent will be required to compensate Claimant in the APA Arbitration will depend [sic] a number of factors including whether Claimant will succeed in relation to the unlawfulness of repudiation by the SAT of the APA, the measures of Respondent denying Claimant and PEM access to both local and international remedies, and the consistency of its enforcement measures with the applicable standards of treatment set out in Section A of Chapter 11 of NAFTA.<sup>52</sup>*

53. The Claimant notes that:

*On the other hand, the compensation claim and the grounds for compensation under the VAT Arbitration will focus almost exclusively on Respondent's representations, the lack of legal basis for the VAT entitlement measures, and Respondent's failure to meet its obligation in connection with Claimant's entitlement [...].*

*Furthermore, the amount[s] of compensation that has been claimed in the two arbitrations are substantially different, with more than [REDACTED] claimed in the APA Arbitration, and approximately [REDACTED] claimed under the VAT Arbitration.<sup>53</sup>*

54. The Claimant emphasizes that it had to file the Second Arbitration to protect its rights since the deadline to do so was expiring on June 30, 2023. These rights required protection as a result of the Respondent's refusal to deposit the VAT refunds, which it has acknowledged were due, in a freely disposable account, and of SAT's refusal to accept even the bank guarantee that PEM had offered.<sup>54</sup>
55. The Claimant concludes by requesting that the Tribunal reject as untimely the Respondent's alternative request concerning the enforcement measures because this request should have been made in the Respondent's Counter-Memorial, and that the Tribunal deny the Objection to jurisdiction in relation to PEM's entitlement and access to

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<sup>52</sup> Response, para. 168.

<sup>53</sup> Response, paras. 170 and 171.

<sup>54</sup> Response, paras. 184-190, 197.

VAT refunds, because the VAT entitlements measures are exclusively within the jurisdiction of the tribunal that will hear the second arbitration.<sup>55</sup>

56. In its Rejoinder, the Claimant insists that “*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.*” To the contrary, enforcement measures, including the rejection of the guarantees offered to SAT, the blocking of PEM’s accounts and restrictions on the sale of other assets (*i.e.* enforcement measures) are (only) before this Tribunal.<sup>56</sup>
57. The Claimant challenges the Respondent’s interpretation of the Tribunal’s PM Decision, granting provisional measure only from January 4, 2023. According to the Claimant, the Tribunal acknowledged that it had the authority to grant such a provisional measure because it was not precluded from doing so by Article 1134 NAFTA, but set the starting date as of January 4, 2023 (when the Claimant had filed its PM Request) because of the requirements and criteria for issuing provisional measures (such as urgency, necessity, irreparable harm and maintaining the status quo) which, by their very nature cannot be retroactive.<sup>57</sup>
58. The Claimant concludes that the measures at issue in the two arbitrations are different and that the claims are separate and distinct. This allows the two arbitrations to proceed without any impediment stemming from Article 1121 NAFTA, since some measures have been challenged in the present arbitration (the enforcement measures) and some (different ones) in the Second Arbitration (the entitlement measures), but none in both.<sup>58</sup>
59. The Claimant requests therefore that the Tribunal “[d]etermine that the Claimant and PEM have not breached the waivers provided at the outset of this arbitration, and that the VAT

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<sup>55</sup> Response, para. 203.

<sup>56</sup> Rejoinder, paras. 23-24.

<sup>57</sup> Rejoinder, paras. 38-40, 62-63.

<sup>58</sup> Rejoinder, para. 90-94.

*entitlement measures are exclusively within the jurisdiction of the tribunal that is to be appointed in the VAT Arbitration, and are not before this Tribunal for adjudication.”*<sup>59</sup>

## V. THE TRIBUNAL’S ANALYSIS

60. The Tribunal recall first the text of Article 1121 NAFTA, according to which:

*A disputing investor may submit a claim under Article 1116 to arbitration only if:*

*(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and*

*(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.*

61. The Tribunal and the Parties agree that Article 1121 (1)(b) NAFTA lays down a condition precedent to the submission of a claim. It requires that an investor, in order to be able to submit validly an arbitration request, sign and submit a waiver of the right to initiate or continue domestic and other proceedings “*before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116*”, except for those mentioned in the provision.

62. It is also common ground that (a) such waiver must be complied with throughout the arbitration, (b) the provision covers also a subsequent arbitration at ICSID (such as the Second Arbitration), (c) a breach of a waiver properly submitted in accordance with Article 1121 NAFTA entails the loss of the jurisdiction of the ICSID tribunal hearing a dispute,

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<sup>59</sup> Rejoinder, Requested Relief, para. 115 (iii).

and (d) that the Claimant (and PEM) have signed and attached as Annex E to the Request for Arbitration a waiver complying with the requirements of Article 1121 NAFTA.

