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 MEMORIAL

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I. INTRODUCTION

1. On March 2, 2021, First Majestic Silver Corp. (**Claimant** or **Company**) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (**ICSID**) in Washington D.C., on its own behalf and on behalf of Primero Empresa Minera, S.A. de C.V. (**PEM**), pursuant to Chapter 11 of the North American Free Trade Agreement (**NAFTA**). This followed a NAFTA Notice of Intent to file a claim served on May 13, 2020 by the Claimant on the Government of the United Mexican States (**Government**).[1]

2. The arbitration is being conducted under the legacy provisions of Annex 14-C of the Canada-United States-Mexico Agreement which provides Canadian investors until July 1, 2023, to file NAFTA claim against the United Mexican States (**Mexico**).

3. The Claimant is relying on NAFTA Articles 1102, 1103, 1104, 1105, 1109 and 1110 for its claim against Mexico and requests compensation of an amount no less than [redacted].[2]

4. The following key events occurred in this proceeding after the filing of the Claimant's Request for Arbitration:

a) On March 1, 2022, the Claimant submitted its Request for Arbitration on its own behalf and on behalf of PEM, its investment in Mexico.[3]

[1] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Intent, dated May 13, 2020, p. 1, **MS-0013**.

[2] *See* Expert Report of [redacted] dated April 25, 2022, ¶¶ 225, [redacted]**0000**.

[3] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Request for Arbitration, dated March 1, 2021, **C-0005**.

b) On March 31, 2022, the Notice of Registration of the Request for Arbitration was issued by the ICSID Secretariat resulting in the commencement of the arbitration proceedings (**NAFTA Proceedings**).[4]

c) On August 20, 2022, the arbitration tribunal made up of three members (the **Tribunal**) was fully constituted.[5]

d) The first session of the Tribunal and the parties was held by videoconference on September 24, 2022, to set out the procedural rules and the schedule related to NAFTA Proceedings.[6]

e) The Tribunal issued Procedural Order No. 1 on October 21, 2022, containing the procedural rules and the schedule for the filing of written submissions and evidence, process for document production, and the conduct of the oral hearing of the Tribunal.[7]

f) The schedule of the proceeding was revised at the request of the Claimant on March 16, 2022, and the due date for the Claimant's Memorial was extended from March 23, 2022 to April 25, 2022.[8]

5. The nature of the legal dispute and the measures that have given rise to the NAFTA claim can be summarized as follows:

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[4] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Registration, dated March 31, 2021, p. 1, **C-0006**.

[5] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Procedural Order No. 1, dated October 21, 2021, p. 4, **C-0007**.

[6] *See id.*, at p. 3.

[7] *See id.*, at pp. 1-29.

[8] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Amended Procedural Order No. 1, dated March 16, 2021], **C-0007**.

a) The unprecedented repudiation by the Servicio de Administración Tributaria (**SAT**), the Government's tax authority, of a legally binding advance pricing agreement (**APA**), entered by PEM in 2012 with the SAT, which provided the legal framework for certainty and stability for investments made in Mexico by PEM and First Majestic.

b) Blocking PEM's challenge of SAT's reassessments under the administrative process demanding amounts purportedly as taxes, penalties and interest.

c) Rejection by the SAT of PEM's requests for resolution of the disputes pursuant to the universally accepted process set out in avoidance of double taxation treaties (**DTTs**) known as the Mutual Agreement Procedure (**MAP**), which is binding on Mexico and provided for in each of the [redacted] Mexico Tax Treaty, the [redacted] Mexico Tax Treaty and the [redacted] Mexico Tax Treaty.[9]

d) Violating the Mexican Federal Court on Administrative Matters injunctions ordered in January 2020, for the 2010 and 2012 taxation years of PEM, prohibiting SAT from engaging in collections while the MAP requests were pending.

e) Unlawful interference with the operation of PEM's business, and the management activities of its executives and its personnel (including during the exceedingly difficult period at the start of the COVID-19 pandemic).

[9] [redacted]

f) Unjustifiably encumbering, attaching, and freezing of PEM bank accounts and other assets.

g) Seizing and encumbering of over [redacted]

h) Using collateral powers of the Government of Mexico including [redacted] provisions to interfere with the core business activities of PEM and to create conditions of coercion.

i) Interference with contractual agreements of PEM with its workforce and suppliers by limiting PEM's ability to meet its legal obligations, critical for generating revenues from its mining activities and for maintaining the health and welfare of its workforce.

j) Impeding First Majestic's ability to further invest and expand in PEM and in Mexico.

k) Restricting First Majestic's ownership rights as the exclusive shareholder of PEM, including in its ability to transfer the ownership of PEM and its assets.

l) Prohibiting First Majestic from receiving dividends and other returns from PEM.

m) Targeting, ostracizing and censuring First Majestic and PEM in the Mexican and international media as a Canadian mining company engaged in [redacted] conduct, for failing to pay its taxes, and resorting to an arbitration proceeding before an international tribunal to avoid its legal obligations.

n) Unlawfully publicizing confidential tax related information of First Majestic and PEM and asserting that [redacted] are owed by PEM to the SAT, while there are ongoing legal proceedings relating to the claims of the SAT.

o) violating the protections and the constitutional due process rights afforded to PEM, its executives and workforce by the Federal Constitution of the United Mexican States and Mexican domestic law.[10]

p) Various other additional egregious and unlawful measures and activities, and harsh enforcement and intimidation tactics.

6. The Claimant's evidence in this case will be advanced through two fact witnesses and six expert witnesses, that the measures taken and not taken[11] of the Respondent breach the standards of treatment and protection contained in Articles 1102, 1103, 1104, 1105, 1109 and 1110

[10] These measures, both taken and not taken, against First Majestic and PEM establish the foundation of "a legal dispute arising directly out of an investment" made by First Majestic in Mexico, thus satisfying the jurisdictional requirement in Article 25(1) of the ICSID Convention.

[11] The issues arising in this arbitration proceeding in connection with Mexico's measures include:

i. Whether the Respondent and its tax authority (**SAT**) can unilaterally repudiate a binding legal contract (i.e., an Advanced Pricing Agreement or **APA**) that it freely entered into in accordance with its domestic law and international treaty requirements, which provided the Claimant's subsidiary binding assurances concerning its transfer pricing methodology for a period of five years (i.e., from 2010 to 2014), and in so doing violating its domestic laws, its constitutional law obligations and its international treaty obligations.

ii. Whether the SAT can impose liabilities, on a retroactive basis, totaling approximately [redacted], which it claims are owed by the Claimant's subsidiary for taxes, interest, and penalties, that separately and cumulatively are arbitrary, discriminatory, and punitive, notwithstanding the complete absence of wrongdoing by the Claimant's subsidiary in obtaining the **APA** and full compliance of its annual reporting obligations.

iii. Whether the Respondent is entitled to prohibit the Claimant's subsidiary access to the usual legal remedies, whether in accordance with its own laws or international law obligations contained within Mexico's avoidance of double taxation treaty obligations to contest the amount of liability being imposed for taxes, interest, and penalties.

iv. Whether the Respondent, in order to demand and compel payment of amounts it asserts are overdue taxes, interest, penalties, and surcharges, which it has blocked from being challenged (as to their quantum or other otherwise) under its administrative processes for taxation matters, can nevertheless engage in harsh and illegal collection tactics, notwithstanding a court injunction, by carrying out illegal searches and seizures, initiating bogus investigations into [redacted], freezing bank accounts which are necessary for the operation of mines and to meet payroll obligations, refusing to accept guarantees in lieu of seizures, withholding access to VAT refunds by depositing these amounts into a frozen bank account, blocking the disposal of the assets in any sale transaction, prohibiting payment of any dividends, all because it views its Reassessments as final and non-appealable.

v. Whether the Respondent can abuse the [redacted] law procedures of Mexico by repeatedly [redacted] of PEM, notwithstanding the dismissal of charges in the Mexican [redacted] law system.

set out in Section A of Chapter 11 of NAFTA, and that the Claimant and its investment in Mexico are entitled to compensation of an amount not less than [redacted].

II. THE PARTIES

A. Claimant

7. First Majestic Silver Corp. is a Canadian mining company incorporated under the laws of the Province of British Columbia, Canada, and has its head office in Vancouver, British Columbia.[12]

8. It is publicly listed on the New York Stock Exchange, the Toronto Stock Exchange, and the Frankfurt Stock Exchange.[13]

9. First Majestic is in the business of the exploration, development and acquisition of silver and gold deposits and silver and gold mines.

10. PEM is an entity constituted and organized under the laws of Mexico and indirectly owned and controlled by First Majestic. As such, PEM is both an enterprise and an investment of First Majestic in Mexico.[14]

B. Respondent

11. The Government of United Mexican States is the Respondent to this Chapter 11 NAFTA arbitration proceeding.

12. Claimant's claims arise principally out of the conduct of the SAT, the entity responsible for the administration and enforcement of various taxes in Mexico. Claimant's claims

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[12] *See* First Majestic Silver Corp, Form 40-F, SEC filing, dated December 31, 2021, p. 1, **RP-0008**.

[13] *See* First Majestic Silver Corp AG, New York Stock Exchange, accessed April 25, 2022, https://www.nyse.com/quote/XNYS:AG; *see also* First Majestic Silver Corp., TMX Money, accessed April 25, 2022, https://money.tmx.com/en/quote/FR:APH; First Majestic Silver Corp Silver Corp., Boerse Frankfurt, accessed April 25, 2022, https://www.boerse-frankfurt.de/equity/first-majestic-silver-corp.

[14] Art. 201 and 1139, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

also arise out of the conduct of the tax prosecutor, the administrative courts, the judicial system, and the President of the United Mexican States.

13. Under both NAFTA and general principles of international law, the actions of governmental agencies and its judicial system are attributable to the Respondent.

III. FACTUAL BACKGROUND

Canadian Mining Industry in Mexico

14. With the implementation of NAFTA, total Canadian foreign investment in Mexico grew significantly.[15]

15. Canadian investments in Mexico's mining industry represents 44% of Canada's total investment in Mexico.[16]

16. Canadian participation in the Mexican mining sector has been described as a "key element of the Canada-Mexico trading relationship" with 125 of the 179 foreign companies active in the mining sector headquartered in Canada or financed from Canada,[17] and representing approximately 70% of the total foreign investment in the mining sector in Mexico.[18]

17. However, as detailed in the attached Exhibit C-0004, since the election of President López Obrador in mid-2018, Canadian investment in the mining sector has experienced a continual decline. Furthermore, the prospects of a revival look extremely unlikely during this President's tenure due to his "resource nationalism" policies that have manifested themselves through measures such as: cessation of additional mining concessions being granted; the nationalization of lithium mining and its reservation for exploration and mining by the state, and public broadcast of

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[15] Andrés León, Canadian Trade and Investment Activity: Canada-Mexico 2018 Data Series, dated August 28, 2019, p. 6, **C-0008**.

[16] Mining industry in Mexico, Deloitte, dated May 2012, p. 4, ("[o]f the total foreign mining companies in Mexico, 73% are Canadian, representing 44% of Canada's total investment in Mexico. Stock Market"), **C-0009**.

[17] Mexico – Market Overview, Government of Canada, accessed April 18, 2022, p. 1, **C-0010**.

[18] *See ibid.*

pejorative and prejudicial statements, claiming that the presence of Canadian mining companies in Mexico has been to the detriment of the state.[19]

18. Additionally, numerous statements made by the President have made it clear that the current administration does not have any intention of encouraging foreign investment from mining companies.[20]

19. The fact that many of his statements are targeted at Canadian mining companies, the largest group of foreign investors in that sector in Mexico, suggests that these investors can expect to be stripped of their investments if they run into disputes with the Mexican government. First Majestic's evidence confirms this to be the case.[21]

20. The result has been that Canadian investment in Mexico has fallen as companies look elsewhere to invest where the government policies are favorable and predictable. Canadian mining companies that already own concessions are in most cases deferring making commitments until the Mexican government policies revert to the creation of conditions that had attracted them in the first place to invest in Mexico.[22]

C. First Majestic's Investment in Mexico

21. First Majestic began investing in Mexico in 2003 by which time NAFTA had been effective for several years and conditions for investment in Mexico were promising.[23]

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[19] Baker Institute, Is Resource Nationalism Making A Comeback To Mexico with López Obrador Forbes, dated June 7, 2018, pp. 1-8, **C-0011**.

[20] *See* Media Summaries, dated April 25, 2022, **C-0003**.

[21] *See* Mexico No Longer Hospital to Foreign Investors, dated April 25, 2022, **C-0004**.

[22] The substantial and unambiguous evidence in support of the foregoing facts can be found in **C-0004**.

[23] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 133, [redacted]**0000**.

22. Since its inception, First Majestic has been in the business of exploration, production, as well as acquisition of mineral properties for development, with a focus on silver and gold production in Mexico.

23. Currently in Mexico, First Majestic has seven silver and gold mines, 113 parcels of land and 33 mining concessions. Three of the mines are in production,[24] four mines under care and maintenance, and two advanced-stage development silver projects and several exploration projects.[25]

24. The number of workers employed at the San Dimas Mine (**San Dimas**), which is directly affected by this dispute, is approximately 2,000.[26]

25. As of December 31, 2021, First Majestic had a total of 5,287 employees and/or contractors of which 4,305 were employed in the various mining and project locations in Mexico. It has indirectly created over 20,000 jobs spread among eight states within Mexico.[27]

26. First Majestic had not ventured outside of Mexico[28] until 2021, when it acquired a silver mine in the State of Nevada, United States. This acquisition was a major change in strategy precipitated by the early 2020 actions of the SAT:when it undertook its unlawful search and seizure at the PEM offices in Durango. This investigation took place right in middle of a government-ordered closure of mines due to the COVID-19 pandemic, and in violation of a court ordered injunction.[29]

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[24] These are: the San Dimas Silver/Gold Mine in Durango State (**San Dimas**); the Santa Elena Silver/Gold Mine in Sonora State (**Santa Elena**); and the La Encantada Silver Mine in Coahuila State (**La Encantada**).

[25] These are: (a) La Parrilla Silver Mine in Durango State (**La Parrilla**); (b) Del Toro Silver Mine in Zacatecas State (**Del Toro**); and (c) La Guitarra Silver Mine in Mexico State (**La Guitarra**); *see* Figure I: First Majestic Producing Mines, First Majestic, accessed April 24, 2022, p. 1, **RP-0002**.

[26] *See* Table of direct employees of First Majestic, First Majestic, dated January 2022, p.1, **RP-0008**.

[27] Figure VIII: Table of Other Mexican Streaming Agreements, accessed April 24, 2022, p. 1, **RP-0014**.

[28] First Majestic Corp., Investor Slide Deck, n.d., pp. 1-9, **C-0012;** *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 24, [redacted]**-0000**.

[29] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 132(c), [redacted]**-0000**.

27. First Majestic is not alone in its view that the current administration headed by President López Obrador does not respect the rule of law,[30] and that it does not respect its prior commitments even if this means violating its own laws and its international commitments. Recently, Christopher Landau, United States Ambassador in Mexico (2019-2021), was quoted as saying: "due to the change of rules, mainly in the energy sector, I can say that it is not an opportune time to invest in Mexico." These statements from the Ambassador were picked up by all the major media outlets, both international and national. In Mexico, a media outlet reported his statements as follows:

> MEXICO (Times Media Mexico) Christopher Landau, U.S. Ambassador to Mexico, made strong statements to his country's industrialists in a virtual meeting. "Some of the actions, especially in the energy sector, have created uncertainty about the Mexican government's promise to respect what was done in the past and not to change the rules of the game," said Landau, participating in a virtual forum organized by the Confederation of Industrial Chambers (Concamin).
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> A couple of hours after making the statement, Landau wrote on Twitter: "Investors are looking for certainty, and there is nothing worse than changing the rules of the game.[31]

D. Capital, Skilled Employment and Social Spending

28. First Majestic has invested over USD 2 billion in Mexico and has additionally contributed substantial sums annually for social programs to benefit the communities in which it operates in Mexico.[32]

29. This is part of First Majestic's long-term strategic plan to be successful in Mexico and to develop goodwill both with its employees and all levels of government in Mexico. The employment it creates requires highly skilled employees who are paid well and who receive

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[30] *See* Expert Report of [redacted] dated April 25, 2022, [redacted]**0000**.

[31] Yucatan Times, Bad time to invest in Mexico, Yucatan Times, dated June 27, 2020, p. 1, **C-0013**.

[32] Witness Statement of [redacted], dated April 25, 2022, ¶ 39, [redacted]**0000**.

training to perform their duties. It has supported scholarships for promising employees so that they can return to First Majestic and take on greater responsibilities.

30. In the close to 20 years, it has been operating in Mexico, First Majestic has been able to establish deep roots in the country and in the social fabric of Mexico.[33] Its relationships in Mexico extend beyond its employees and the surrounding communities, and extend to indigenous communities, various business partners, various levels of government in Mexico, and other stakeholders and entities interested in Mexico's future.

31. For all its efforts, it has been recognized by the Centro Mexicano para la Filantropria (CEMEFI) as a "Socially Responsible Company" each consecutive year starting in 2008 until the present.[34]

32. A sustainability report issued on an annual basis by First Majestic provides a full accounting of its community projects and social spending.[35] In the 2019 report, the first full year during which it owned the San Dimas Mine, First Majestic supplied electricity to 100 communities benefitting over 800 families and contributed to roadworks that improved 319 kilometers (about 200 mi) and 13 roads in the area.[36]

33. In the same year, First Majestic contributed to education and youth development in a variety of ways: it supported 347 students through scholarships designed to encourage youth to remain in school and excel in their studies,[37] provided a variety of supplies to local schools, including elementary-level teaching materials, electronic equipment for programs at local trades school, as well as, building materials for improvements to school infrastructure.[38]

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[33] Witness Statement of [redacted], dated April 25, 2022, ¶ 7(a), [redacted]**0000**.

[34] Witness Statement of [redacted], dated April 25, 2022, ¶ 28, [redacted]**0000**.

[35] Sustainability Report, First Majestic, dated August 31, 2020, pp. 1-55, **C-0014**.

[36] *See id.*, at p. 33.

[37] *See id.*, at p. 34.

[38] Witness Statement of [redacted], dated April 25, 2022, ¶ 40(1), [redacted]**0000**.

34. The company also operates a community center dedicated to youth, the arts, and capacity building programs. In 2019, First Majestic increased its program offerings to include a new high school student robotics program, chess, contemporary dance, woodworking, music, technical drawing, and traditional carving.[39]

35. Other projects in 2019 included reforestation, sustainable agriculture, promoting local employment projects and establishing scholarship programs. Additional details of the social and other contributions made by First Majestic in Mexico can be found in its 55-page report that is published, available on its website, and included as an exhibit to this Memorial.[40]

36. In addition to its community contributions, its relationship with Wheaton through the stream agreement has resulted in joint contributions being made to the communities surrounding the San Dimas Mine. The projects have by any measure been transformative for the local communities.[41]

37. Finally, it should be noted that in all its time in Mexico, First Majestic has not had disputes of any significance until the current dispute with the SAT, which, as previously noted,

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[39] *See id.*, at p. 34.

[40] *See id.*, pp. 1-55.

[41] The following in an example of a project undertaken together with Wheaton in 2019 and another that was constructed before First Majestic acquired the San Dimas mine:

In 2019, Wheaton partnered with First Majestic to provide funding for the setup and operation of the first local radio station in the town of Tayoltita where the San Dimas mine is located. Radio is widely recognized as a powerful and inclusive communication tool. It is highly regarded for promoting access to information, especially to remote communities. The project's objective is to improve and promote communication between the mine and the community.

The radio station will serve as a platform for public announcements and community relations initiatives as well as deliver a variety of content including cultural music and entertainment. As part of the project, a building will be renovated to host the radio station as well as a "Cultural Centre" that will be used to provide additional community programs and activities.

One of Wheaton's inaugural Partner CSR programs was in Tayoltita, where the San Dimas mine is located and now operated by First Majestic Silver. The project provided funding for the construction of three community recreational facilities. The town of approximately 8,000 is home to most of the San Dimas employees. Completed in 2015, this project provides recreational opportunities that promote health and well-being while encouraging positive interactions within the community. For the first time, the town has playgrounds, outdoor fitness facilities for adults, softball and soccer fields, and a multipurpose court for basketball and volleyball.

arises out of an acquisition it made in 2018 of Primero Mining Corp. (and PEM), which is now its wholly owned subsidiary.[42] As will be explained in detail in this Memorial, the present dispute arose because of pressure on the SAT to obtain more revenue for the Government. This pressure arose prior to First Majestic's acquisition and as such is an inherited issue, but one that First Majestic had every confidence was capable of being resolved rationally and within the bounds of the rule of law. In fact, negotiations with the SAT progressed in a manner that indicated a settlement was likely, until the election of Mexico's current President and the appointment of the new Head of the SAT. The expectation of a positive state of affairs was shattered when PEM received the first reassessments from the SAT in August 2019.