63. The substantive issue to be decided is therefore whether the Second Arbitration is a proceeding with respect to the [same] measure(s) which the Claimant has alleged to be in breach of Mexico's obligations towards the Claimant in the present arbitration.
64. The Tribunal wishes at this juncture to point out that its task has not been made easier but rather more complicated by the different terminology used by the Parties – such as “enforcement” v. “entitlement” measures used by the Claimant - in their (also different) descriptions of the measures involved. The Tribunal will therefore not make use of those terms to characterize and distinguish the various measures at issue.<sup>60</sup>
65. It is common ground that if a measure challenged in the present arbitration as breaching Mexico's NAFTA obligations to the detriment of the Claimant (and/or PEM) is also challenged in the Second Arbitration, then the Claimant would breach its waiver commitment under Article 1121 NAFTA. In such a case, the consequence would be that this Tribunal would have no jurisdiction over the claim that First Majestic has also submitted in the Second Arbitration.
66. Since the Claimant has challenged in the present arbitration a number of different measures by Mexico's authorities as being in breach of several provisions of Chapter 11 of NAFTA on Investments, should one or more claims concerning one or more of the measures submitted in the present arbitration be found to have been submitted also in the Second Arbitration, Article 1121 NAFTA would deprive this Tribunal of jurisdiction only in respect of the claims submitted in both arbitrations. In other words, this arbitration should proceed with respect to the other (non-overlapping) claims.
67. Therefore, the Tribunal must now identify the measure(s) which, according to the Respondent, have been submitted in both arbitrations and thus entail the loss of jurisdiction

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<sup>60</sup> The definition of “measures” is found in Article 201 NAFTA: “Article 201. *Definitions of General Application* 1. *For purposes of this Agreement, unless otherwise specified: [...] “measure includes any law, regulation, procedure, requirement or practice.”*”

of this Tribunal over First Majestic's claims based on such measure(s). These measures are listed by the Respondent as being:

- (a) The freezing of certain bank accounts of PEM; and
- (b) Depositing VAT refunds in those frozen bank accounts thereby impeding recovery of same by PEM.<sup>61</sup>

68. In its Preliminary Objection, however, the Respondent focuses primarily on the second measure, thus the Tribunal will examine this measure first. The Respondent explains in this respect that:

*En el contexto de este caso, la medida que se reclama en los dos procedimientos es la interferencia con el acceso a las devoluciones del IVA, con independencia de que se le describa como el congelamiento de cuentas, el depósito de las devoluciones en una cuenta congelada o 'medidas para restringir el acceso a los fondos'.<sup>62</sup>*

69. According to the Respondent, the “*interferencia con el acceso a las devoluciones de IVA*”, that is, SAT (Mexico) preventing PEM to access VAT refunds by depositing them in accounts blocked by SAT, is the measure that the Claimant has challenged in the present arbitration and also in the Second Arbitration.<sup>63</sup> In this respect, the Respondent quotes the Request for Arbitration submitted by First Majestic in the Second Arbitration where the Claimant states that “[w]hile the refunds are payable and have been nominally deposited on a periodic basis by the SAT into a bank account of PEM, it is the failure of the SAT to make these refunds available to PEM that is at issue in this dispute regardless of the means used”.<sup>64</sup>

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<sup>61</sup> Preliminary Objection, para. 15 with reference to para. 158 of the Claimant's Memorial.

<sup>62</sup> Preliminary Objection, para. 56.

<sup>63</sup> Preliminary Objection, para. 57.

<sup>64</sup> First Majestic's Request for Arbitration in the Second Arbitration, para. 31, R-202, as quoted in the Preliminary Objection, para. 58. This is also the position taken by the Respondent in the present arbitration: “*todo indica que su reclamación, en realidad, es que las devoluciones en cuestión se depositaron en cuentas congeladas sin la autorización o instrucción de PEM.*” (PM Response, para. 34).