E. First Majestic Acquires Primero Mining Corp.

38. To fully understand the genesis of the present dispute between the Claimant at the Government, it is necessary to understand the transactions that resulted in First Majestic owning the San Dimas Mine.

39. In May 2018, First Majestic acquired all of the issued and outstanding shares of Primero Mining Corp (PMC), a Canadian Corporation[43] and indirectly its wholly-owned subsidiary in Mexico, Primero Empresa Minera (PEM). PEM owned and controlled the San Dimas Mine.[44]

40. The San Dimas Mine is in Tayoltita, in the State of Durango, Mexico and has been producing silver for over 100 years. The San Dimas region is considered one of the most significant metal mining districts in Mexico, with a history spanning more than 250 years.[45]

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[42] Witness Statement of [redacted] dated April 25, 2022, ¶ 41, [redacted]**0000**.

[43] First Majestic Completes Acquisition of Primero, First Majestic News Releases, dated May 10, 2018, p. 1, **RP-0016**.

[44] First Majestic Organizational Chart, dated August 31, 2021, **RP-0004**.

[45] *See* First Majestic Silver Announces Friendly Acquisition of Primero Mining and Restructured Stream with Wheaton Precious Metals, First Majestic News Releases, dated January 12, 2018, p. 1, **RP-0010**.

41. As part of First Majestic's acquisition of PMC and the San Dimas mine, it took on binding obligations related to a silver stream agreement for production from the San Dimas Mine. Simply put, a "stream agreement" is a well-established and an important mechanism to help mining companies offset the volatility of commodity prices and rising production costs. While there are many kinds of stream arrangements, the basic concept of a stream agreement is that the mining company agrees to sell all or part of its mineral (in this case, silver) to another company at an agreed fixed price.[46]

42. In return, the mining company can establish a steady source of capital that it can leverage for its operations, or the agreement may require that the streaming company provide upfront financing for the mining company's operational needs. While the agreements come in many varieties, the fundamental purpose is the same: stream agreements with established fixed price basis (e.g., for the sale of silver) are a common means of financing used by mining companies, both Canadian owned and those owned by other foreign investors.

43. The revenue from the stream agreement for the sale of silver by PEM to an affiliate, Silver Trading Barbados (**STB**), was subject to an APA issued in 2012 by the SAT. The APA applied for a five-year period between 2010 and 2015 taxation years of PEM.[47]

44. The APA confirmed that the selling price for silver between PEM and STB could be used to declare revenues (actual realized price) for tax purposes rather than on the basis for prevailing "spot price" on the day of the sale. Effectively, the APA confirmed that the SAT was agreeable to PEM declaring as its revenue for tax purposes the actual realized revenue set out in the stream agreement, and not a deemed amount based on "spot prices" which it could have realized in the absence of a stream agreement.[48]

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[46] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 38, [redacted]**0000**.

[47] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 38, [redacted]**0000**.

[48] *See, e.g.,* Expert Report of [redacted], dated April 6, 2022, ¶¶ 98-100, [redacted]**0000**.

45. The silver was sold further by STB to Wheaton Precious Metals, a globally known and respected streaming company headquartered in Canada. It is important to note that the onward price, that is, the price between STB as the seller and Wheaton as the buyer of the silver, was s at arm's length, at the same fixed price. In this manner, the parties established a comparable arm's length sale price that the SAT could reference.

46. With this agreed-upon arrangement in mind, one of the issues in this dispute is whether the APA issued in 2012 can be repudiated by the SAT because, contrary to its earlier agreement (which confirmed that the price realized by PEM on its sale to STB could be used for reporting of the revenues of PEM for tax purposes), SAT decided through its reassessment that PEM should have declared its revenues for the sale of silver based on prevailing "spot prices" (so as to result in the reporting of income based on revenues it was not entitled to and never did receive).[49] The SAT has as much admitted that PEM did not mislead or provide false information to the SAT, and that PEM and that PEM has in all respects complied with the annual reporting obligation contained in the APA.[50]

47. Additionally, the SAT has issued reassessments for the four fiscal years 2010 to 2013 and with the reassessment for 2014 being finalized.[51] In total, these reassessments cumulatively add up to approximately [redacted][52] totally ignoring PEM's request for the SAT to abide by the APA.

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[49] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 45, [redacted]**0000**.

[50] *See* Expert Report of [redacted] dated April 25, 2022, p. 27, [redacted]**0000**.

[51] *See* Administrative Appeal, No. RL2019008326, dated September 25, 2019, pp. 1, 3, (2010), **C-0002, p. 1677**; *See* Official Letter No. 900-06-04-00-00-2019-000682, dated September 25, 2019, pp. 261, 268, (2011), **C-0002, p. 2218**; Conclusive Agreement, dated June 18, 2019, p. 158, (2012) **C-0002, p. 1637**; Administrative Appeal, No. RRL2021004797, dated April 16, 2021, p. 11, (2013), **C-0002, p. 3648**; Observations Letter, No. 900-06-04-00-00-2020-000548, dated August 11, 2020, p. 1-91, (2014), **C-0002, p. 3896**.

[52] *See* Expert Report of [redacted] dated April 25, 2022, ¶ 20, [redacted]**0000**.

48. The timing of the issuance of these reassessments by SAT coincided with the direction from Mexico's President that foreign investors should be required to pay towards the government's mounting budgetary deficits.[53]

49. The administrative courts of Mexico have also confirmed that PEM's conduct throughout the application process was undertaken in good faith, and that it complied with all requests made from the SAT at the time of the application, and thereafter complied with all reporting obligations.[54]

50. To date, the SAT has never attempted to repudiate any one of the 90 APAs it has entered into with foreign investors from United States, Canada, Luxembourg, Hong Kong and Japan.[55]

51. As far as the Claimant is aware, stream agreements have not been the subject of a publicized dispute with the SAT. Certainly, there have been no adverse public statements made by the SAT in relation to any other dispute with a foreign investor arising out of the existence of a stream agreement.

52. In stark contrast, PEM's APA was repudiated, and there are numerous examples of the adverse and extremely disturbing statements that have been directed at First Majestic and PEM by the Mexican President, the Minister of Finance, the Mexican Federal Fiscal Prosecutor, and the Head of the SAT.[56]

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[53] Michael O'Boyle, Mexico Tax Prosecutor: Pay Up, Or We Are Taking Your Company, Daily Tax Report, dated June 29, 2020, p. 2, ("Rather than dish out fiscal aid to companies that saw their revenue dry up with lockdown measures, AMLO as the president is known, demanded firms pay tax debts as a way of boosting government revenue"), **C-0015**.

[54] *See* Expert Report of [redacted], dated April 25, 2022, p. 19, [redacted]**0000**.

[55] Request for Information, No. 330027722000399, dated February 28, 2022, p. 1, **C-0002, p. 387**.

[56] Examples of these statements can be found in **C-0004**.

F. Before First Majestic's Acquisition of Primero Mining Corp.: The Streaming Agreements

53. In 2004, some 14 years before First Majestic acquired PMC (and its subsidiaries) in 2018, Wheaton River Minerals Ltd. (Wheaton), had executed a "stream agreement" with Goldcorp, a Canadian public company, which had agreed to sell all of its silver production to a subsidiary of Wheaton.[57]

54. As noted above, a stream agreement is an agreement between a mining company and an investor to purchase a percentage of the company's future production at a fixed price below the prevailing "spot price" (for the mineral) on the day of sale. In consideration for this fixed price contract, the purchaser of the stream provides monetary or other contributions to the supplier of the metal in many cases so that it can develop and then extract the mineral for supply under the stream agreement. This is a financing agreement that is quite common in the mining industry and is used by mining companies that may not have access to other forms of financing.[58] Wheaton alone currently has four stream agreements relating to silver and gold in Mexico each with a different company.[59]

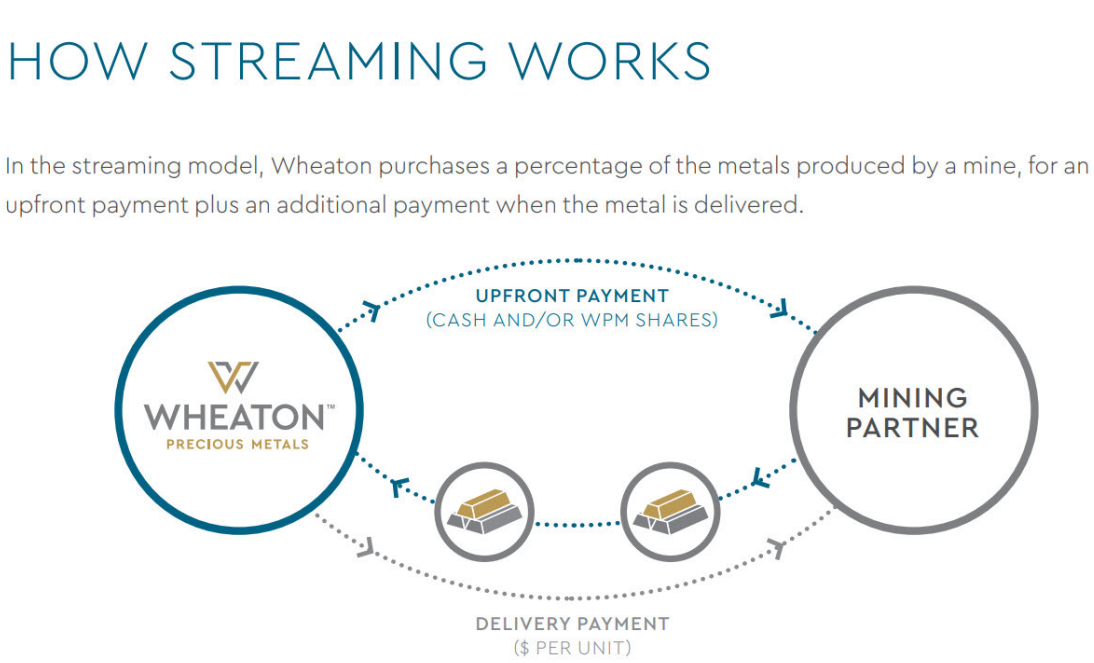
55. The following is a pictorial depiction[60] from the Wheaton Precious Metals 2021/2022 Guidebook of how stream agreements are intended to work:

[57] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 53, [redacted]**0000**.

[58] *See* Wheaton Precious Metals 2021/2022 Guidebook, dated 9 September 2021, p. 2, **C-0016**.

[59] *See id.*, p. 2.

[60] *See id.*, p. 5.



56. In August 2010, the stream agreement between Goldcorp and Wheaton was amended and restated as the "San Dimas Stream Agreement" when PMC acquired the San Dimas Mine from Goldcorp.[61]

57. Under the amended San Dimas Stream Agreement—which continued to be an arm's length agreement—in exchange for a reduced price of the purchased San Dimas Mine, PMC was required to sell to an affiliate of Silver Wheaton [redacted] of the silver produced from the San Dimas Mine up to [redacted] of the silver produced thereafter, based on the following formula:

a) the current market price; and

[61] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 65, [redacted]**0000**.

b) [redacted] per ounce plus an annual increase of [redacted] (the "PEM Realized Price").[62]

58. This arm's length[63] negotiated price represented the total value that PMC (including its Mexican affiliate) would receive for the sale of silver to Silver Wheaton.[64]

59. Under the San Dimas Agreement, PMC was also required to sell the silver through one of its non-Mexican subsidiaries, Silver Trading Barbados (**STB**), located in Barbados. STB would then sell the silver to Wheaton Precious Metals International Ltd., a Silver Wheaton company in the Caymans.[65]

60. Prior to the acquisition by First Majestic, PMC, to meet its obligations under the San Dimas Stream Agreement to Wheaton, entered into an agreement with its subsidiary PEM (the Internal Streaming Agreement), which required PEM to sell silver to STB.[66]

61. The Internal Stream Agreement requiring PEM to sell silver to STB at the same price as provided in the "External Stream Agreement" (namely, the San Dimas Stream Agreement), which had been negotiated at arm's length with Wheaton. Therefore, during the period from 2010 to 2018, after the PMC had acquired the San Dimas Mine and until the sale to First Majestic, the sales from PEM to STB under the Internal Stream Agreement were also made

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[62] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 57, [redacted]**0000**.

[63] *See* Mexican APA Request – Supporting Transfer Pricing Economic Analyses, Ernst & Young, dated October 11, 2011, p. 3, ("Following a detailed review of the intercompany agreements entered into between the related entities within the Primero Group as well as the other agreements with unrelated parties, and the ensuing the transfer pricing analysis performed using two variations in application of the CUP method, it was ***concluded that a transfer pricing policy of [redacted] per ounce of the silver sold by PEM to STB is consistent with what unrelated parties would have agreed under comparable circumstances and is consistent with the arm's length principle***"), (emphasis added), **C-0017**.

[64] Wheaton River Minerals Ltd Annual Report 2004, dated December 31, 2004, **C-0017**.

[65] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 61, [redacted]**0000**.

[66] *See id.*, at ¶ 62.

at the same price as the sale by STB to a Wheaton subsidiary based in the Caymans (i.e., sold under the "External Stream Agreement").[67]

62. By these agreements, for Mexican income tax purposes, PEM recognized the revenue on these sales pursuant to the Internal Stream Agreement at the "PEM Realized Price,"[68] consistent with the methodology set out in the APA.

G. The Advance Pricing Agreement

1. PEM's Request for an APA from the SAT

63. To obtain legal stability and tax certainty for PMC's investments and returns and – critically – to obtain that stability and certainty by ensuring that the SAT would accept the PEM Realized Price for the period as of 2010 as the appropriate transfer price for determining income tax, PEM applied for an APA from the SAT.[69]

64. As described by the OECD, an APA "is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g., method, comparable and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time."[70]

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[67] *See* 2004 Internal SPA, dated October 15, 2004, pp. 1-32, **C-0018**; *see also* 2004 External SPA, dated October 15, 2004, pp. 1-51, **C-0019**.

[68] *See* Mexican APA Request – Supporting Transfer Pricing Economic Analyses, Ernst & Young, dated October 11, 2011, p. 3, **C-0017**, ("Following a detailed review of the intercompany agreements entered into between the related entities within the Primero Group as well as the other agreements with unrelated parties, and the ensuing the transfer pricing analysis performed using two variations in application of the CUP method, it was **concluded that a transfer pricing policy of [redacted] per ounce of the silver sold by PEM to STB is consistent with what unrelated parties would have agreed under comparable circumstances and is consistent with the arm's length principle**") (emphasis added).

[69] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 13, [redacted]**0000**.

[70] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, p. 213, ¶ 4.134, **MS-0012**; *see also* Mexico Dispute Resolution Profile, dated October 24, 2020, p. 5, **C-0020**.

65. On October 17, 2011, PEM applied for an APA from the SAT to establish the methodology to be used to determine PEM's cumulative income for fiscal years 2010, 2011, 2012, 2013, and 2014.[71]

66. To obtain the APA, PEM paid the required fee to the SAT and disclosed to the SAT extensive and detailed information concerning its financial performance and that of PEM, and all relevant domestic and international transactions including the streaming agreements.[72]

67. The SAT was provided with analyses and transfer pricing studies created with the assistance and advice of Ernst & Young and KPMG.[73]

68. Further, in the APA request letter, PMC listed the sale of silver from the San Dimas Mine at the PEM Realized Price ([redacted] per ounce plus an annual adjustment of [redacted]).[74]

69. PEM received the APA on October 4, 2012, after almost twelve months of review and analysis by the SAT.[75] This provided PEM with a legally binding agreement with the SAT for calculating revenues from the sale of silver for a defined five-year period (2010, 2011, 2012, 2013, and 2014).[76]

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[71] *See* APA Request Letter, dated October 17, 2011, p. 1, **C-0002, p. 1**.

[72] *See id.*, at pp. 1-42.

[73] *See* Mexican APA Request – Supporting Transfer Pricing Economic Analyses, Ernst & Young, dated October 11, 2011, p. 3, **C-0017**, ("Following a detailed review of the intercompany agreements entered into between the related entities within the Primero Group as well as the other agreements with unrelated parties, and the ensuing the transfer pricing analysis performed using two variations in application of the CUP method, it was concluded that a transfer pricing policy of [redacted] per ounce of the silver sold by PEM to STB is consistent with what unrelated parties would have agreed under comparable circumstances and is consistent with the **arm's length principle**") (emphasis added); *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 12, [redacted]**0000**.

[74] *See* APA Request Letter, dated October 17, 2011, p. 1, **C-0002, p. 1**.

[75] SAT PEM Ruling, No. 900-08-2012-52885, dated October 4, 2012, p. 4, **C-0002, p. 43**.

[76] *See id.*, at p. 35.

70. The APA also confirmed that the PEM Realized Price on the sale of silver between PEM and STB was consistent with the arm's length principle and would be used by the SAT to calculate taxes owed on the silver sold under the Internal Streaming Agreement.[77]

2. PEM's Compliance with the Requirements of the APA

71. PEM has at all times complied with the terms of APA including making its annual filings. The SAT has not raised any issues concerning PEM's compliance in any of its efforts to repudiate the APA.[78]

3. Limited Conditions Under Which an APA Can Be Retroactively Cancelled Under Mexican and International Law

72. Under both international tax law and as well under Mexican tax law, APAs may only be retroactively canceled under exceptional circumstances.[79]

73. The OECD Transfer Pricing Guidelines establish that an APA may only be canceled retroactively if there is fraud, or error in the information provided during the APA negotiation or if the taxpayer fails to comply with the terms and conditions established therein.[80]

74. Furthermore, under Mexican law an APA cannot be repudiated with retroactive effect so long as the taxpayer PEM has complied with the terms and conditions established in the

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[77] *See* Expert Report of [redacted] dated April 25, 2022, ¶ 41, [redacted]**0000**.

[78] *See* Expert Report of [redacted], dated April 25, 2022, ¶ 313, [redacted]**0000**.

[79] *See id.* ¶¶ 7,313, **PP-0000**; Expert Report of [redacted], dated April 25, 2022, p. 12, ¶ 3.4.2, [redacted]**0000.**

[80] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, dated January 2022, p. 217, ¶ 4.149, ("An APA should be subject to cancellation, even retroactively, in the case of fraud or misrepresentation or information during an APA negotiation, or when a taxpayer fails to comply with the terms and conditions of an APA. Where an APA is proposed to be cancelled or revoked, the tax administration proposing the action should notify the other tax administrations of its intention and of the reasons for such action"), **MS-0012**.

APA, has acted throughout in good faith, and so long as there was no fraud or error in the information provided during the APA negotiation.[81]

4. After First Majestic's Acquisition of Primero Mining Corp.

75. Part of First Majestic's negotiations to acquire PMC included parallel negotiations with Wheaton Precious Metals (WPM) to alter the San Dimas Streaming Agreement.[82]

76. Ultimately, the prior onerous steam agreement, which required on [redacted] of the silver production, was renegotiated and changed to [redacted] of the gold equivalent production at San Dimas.[83]

77. Under the new San Dimas Stream Agreement the San Dimas mine is directly owned by PEM, a wholly owned subsidiary of First Majestic. The stream agreement is between Wheaton and FM Metal Trading (Barbados) (**FM Barbados**), another wholly own First Majestic subsidiary, which previously was STB prior to the acquisition.

H. Mexico's Wrongful Measures

78. Starting in 2015, Mexico engaged in a series of wrongful and illegal measures.[84]

79. However, as discussed further below, the SAT was over time willing to agree to a settlement of the issues with PEM, which would have resulted in the SAT abandoning the *Lesividad* proceeding against the APA.

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[81] Expert Report of [redacted], dated April 25, 2022, ¶ 313, [redacted]**0000**; Expert Report of [redacted], dated April 25, 2022, p. 12, ¶ 3.4.2, [redacted]**0000.**

[82] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 23, [redacted]**0000**.