70. From reading the Preliminary Objection, it is not clear whether the Respondent is also arguing that the blocking of the account, as a distinct measure, has also been submitted by the Claimant in the Second Arbitration. In this respect, the Tribunal recalls that it is common ground that SAT has blocked several bank accounts of PEM (as well as other assets) starting in April 2020, in order to secure back and accruing taxes which SAT claims PEM owes due to the invalidity of the APA and for other reasons.<sup>65</sup>
71. The position of the Claimant, instead, is that there is no overlap (or “*superposición*” to use the Respondent’s term) of the two claims in the two arbitrations. The blocking of the accounts has been challenged in the present arbitration but not in the Second Arbitration, while the impediment for PEM to access the VAT refunds (because SAT has deposited them, and continues depositing them, in a blocked account) has been challenged in the Second Arbitration but not in the present one.
72. Starting with the second measure on which the Parties have focused, *i.e.*, the freezing of PEM’s bank accounts, the Claimant has repeatedly insisted, especially in its briefs in the provisional measures proceedings and in those relating to the Respondent’s Revocation Request, that it has submitted no claim in this arbitration concerning the inaccessibility of the deposits of VAT refunds to PEM made by SAT.
73. Thus, at para. 78 of its PM Request the Claimant stated:

*In making the request for provisional measures (concerning payments of VAT refunds owed to PEM as of the filing of the Request for Arbitration and all future payments of the VAT refunds to be made to PEM), the Claimant has framed its request carefully taking into consideration the limitations imposed by Article 1134 of NAFTA, according to which ‘[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.’*

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<sup>65</sup> See para. 42 of the PM Decision referring to PM Request, paras. 80-81 and original footnote 26 of the PM Decision: “These measures are described by the Claimant at para. 97 of the Request, especially at para. 97 (ii) and (v), and appear to be the result of SAT [REDACTED]”

[REDACTED] The Claimant indicates that, on average, these VAT refunds payable in the future amount to [REDACTED].”

74. At para. 80 of its PM Request, the Claimant explained that:

*To be clear, the Claimant is not seeking to have the freezing of PEM's bank accounts undone including the funds that were on deposit at the time of the seizure, which could be viewed as directed at a measure being challenged in this arbitration.*

75. And at para. 81:

*Rather, it is seeking to ensure that its entitlement to the VAT refunds, which has not been the subject of a challenge under the ongoing NAFTA dispute, should not be gutted by the unauthorized deposit of the refunds by the SAT. Such unauthorized deposits of VAT refunds owing to PEM were made after the filing of the Request for Arbitration to the present date.*

76. At para. 144 of its PM Request, the Claimant explained, with reference to Article 1134 NAFTA, that it “*has limited its request to payment of VAT refunds owed to PEM by SAT that have been deposited into its bank accounts without the authorization of PEM and future VAT refunds that have not been deposited into a frozen bank account.*”

77. As mentioned above, after having heard the clarifications of the Parties at the hearing on the PM Request, the Tribunal was convinced that granting a provisional measure recommending Mexico that SAT makes the refunds effectively available to PEM, by paying or transferring the amounts of refunds to an unblocked account of PEM, was not contrary to Article 1134 NAFTA, since the Claimant was not challenging in the present arbitration the fact that refunds were being made in a way that deprived PEM of their use. In this context, the Tribunal notes the Claimant's statements that SAT has not complied with its requests, notwithstanding the granting by the Tribunal of the provisional measure to this effect, and notwithstanding the fact that the Claimant has indicated on which unblocked account such payments could be made.<sup>66</sup>

78. The Tribunal has acknowledged in the PM Decision that the blocking of the effective enjoyment by PEM of the VAT refunds to which it was – and is – entitled, as recognized

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<sup>66</sup> See Response, para. 40; Rejoinder, paras. 15-19. It does not appear that the Respondent has challenged this statement in its briefs nor that it has until now complied with the provisional measure granted by the Tribunal.

by the fact that SAT is transferring them monthly to its (blocked) accounts, is not a measure challenged in this arbitration in the following terms:

*[T]he 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>67</sup>*

79. This conclusion is not undermined by the fact that the Claimant mentions “*depositing VAT refunds in frozen bank accounts thereby impeding recovery of same by PEM*” in the “non-exhaustive” list of 17 measures in para. 158 of its Memorial, to which the Respondent refers.<sup>68</sup> This is because, first, the Claimant indicates there that these measures “*form part of the dispute*” in general terms. Secondly, because the Claimant does not complain of the inability for PEM to access its VAT refunds when in its Memorial it elaborates on the blocking of the accounts being in breach of the “Free Transfer Standard” of Article 1109 NAFTA.<sup>69</sup>
80. The Tribunal sees therefore no reason to change its position from the one stated in its PM Decision on this point. The Tribunal therefore confirms its conclusion there that the payment of VAT refunds to PEM into blocked accounts, making them thus inaccessible to PEM, is not a measure which First Majestic is challenging in the present arbitration. The Tribunal concludes consequently that the Respondent’s Preliminary Objection is in this respect unfounded.
81. Since the measure relating to SAT’s refusal to allow PEM to access the VAT refunds is not before this Tribunal, it is immaterial for the jurisdiction of this Tribunal that this measure is the subject matter of the Second Arbitration (including with respect to the determination of the relevant periods of time and the request for compensation of the

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<sup>67</sup> See para.135 PM Decision, quoted above at para. 9.