[83] *See* First Majestic Silver Corp, Form 40-F, SEC filing, dated December 31, 2021, p. 57, **RP-0008**; *see also* Expert Report of [redacted] dated April 25, 2022, ¶ 32, ("Under this restructured stream agreement ("New Stream Agreement"), Wheaton is entitled to receive [redacted] of the gold equivalent production at San Dimas (based on a fixed exchange ratio of 70 silver ounces to 1 gold ounce), at the lesser of [redacted] (subject to a [redacted] annual inflation adjustment) and the prevailing market price, for each ounce of gold equivalent produced"), [redacted]**0000**.

[84] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 10, [redacted]**0000**.

80. The settlement negotiations were thwarted by the election of President López Obrador and the fear by the SAT negotiators that they would be accused of corruption for having arrived at a settlement with PEM. As the narrative that follows below shows, the imposition of illegal measures increased in intensity and number, with the critical steps taken by the SAT after First Majestic's acquisition of PEM.

1. Mexico's Repudiation of the Advance Pricing Agreement

81. Starting in 2015, Mexico began an illegal and forceful campaign aimed at retroactively repudiating the APA.[85] Mexico's illegal and forceful acts include, but are not limited to, attempting to coerce PEM to voluntarily abandon the APA, initiating the *Lesividad* trial, and after failing to get PEM to accede to having the APA annulled, issuing illegal reassessments in August 2019 for fiscal years 2010-2012.

82. Mexico's Attempt to Coerce PEM into Abandoning the APA

83. During the 2015 fiscal year, the SAT approached PEM several times asking it to abandon the APA and the arm's length transfer pricing methodology approved in the APA, and instead to declare revenues based on "spot prices" even though this was inconsistent with the agreed upon arm's length methodology reflected in the APA.[86]

84. PEM refused to abandon the validly-obtained APA as not only did the SAT have no basis to retroactively revoke the APA—as PEM had fully complied with its obligations under the APA, had at all times acted in good faith, and there was no fraud or misrepresentation on the part of PEM—but such abandonment would expose the company to double taxation and negatively impact its shareholders as a publicly-traded company.[87]

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[85] *See ibid.*

[86] *See* Witness Statement of [redacted] dated April 25, 2022, ¶¶ 10, 16, [redacted]**0000**.

[87] *See id*., at ¶ 15.

85. After PEM rejected the SAT's request, various governmental authorities began to harass and threaten PEM to coerce its abandonment of the APA.[88] As noted in the [redacted] Witness Statement, these acts include:[89]

a) On March 30, 2015, SAT issued a ruling letter requesting Claimant to clarify information contained in its declaration of provisional payments for January 2015.[90]

b) On April 27, 2015, SAT issued a detailed record of facts through which the customs authorities withheld merchandise owned by PEM for more than 5 days, unjustifiably delaying the export process.[91]

c) In April 2015, SAT issued a residence verification order from which several verification acts were derived.[92]

d) On April 7, 2015, the Federal Electricity Commission ("CFE") determined deficiencies in the amounts of [redacted] for energy consumption.[93]

e) On May 4, 2015, SAT decreed the suspension of PEM's general registry of specific importers and exporters, as well as its sectorial importers registry.[94]

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[88] *See id.*, at ¶ 16.

[89] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 13, [redacted]0000.

[90] *See* Official Letter, No. 900 09 03-2015-164, dated March 30, 2015, pp. 1-9, **C-0002, p. 106**.

[91] *See* Detailed Record of Events, No. 0098/2015, dated April 27, 2015, pp. 1-4, **C-0002, p. 115**.

[92] *See* Official Letters, Nos. 800-03-00-00-00-2015-5783, 800-03-00-00-00-2015-5784 and 800-03-00-00-00-2015-5785, dated April 29, 2015, **C-0002, p. 5493**.

[93] *See* Billing Adjustments, Nos. 588/2015, 589/2015, dated April 7, 2015, pp. 1-2, **C-0002, p. 119**.

[94] *See* SAT Letter on Suspension of General Registry, dated May 4, 2015, p. 1, **C-0002, p. 123**.

f) On May 6, 2015, The National Water Commission issued an Official Letter B00-909.01.03207 informing PEM of an inspection and requiring vast amounts of information.[95]

g) Despite the SAT's efforts, PEM refused to abandon its valid and legally obtained APA.

2. PRODECON's Finding in Favor of PEM Despite SAT Pressure

86. On May 26, 2015, due to the SAT's illegal harassment of PEM, PEM filed a complaint before PRODECON, the Mexican Taxpayer's Ombudsman.[96]

87. Filing a complaint before PRODECON, triggers a procedure whereby PRODECON acts as a third party and issues a resolution or recommendation on whether there was a violation of taxpayers' rights.

88. At the time, PRODECON was considered a leading example of a government-created Ombudsman office for protecting taxpayer rights[97] and required the SAT to provide an explanation for its coercive collection of tax.[98]

89. PRODECON ultimately found that the SAT had no legal basis for its illegal acts as the APA was validly issued and remained valid, and therefore required the customs authorities to reincorporate PEM to the list of imports and exports and free the merchandise that had been seized, finding that these acts had no legal basis.[99]

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[95] *See* Official Letter, No. B00-909.01.03/207, dated May 6, 2015, pp. 1-27, **C-0002, p. 124**.

[96] *See* Complaint, No. 07471-I-QRA-1681-2015, dated May 29, 2015, pp. 1-10, **C-0002, p. 171**.

[97] *See* [redacted] Expert Report, dated April 22, 2022, ¶ 335, [redacted]**0000**.

[98] In response to the May 26, 2015 complaint, the SAT provided a superficial explanation stating that it required information in terms of article34-A of the Federal Fiscal Code to investigate how the APA was applied. PRODECON did not issue a resolution regarding the sufficiency of the SAT's explanation.

[99] *See* Complaint, No. 07471-I-QRA-1681-2015, dated May 29, 2015, pp. 1-10, **C-0002, p. 171**; *see also* Closing Agreement, dated August 6, 2015, pp. 1-5, **C-0002, p. 181**.

3. The *Juicio de Lesividad* Proceeding Initiated by the SAT

90. Despite ongoing efforts to force PEM to abandon the APA, PEM refused.

91. As such, on August 4, 2015, the SAT filed a lawsuit in the form of *Lesividad* to have the APA granted to PEM declared null and void.[100]

92. The SAT's complaint in the *Lesividad* included, in part, allegations that:

a) the APA issuing authority failed to require relevant information consisting of PEM's opinions, the "Amended Silver Purchase Agreement" of September 30, 2005, and the translation from English to Spanish of a technical report prepared by Watt, Griffis and McQaut.[101]

b) That one of the PEM advisors [redacted], but there was no allegation of improper conduct or conflict of interest.

c) That some of the information provided was in English and should have been provided in Spanish.

93. In the proceedings for challenging the APA, PEM argued that the SAT's reliance on the *Lesividad* proceeding to nullify the APA was improper, based on the following:

a) The *Lesividad* can only be filed by the authorities against resolutions issued under Section 34 of the Federal Tax Codes.

b) APAs are issued under Section 34-A of the Federal Tax Code.[102]

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[100] *See* Juicio de Lesividad Complaint of the SAT, No. 900 0 02-2015-31276, dated August 4, 2015, p. 1, **C-0002, p. 185**.

[101] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 19(e), [redacted]**0000**.

[102] *See* Art. 34-A, Mexican Federal Tax Code, last reform dated November 12, 2021, p. 80, **MS-0005**.

c) When the *Lesividad* was incorporated into the Mexican legal system, APAs did not yet exist in Mexico. Once APAs were introduced, the Mexican legislator did not modify the legislation so as to extend the jurisdiction of the *Lesividad* to APAs.

d) The *Lesividad* is therefore not the proper grounds for challenging the APA.

e) Even if the *Lesividad* was the proper form—which it is not—to retroactively cancel the APA there would have to be an annulment resolution from the TFJA based on malfeasance by the applicant— which has not been done.

94. On August 19, 2015, the *Lesividad* trial was admitted by the JFJA:[103]

a) On February 2, 2016, PEM was summoned to the case and filed a complaint against its admission.[104]

b) PEM argued that the admission of the *Lesividad* trial would create the precedent that individuals who adhere to the law and obtain a certain resolution, may have such resolution revoked at the request of the same authority that issued it.

c) In other words, the admission of the *Lesividad* would signal that the SAT may grant an APA and then revoke it at will for no cause.

d) Nonetheless, on May 4, 2016, PEM's complaint against SAT's proceeding was declared unfounded.[105] As such, on April 11, 2016, PEM filed a writ answering the SAT's *Lesividad* claim.[106]

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[103] *See* Admission Resolution, No. 15/2371-24-01-02-05-OL, dated August 19, 2015, p. 1, **C-0002, p. 389**.

[104] *See id.*, at p. 1.

[105] *See* Interlocutory Sentence, No. 15/2371-24-01-02-05-OL, dated May 4, 2016, p. 259, **C-0002, p. 440**.

[106] *See* Answering Writ to the Injurious Claim, No. 3998/14-17-8, dated April 11, 2016, pp. 1-46, **C-0002, p. 394**.

95. After months of political pressure from the SAT, the *Lesividad* trial was processed before the Online Chamber of the TFJA and remitted for its resolution to the High Chamber of the Court.

96. Approximately four years later, on September 23, 2020, the High Chamber declared PEM's APA null and void with retroactive effects.[107] Shockingly, the High Chamber's decision was not based on any wrongdoing by PEM. In fact, as explained by [redacted], "all the reasons considered by the [High Court] of the TFJA to declare the nullity for the purpose of the resolution approved by the APA were attributable to the administrative authority and not to the taxpayer company, which seems not to have been taken into account when dictating the effects of the judgment."[108]

97. On November 30, 2020, in response to the High Chamber's decision, PEM filed an *Amparo* lawsuit (constitutional appeal) which was admitted by the Fourteenth Collegiate Court on Administrative Matters of the First Circuit on February 23, 2021.[109]

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[107] *See* High Chamber of the TFJA Sentence, dated September 23, 2020, p. 370, **C-0002, p. 702**; *see also* News Releases: First Majestic to Appeal Circuit Court Decision to Nullify APA, First Majestic, dated November 12, 2020, p. 1, ("The Federal Court's decision directs SAT to re-examine the evidence and basis for the issuance of the APA with retroactive effect, for the following key reasons (i) SAT's errors in analyzing PEM's request for the APA and the evidence provided in support of the request; and (ii) SAT's failure to request from PEM certain additional information before issuing the APA. The Company's legal advisors having now reviewed the written reasons continue to be of the view that the Federal Court's decision is flawed both due to procedural irregularities and failure to address the relevant evidence and legal authorities. The Company intends to appeal the decision to the Circuit Courts by the December 1, 2020 deadline"), **C-0002, p. 1404**; *see* News Releases: First Majestic Provides SAT Tax Dispute Update, First Majestic, dated September 25, 2020, p. 1, ("The Company's legal advisors are of the view that the Federal Court's decision was not arrived following regular procedures, was undertaken hastily, and did not provide opportunity for the presentation of evidence from PEM. In addition, the decision is inconsistent with previous legal precedents and violates the Federal Mexican Constitution. The Company continues to assess all of its legal options, both domestic and international including under the North American Free Trade Agreement, and will make additional updates, when necessary, on its legal plan of action"), **C-0002, p. 1076**.

[108] Expert Report of [redacted] dated March 28, 2022, p. 26, [redacted]**0000**.

[109] *See* Amparo Lawsuit Complaint, dated November 30, 2020, p. 1, **C-0002, p. 1078**.

98. In an unusual maneuver, on April 15, 2021, Mexican Supreme Court of Justice Minister Yasmin Esquivel Mossa and the Ministry of Finance and Public Credit, asked the Supreme Court to exercise its power of attraction and hear the case.[110]

99. Currently, the proceeding is pending before the Mexican Supreme Court. Under Mexican Law, until a resolution is issued from the Supreme Court, the APA remains valid and binding on the SAT. It is not known at this time when the *Amparo* will be considered by the Supreme Court due to a severe backlog of cases at the Mexican Supreme Court.

100. On February 10, 2022, 173 Mexican lawyers signed a letter to the Justices of the Supreme Court, urging them to resolve the unusually high number of pending cases before the Supreme Court.[111]

101. According to the letter, there have been "few [instances] in the contemporary history of Mexico [when] the Supreme Court had so many important issues to resolve. The government of President Andres Manuel López Obrador has made substantive legal changes. It is not an exaggeration to say that the set of constitutional reforms, laws and decrees of these years alter the democratic balance between the powers of the union."[112]

102. This delay "keeps the country in an enormous legal uncertainty, in a lack of personal security, in a lack of guarantees necessary for development and in a social division of unforeseeable risks."[113]

103. As such, even if the *Amparo* is rightfully found in favor of PEM, it is unclear when the Supreme Court will hear the case and make its ruling.

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

[111] Hector Aguilar Camin, Warrant of 173 lawyers to the Court, Milenio, dated February 2, 2022, p. 1, **C-0021**.

[112] *Ibid.*

[113] *Ibid.*

104. Adding to the judicial uncertainty, Mexico's judicial branch and judicial independence is publicly under attack and often under considerable pressure from the President.

a) In March 2021, President López Obrador attacked publicly and then requested an investigation of an independent judge who granted a temporary injunction against the changes of energy laws that are being contested as being unconstitutional.[114]

b) In April 2021, Mexico's Congress passed a judicial reform known as the "Zaldivar Law" which included a last-minute amendment that would extend the term of Supreme Court President Arturo Zaldivar for an additional two years. As described by Human Rights Watch, this "move directly contravenes the **Mexican Constitution** and undermines judicial independence. It is nothing less than a direct assault on the rule of law in Mexico."[115] The Zaldivar Law not only contravenes the Mexican Constitution—which requires Mexico's Supreme Court to elect a president every four years with only a single term—but it places the judicial independence of the Mexican Supreme Court in question.

c) Thirdly, the recent appointment to Mexico's Supreme Court includes those that are known to be clearly partial to the President. One such recent appointee is Justice Minister Yasmin Esquivel Mossa, who, as noted above, along with the Ministry of Finance and Public Credit, asked the Supreme Court to exercise its power of attraction and hear the *Amparo* proceedings of PEM. In the normal course, this case was directed to be heard by Fourteenth Collegiate Court on Administrative Matters of the First Circuit.

[114] Mexican Lawyers Raise Voices to Defend Judicial Independence, Law.com, dated March 18, 2021, **C-0022**.

[115] Lopez Obrador Threatens Judicial Independence, Human Rights Watch, dated April 26, 2021, **C-0023**.

105. It is therefore not only unclear when the Supreme Court will hear the case, but it is also highly likely that PEM will may not receive a fair hearing before the Mexican Supreme Court in the current political environment.

I. The SAT's Illegal Reassessments

106. Notwithstanding the APA, which remains valid pending the appeal, the SAT continues to initiate audits and impose retroactive reassessments for the years 2010-2013 totaling [redacted], consisting of [redacted] in double counted taxes, [redacted] in interest deductibility and services charges, [redacted] in APA related costs, and [redacted] million in interest, penalties, and inflation. The SAT has also issued an audit for 2014 but has yet to issue a tax reassessment.

107. The SAT's reassessments are illegal under Mexican law as they ignore the existence of the APA, they purport to retroactively impose exorbitant amounts as taxes, that are outside the legislative framework and Mexico's constitutional requirements.

J. First Majestic's Administrative Appeal Against the SAT's Illegal Reassessments

108. To protect its legal rights, PEM filed administrative appeals against all four of the SAT's illegal reassessments.

109. PEM filed four administrative appeals before the legal department of the SAT on September 25, 2019,[116] November 7, 2019,[117] February 18, 2020,[118] and April 16, 2021,[119] against the 2010, 2011, 2012, and 2013 illegal Reassessments, respectively.

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

[117] *See* Administrative Appeal, No. RRL2019009954, dated November 7, 2019, pp. 1-236, **C-0002, p. 2488**.

[118] *See* Administrative Appeal, No. RRL2020001482, dated February 18, 2020, pp. 1-209, **C-0002, p. 2801**.

[119] *See* Administrative Appeal, No. RRL2021004797, dated April 16, 2021, p. 11, **C-0002, p. 3648**.

110. On December 5, 2019, the SAT dismissed the administrative appeals for fiscal years 2010[120] and 2011,[121] with the appeal for 2012 dismissed on April 6, 2020.[122] These dismissals all occurred within a period of one to three months.

111. The administrative appeal for fiscal year 2013 is still pending.

112. The SAT dismissed the administrative appeals on the basis that under Articles 124 and 125 of the Federal Fiscal Code, an administrative appeal is inadmissible where the taxpayer is challenging an act related to one that has been challenged in a different forum.[123] In such a case, the taxpayer must choose the same route to challenge that act.[124]

113. However, in this case, the *Lesividad* trial was initiated by the SAT, not PEM.[125] Therefore, PEM is not restricted to contesting the reassessments through the *Lesividad* trial. PEM's entitlement to rely on its remedy to seek an administrative appeal is not only a procedural right provided to PEM but also challenges another act, namely the illegal reassessments rather than the APA.

114. Additionally, the tax assessments contained items that were not related in any way to the silver sale operations covered by the APA, for which PEM had the right to submit additional information through an administrative appeal.

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

[121] See *ibid.*

[122] *See* Official Letter, No. 900-09-02-2019-3067, dated April 6, 2020, p. 9, **C-0002, p. 3010**.

[123] *See* Official Letter, No. 900-09-02-2019-10302, dated December 5, 2019, p. 10, **C-0002, p. 1848**; *see also See* Official Letter, No. 900-09-02-2019-3067, dated April 6, 2020, p. 9, **C-0002, p. 3010**.

[124] *Ibid.*

[125] *See* Juicio de Lesividad Complaint of the SAT, No. 900 0 02-2015-31276, dated August 4, 2015, p. 1, **C-0002, p. 185**; *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 19, [redacted]**0000**.

115. SAT arguably agreed with this procedural approach in an Official Letter indicating that under Article 23 of the Federal Taxpayer rights, both the administrative appeal and the annulment complaint were the ideal means of defense to combat the deficiency.[126]

116. Consequently, in response to SAT, in addition to its earlier administrative appeals, PEM filed on December 13, 2019 an annulment complaint before the Online Chamber of the TFJA against the 2010 and 2011 tax reassessments and the administrative appeal dismissal.[127] The corresponding annulment complaint for the 2012 tax reassessment and administrative appeal dismissal was filed on May 4, 2020.[128]

117. On January 3, 2020, the TFJA admitted the annulment complaint requiring the SAT to answer PEM's claim and granting PEM a provisional injunction against the execution and collection of the 2010 tax deficiency.[129] On January 5, 2020, the TFJA granted PEM the same relief for the 2011 reassessment.[130] The relief for the 2012 tax reassessment was granted on May 7, 2020.[131]

118. Further, as PEM had filed MAP requests with the relevant competent authorities in [redacted] PEM was not required to offer a guarantee for the injunctions.

K. The SAT's Refusal to Engage in the Mutual Agreement Procedure

119. To protect its legal rights, PEM invoked the MAP under three applicable international avoidance of double taxation treaties.

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[126] *See ibid.*

[127] *See* Annulment Complaint, No. 19/3171-24-01-02-02-OL, dated December 13, 2019, pp. 1-280, **C-0002, p. 1862**.

[128] *See* Application for Annulment, No. 20/770-24-01-01-04-OL, dated May 4, 2020, pp. 1-299, **C-0002, p. 3021**.

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

[130] *See* Admission Resolution of the Claim and Provisional Suspension, dated January 5, 2020, p. 2, **C-0002, p. 2724**.

[131] *See* Provisional Injunction No. 20/770-24-01-01-04-OL, dated May 7, 2020, **C-0002, p. 5801**.

120. The MAP is a dispute resolution provision in almost all DTTs. [132]

121. The MAP is the primary means for a taxpayer to "make a competent authority aware that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty."[133] As described by [redacted], when a taxpayer requests access to a MAP, the relevant tax competent authorities must ensure that the following steps are taken:

a) the state must allow a taxpayer, at the taxpayer's choice, to initiate the MAP, and to present the case to the competent authorities of the state.

b) the state (represented by its competent authorities) must consider the case presented by the taxpayer).

c) the state must determine whether the case presented by the taxpayer is justified, i.e., that the action or actions of a party or both parties to the treaty will result in taxation not in accordance with the provisions of the treaty.

d) if the state determines that the case is justified, then it must determine whether it can unilaterally resolve it; and

e) if it reaches the fourth step above and determines that it cannot unilaterally resolve the case, it must "endeavor… to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the convention.[134]

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[132] *See* Expert Report of [redacted], dated April 6, 2022, ¶ 48, [redacted]**0000**.