<sup>68</sup> See Preliminary Objection, para. 15, quoted above at para. 40.

<sup>69</sup> See Claimant’s Memorial, paras. 440-452 and note 461 listing the evidence showing that SAT froze PEM’s banks accounts in April 2020.

ensuing damages).<sup>70</sup> By submitting a claim concerning the inaccessibility of the VAT refunds to PEM in the Second Arbitration, the Claimant could not and has not breached Article 1121 NAFTA nor its waiver since it has not challenged this measure as being in breach of NAFTA nor has it submitted any claim in that respect in the present arbitration.

82. As to the other measure that the Respondent has raised in connection with Article 1121 NAFTA, that is, the blocking of PEM's accounts by SAT since April 2020,<sup>71</sup> there can be no doubt, nor is there any disagreement between the Parties, that this is a measure which the Claimant has challenged in this arbitration as being in breach of Mexico's obligations under the NAFTA.<sup>72</sup> On the other hand, the Respondent has not alleged that First Majestic has challenged this measure (also) in the Second Arbitration, nor does it appear from examining First Majestic's Request for Arbitration in the Second Arbitration that any claim related to such measure has been made by the Claimant there. On the contrary, the Claimant has been explicit there that it is not submitting claims in respect of such measure in the Second Arbitration.<sup>73</sup>

83. Finally, considering its conclusion that the Claimant is not challenging in the Second Arbitration measures that it has alleged in the present arbitration to be in breach of Mexico's obligations toward First Majestic, the Tribunal does not need to deal with the Claimant's procedural arguments referred to in para. 48 above.

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<sup>70</sup> See First Majestic's Request for Arbitration in the Second Arbitration, R-202: "23. As explained further below, this claim relates to the Government of Mexico's steadfast refusal to allow PEM access to Value Added Tax (VAT) refunds which it has been entitled to since April 2020. [...] 27. The matter of the imposition of the measures related to the 'blocking' and refusal and to lift the 'blocking' is the subject of an ongoing arbitration between First Majestic and the Government of Mexico (ICSID Case. No. ARB/21/14)" and Section V "Relief 86. As a result of the Government of Mexico's refusal to pay to PEM amounts equal to approximately ██████████ to date and amounts equal to future VAT refunds that belong to PEM, First Majestic and its investments in Mexico and its returns from its investments, have been severely injured in violation of Articles 1102, 1103, 1104, 1105, 1109, and 1110 of the NAFTA. 87. First Majestic, therefore, requests on its own behalf and on behalf of its investments, monetary compensation estimated at this time at a minimum of ██████████ plus interest owed to PEM by the SAT."

<sup>71</sup> See Preliminary Objection, sect. VI Petitorio, (ii) "Determinar que no tiene jurisdicción para conocer del Caso CIADI No. ARB/21/14 y, en la alternativa, que no tiene jurisdicción para conocer de la reclamación relacionada con el congelamiento de cuentas y/o el acceso a las devoluciones del IVA." (emphasis added)

<sup>72</sup> See Claimant's Memorial, para. 446 and note 461 there.

<sup>73</sup> See para. 27 of First Majestic's Request for Arbitration in the Second Arbitration, R-202, quoted in footnote 70 above: "The matter of the imposition of the measures related to the 'blocking' and refusal and to lift the 'blocking' is the subject of an ongoing arbitration between First Majestic and the Government of Mexico (ICSID Case. No. ARB/21/14)."

**I. DECISION**

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

- a. To dismiss the objections to the jurisdiction of this Tribunal submitted by the Respondent with its Preliminary Objection;
- b. To declare the Parties' requests concerning bifurcation moot in view of the decision under (a); and
- c. To defer to a later stage the/any decision on the costs of the present proceedings on the Respondent's Preliminary Objection.

[Signed]

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Prof. Stanimir A. Alexandrov  
Arbitrator

[Signed]

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Prof. Yves Derains  
Arbitrator

[Signed]

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Prof. Giorgio Sacerdoti  
President of the Tribunal

Dated: December 20, 2023.