[133]UN Committee of Experts on International Cooperation in Tax Matters, Guide to the Mutual Agreement Procedure Under Tax Treaties, dated October 2012, https:www.un.orgesaffdwp-contentuploads201410ta-Guide_MAP.pdf.

[134] Expert Report of [redacted], dated April 6, 2022, currently pp. 3-4, 20-21, [redacted]**0000**.

122. As outlined by the OECD, "the competent authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties."[135]

123. As further explained by [redacted] in his expert report "States must make an effort, seek to resolve double-taxation conflicts through agreement between the parties, through [the MAP]….[Further,] ...acceptance of a mutual agreement procedure is not left to the free choice of a Contracting State, but is obliged to carry out the process, even if you are not obliged to reach agreement once it has been initiated."[136]

124. In this case, First Majestic through PEM and PMC filed MAPs under the [redacted] Mexico Treaty, [redacted]Mexico Treaty, and the [redacted]Mexico Treaty for the illegal reassessments of fiscal years 2010, 2011, and 2012.

a) Mexico dismissed 6 of the Mexican and [redacted] MAPs requests on the same day (February 14, 2020) and all of the [redacted] MAPs requests on May 8, 2020.[137]

b) Mexico provided nine responses to the MAP requests and in each response stated that the contested acts were ones of domestic law, that could only be addressed at the domestic level.[138]

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[135] Model Tax Convention on Income and on Capital, OECD, dated 2017, p. 1180, **YB-0009**.

[136] Expert Report of [redacted], dated April 25, 2022, p. 7, [redacted]**0000**.

[137] *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**; *see also* Official Letters, Nos. 900-06-01-00-00-2020-000319, 900-06-01-00-00-2020-000320 and 900-06-01-00-00-2020-000321, dated May 8, 2020, pp. 1-2, **C-0002, p. 4831**.

[138] *Ibid.*

c) As such, Mexico did not meet its obligations under the MAP as it relied on domestic law to refuse to undertake the MAP process which is not an acceptable justification."[139]

L. Mexico's Illegal Efforts to Collect Unlawful Reassessments

1. President López Obrador 's Effort to Collect Tax Revenue from Selected Large Corporations

125. The election of President López Obrador on July 1, 2018 and his entry into office on December 1, 2018 marked a shift in Mexico's tactics to raise revenues to deal with the mounting revenue deficits.

126. The President made it clear on June 7, 2021, "that there will not be reforms promoted by the executive to increase taxes."[140] Instead, the President expressed his plans to make up the tax deficit by cutting corruption and waste[141] and ending what he characterized as "tax forgiveness" for Mexico's largest companies.[142]

127. Under the guise of ending "tax forgiveness", the President has sought to increase tax revenues by threatening and coercing selected foreign large corporations to pay amounts, in most instances in the hundreds of millions of dollars, under the threat of criminal proceedings and public humiliation.[143]

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[139] Model Tax Convention on Income and on Capital, OECD, dated 2017, p. 1180, **YB-0009**.

[140] *See* Mexican president says he has no plans to hike taxes, Reuters, dated June 15, 2021, **C-0024**; *see also* Daina Beth Solomon, *Exclusive: Mexico's tax chief eyes criminal charges as path to tougher corporate enforcement,* Reuters, dated June 9, 2020, https:www.reuters.comarticleus-mexico-politics-tax-exclusiveexclusive-mexicos-tax-chief-eyes-criminal-charges-as-path-to-tougher-corporate-enforcement-idUSKBN23G2V3, **C-0025**.

[141] Editorial Board, Opinion: A New Path in Mexico, New York Times, dated July 2, 2018, p. 1, **C-0003, p. 1**.

[142] Cecila Jamasmie, First Majestic takes Mexico tax row to arbitration, Mining, dated March 3, 2021, p. 1, **C-0026**.

[143] Michael O'Boyle, Walmart Buckled on Mexico Tax Claims After Charges Threatened, Bloomberg, dated June 3, 2020, p. 3, (emphasis added), **C-0003, p. 143**.

128. Faced with the possibility of criminal charges and reputational damage, the selected large multinationals paid large sums of money in the year 2020 which were described as arrears in taxes payable.[144]

129. Walmart de Mexico allegedly paid USD 358 million, Coca-Cola bottler Femsa similarly paid USD 398 million, and Toyota Motor Corp. as well as IBM have also paid similar amounts.[145]

130. The Head of the SAT, Raquel Buenorostro, and the Federal Fiscal Prosecutor Carlos Romero have both, on various occasions, threatened to press criminal charges against these selected companies operating in Mexico if the amounts demanded purportedly as taxes are not paid, and have indicated that the President has a list of 15 companies that are believed to collectively owe USD 2 billion in unpaid taxes,[146] which according to Ms. Buenorostro, represented a handful of companies in arrears.

131. According to Ms. Buenorostro, the SAT had 1,300 audits underway, but it was focusing on cases "where it was confident of proving a tax obligation, *rather than entering the complicated world of tax law interpretation*."[147]

132. Fiscal Prosecutor Carlos Romero threatened not only these selected large corporations but also individuals connected with these corporations. He has indicated that "*if large corporate taxpayers were to come under scrutiny, arrest warrants could target several types of positions, including the person in charge of tax payments, board members, lawyers and*

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[144] Daina Beth Solomon, *Exclusive: Mexico's tax chief eyes criminal charges as path to tougher corporate enforcement*, Reuters, dated June 9, 2020, https:www.reuters.comarticleus-mexico-politics-tax-exclusiveexclusive-mexicos-tax-chief-eyes-criminal-charges-as-path-to-tougher-corporate-enforcement-idUSKBN23G2V3, **C-0003, pg. 176**.

[145] See Ibid.

[146] Exclusive: Mexico's Tax Chief Eyes Criminal Charges as Path to Tougher Corporate Enforcement, Reuters, dated June 9, 2020, p. 1, (emphasis added), **C-0003, p. 176**.

[147] Daina Beth Solomon and Carlos Gonzalez Galvan, Exclusive: 'There will be people in jail': Mexico plans arrests soon in tax crackdown, Reuters, dated July 15, 2020, p. 1, **C-0003, p. 12**.

accountants." To prove his point, he has been quoted as saying that between "*Between 2020 and 2021, there will be people in jail*."[148] These threats appear to have worked with some of the world's largest multinational corporations given their resources, but in the case of First Majestic the payment of the amount demanded would prove devastating. First Majestic has therefore decided to seek redress before a neutral international arbitration tribunal pursuant to Chapter 11 of NAFTA.

[redacted]

133. It is also clear that the current government's campaign to collect amounts as taxes by whatever means has severely limited the role of PRODECON, the tax ombudsman's office in Mexico. The former head of that institution, who was well respected internationally, was terminated from her position shortly after the current President was elected.

134. The following quote from this former head of PRODECON explains most clearly describes the very different approach of the current Head of the SAT when it comes to tax collection:

> *"Raquel Buenrostro is very good at collecting," Ms. Bernal said.* ***"But it's very easy when you have a garrote in your hand."*** Diana Bernal, former taxpayers' ombudswoman[149]

135. Furthermore, lawyers have been targeted by the new administration as engaging in treacherous behavior against their own government to the point that their ability to ensure that taxpayer rights are defended including being entitled to defend their client's position is under threat. This has rightly drawn criticisms from the International Bar Association and the American Bar Association.[150]

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[148] *Ibid.*

[149] Mexico's 'Iron Lady' cracks whip on multinationals' taxes, Financial Times, June 22, 2020, **C-0003, p. 192**.

[150] Letter Regarding Respect For the Rule of Law and the Right to Legal representation, American Bar Association, dated 20 October 2020, pp. 1-2, **MT-0032**.

136. Attached as **C-0003** are some national and international media reports of the SAT's coercive revenue raising campaign against targeted foreign companies, which includes First Majestic.

2. The SAT's Illegal Investigation of PEM's Assets

137. In April 2020, while the SAT engaged in and effected its illegal investigation including searches and seizures at PEM's facilities, the Government had declared a shut-down due to COVID-19 that included government offices and the courts.

138. These collection measures taken by the SAT violated a court issued injunction and also put PEM staff at jeopardy of contracting COVID-19 when there were no vaccinations, and the consequences of infection were life-threatening.

139. The events that occurred in April 2020 are as follows:

a) On April 3, 2020, the SAT arrived at PEM's Durango offices to collect on their alleged debts.[151]

b) The SAT launched an investigation to identify which of PEM's assets could be seized or forfeited. After spending the day photocopying PEM's concessions and property deeds, the SAT seized 36 plots of land and 113 mining concessions.[152]

c) This investigation was in violation of the court decisions granting PEM an injunction against the collection of any debts related to the alleged 2010 and 2011 deficiencies.

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[151] *See* Tax Collection Orders, Payment Requirements and Seizure Orders, dated April 3, 2020, p. 2, **C-0002, p. 4952**; Email between First Majestic – Re: Procedimiento SAT, dated April 7, 2020, pp. 1-2. **RP-0020**.

[152] *See* [redacted] Witness Statement, dated April 25, 2022, ¶ 8(h), **Exhibit [redacted]0000**; *see also* Tax Collection Orders, Payment Requirements and Seizure Orders, dated April 3, 2020, p. 2, **C-0002, p. 4952**.

d) Further, by demanding entry to the PEM offices, which should have been closed due to the lock-down, the SAT exposed PEM employees to the risk of contracting COVID-19.

e) Finally, as the courts were still shut down due to Covid-19, PEM was barred from any legal recourse to protect its legal rights and those of its management personnel.

f) As such, the Government used COVID-19 as an opportunity to directly violate a court order and put PEM staff at risk, at a point where it knew that PEM would have no legal recourse due to the closure of the courts.

140. After making many attempts to settle its dispute with the SAT, First Majestic decided that it had to escalate its attempts to settle in order to draw attention to its position from the highest levels of the Mexican government. It made it absolutely clear in the Notice of Intent issued in May 2020 and in the accompanying First Majestic news release that in filing the Notice of Intent, it was seeking to achieve an amicable settlement.[153]

141. However, such attempts were rebuffed by the SAT which insisted on the full payment of what it claimed as the amount owing and indicated that seeking to achieve a global settlement for lesser amount would be viewed as an attempt to bribe.[154]

3. The SAT's Freezing of PEM's bank accounts

142. In April 2020, the SAT ordered the seizure and freezing of PEM's Mexican bank accounts:[155]

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[153] *See* [redacted] Witness Statement of [redacted] dated April 25, 2022, ¶ 132,(r), **Exhibit [redacted]0000**.

[154] *See* [redacted] Witness Statement of [redacted] dated April 25, 2022, ¶ 140, **Exhibit [redacted]0000**.

[155] *See* Official Letters, Nos. 400-24-00-02-00-2020-000968, 400-24-00-02-00-2020-000969 and 400-24-00-02-00-2020-000970, dated April 3, 2020, p. 2, **C-0002, p. 4954**.

a) At this time, PEM had been granted injunctions on the collection of the 2010 and 2011 alleged tax deficiencies.[156]

b) The SAT ordered the seizure under Article 151 of the Federal Fiscal Code which requires the tax deficiencies to have been declared as valid by the Courts.[157]

c) The SAT unilaterally decided that, due to its dismissal of the MAPs requests, the effects of the injunctions granted to PEM had expired. Therefore, the SAT proceeded to issue the tax collection orders, and payment requirements, as well as carry out the seizures and freezing of PEM's bank accounts.

d) The SAT, therefore, ignored a resolution issued by a Federal Court and the rule of law and principle of legal certainty.

4. Mexico's Unlawful [redacted] Against First Majestic

143. On June 4, 2020, the SAT presented a letter of vulnerable PEM operations regarding sales of precious metals, which would lead to an investigation of the PEM's compliance with its obligations in the [redacted].[158]

144. The measures that the SAT took purportedly to investigate [redacted] which it had never done during all of First Majestic's operations through various Mexican subsidiaries, and this time targeting only PEM included the follow:

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[156] Such injunctions were granted through resolutions issued on January 3 and 5 by the Online Chamber of the TFJA within the nullity trials. *See* Admission Resolution of the Claim and Provisional Suspension, dated January 3, 2020, p. 13, **C-0002, p. 2142**; *see also See* Admission Resolution of the Claim and Provisional Suspension, dated January 5, 2020, p. 2, **C-0002, p. 2724**.

[157] *See* Official Letters, Nos. 400-24-00-02-00-2020-000968, 400-24-00-02-00-2020-000969 and 400-24-00-02-00-2020-000970, dated April 3, 2020, p. 2, **C-0002, p. 4954**.

[158] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 153, [redacted]**0000**; *see also* Official Letter, No. 500-23-00-02-01-2020-07943, dated September 3, 2020, p. 32, **C-0002, p. 5061**.

a) The auditors demanded evidence that PEM was not [redacted] through cash sales of silver.[159]

b) In 2020 Mexico revised [redacted].[160] As a result, t[redacted] signaled to First Majestic and PEM that the government was following through on its promise to impose [redacted]

c) On July 15, 2020, the SAT [redacted] against PEM to [redacted][161]

d) This investigation again required PEM employees to be at its offices, exposing them to the risk of contracting COVID-19.[162]

e) On September 25, 2020, PEM filed an administrative appeal, arguing that the [redacted][163]

f) The appeal was granted on January 13, 2021, and the SAT's [redacted] were declared to be null and void and lacking legal basis. Specifically, it was held that the [redacted] were illegal as PEM's clients were properly identified in its records. [164]

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[159] *See* Official Letter, No. 500-23-00-02-01-2020-07943, dated September 3, 2020, p. 32, **C-0002, p. 5061**.

[160] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 158, [redacted]**0000**.

[161] *See* Official Letter, No. 500-23-00-02-01-2020-07943, dated September 3, 2020, p. 32, **C-0002, p. 5061**.

[162] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 132(e), [redacted]**0000**.

[163] *See* Administrative Appeal, dated September 25, 2020, p. 1, **C-0002, p. 5107**.

[164] *See* Official Letter, No. 600-23-2021-92, dated January 13, 2021, pp. 1-148, **C-0002, p. 5255**.

5. Mexico's Unlawful [redacted] Against First Majestic and Its Officials

145. The Mexican government has used [redacted] threats not only against corporations (including officers and directors of these entities) that it believes should be contributing larger amounts to the Government's revenues, but it has also threatened [redacted] to coerce companies to settle tax disputes. The International Bar Association has sent SAT a letter noting that targeting law firms and accountants that assist taxpayers "openly threatened the rule of law," and called the threat of [redacted] "disturbing."[165] In relation to First Majestic, the Mexican Government has repeatedly brought baseless [redacted] against [redacted] when even when such charges have been previously dismissed:

a) On June 6, 2020, the Claimant was notified that there was a [redacted] filed against [redacted] as a legal representative of PEM.[166]

b) Under the [redacted], enacted on January 1, 2020, [redacted], including declaring less income to the detriment of the federal tax authorities. Under the law, individuals shall be considered [redacted] when the detriment surpasses [redacted]. Additionally, under the law, individuals [redacted].

[165] IBA Letter, dated August 27, 2020, ("Es de nuestro conocimiento que el Servicio de Administración Tributaria y la Procuraduría Fiscal de la Federación de la Secretaría de Hacienda y Crédito Público, han abiertamente amenazado al Estado de Derecho, particularmente en lo que se refiere a las firmas de abogados y de contadores. Reportes de advertencias a los contribuyentes para que se abstengan de utilizar a sus abogados en procedimientos de acuerdos administrativos, e incluso, amenazas de proceder penalmente en contra de contribuyentes que omitan llegar a un acuerdo, ***son muy perturbadores***") (emphasis added), **C-0027**,

[166] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 145, [redacted]**0000**.

146. The allegations against [redacted] included that PEM had allegedly [redacted] in 2016 omitting income taxes of [redacted]

a) On November 9, 2020, the charges against [redacted] were dropped based on insufficient evidence. The Government did not pursue an [redacted] for [redacted].[167]

b) On November 17, 2020, the tax prosecutor appealed the court's decision. On January 7, 2020, [redacted] won the appeal.[168]

c) On February 23, 2021, the government filed an Amparo—a constitutional appeal used in extraordinary circumstances. The Mexican Court denied the amparo and again denied the government's appeal against the review of the denied Amparo.[169]

d) Ultimately despite trying every possible avenue to impose [redacted] liability on [redacted]—where there was no wrongdoing—the Government was unsuccessful.[170]

147. The SAT thereafter made a second unsuccessful [redacted] attempt against [redacted]. After losing the attempt, both the Tax Prosecutorial Service and the Attorney General's office appealed the partial dismissal.[171]

a) During the [redacted] the Judge on the case, acted improperly and hinted [redacted] that he believed that there was a factual basis to ground the

[167] *See id.*, at ¶ 150.

[168] *See ibid*.

[169] *See id.*, at ¶ 151.

[170] *See id.* ¶ 150.

[171] *See ibid*.

[redacted] rather than the specific charges that had been advanced to date.

b) As a result, PEM is preparing a reply and appeal on the basis that the dismissal should have been a full and final dismissal, an adhesion appeal on the basis that the judge acted improperly in advising [redacted] as to how they might win [redacted] on a third attempt, and an Amparo on the basis that [redacted] has breached [redacted] for the same dismissed [redacted]

c) First Majestic and PEM are aware that the SAT plans to proceed with charges yet again against this individual.

IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

148. The Tribunal has jurisdiction to resolve the current dispute as the Claimant's claims meet all of the jurisdictional criteria under NAFTA and the Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID Convention).

A. First Majestic Is Entitled to Bring Its Claims Against Respondent Under Chapter 11 of NAFTA

149. Article 1101 (Scope and Coverage) provides, in relevant part, that Chapter 11 of NAFTA "applies to measures adopted or maintained by a Party relating to: […] (b) investments of investors of another Party in the territory of the Party."[172]

150. As explained below, the Claimant has raised claims regarding matters within the scope of Chapter 11 and has satisfied all of the jurisdictional requirements and other conditions contained in that Chapter for bringing a claim against the Respondent.

[172] Art. 1101, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

1. First Majestic Is an "Investor of a Party" that Has Made an "Investment" in Mexico

151. NAFTA protects an "investor of a Party," defined in Article 1139 as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." The Claimant is an "enterprise" of Canada. The term "enterprise" is defined under NAFTA as: "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."[173] The Claimant is a company duly incorporated in the State of British Columbia, Canada.

152. The Claimant has made significant "investments" in Mexico. Article 1139 (Definitions) defines "investment" as including, in relevant part:

> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> …
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

[173] *Id.*, Art. 201.

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; … .[174]

153. According to the tribunal in *Marvin Feldman v. United Mexican States*, "[t]he term 'investment' is defined in Article 1139 in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money."[175]

154. The Claimant, in its own right and through PEM, which it wholly owns and controls, has made numerous "investments" in Mexico. These include ownership as of 2004 of a number of mining companies, including PEM, that it acquired indirectly by purchasing all of the shares of PMC.[176] The Claimant's investments also include its shareholdings of [redacted] of PEM's stock.[177] PEM's contract rights under the APA also constitute "investments."[178] Finally, the Claimant's protected assets include all lands and all other assets, tangible or intangible, acquired in connection with its mining businesses in Mexico.[179]

155. Accordingly, the Claimant is an "investor of a Party" that has "made an investment" in Mexico.

2. Mexico's Acts at Issue are "Measures… Relating to" First Majestic's Investments

156. Article 201 of NAFTA defines the term "measure" as "any law, regulation, procedure, requirements or practice." As explained in *Ethyl Corporation v. Canada*, the meaning

[174] Art. 1139, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

[175] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)991, Award, dated December 16, 2002, ¶ 96, **CL-0002**.

[176] Art. 1139(a), North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

[177] *Id.*, Article 1139(e)(f).

[178] *Id.*, Article 1139(h).

[179] *Id.*, Article 1139(g).

of the term is broad: "Clearly something other than a 'law,' even something in the nature of a 'practice,' which may not even amount to a legal stricture, may qualify [as a measure]."[180]

157. The acts underlying the Respondent's misconduct and omissions in this case are clearly measures "relating to" the Claimant's investments. As determined in *Methanex v. United States*, the term "relating to," as used in Article 1101(1), only requires that there be a "legally significant connection" between the "measures" and the "investments" at issue.[181] Such a "legally significant connection" clearly exists in this case with respect to the measures of the Respondent.

158. A non-exhaustive list of measures that form part of the dispute with the Respondent and provide the basis for the claim against the Respondent include:

a) unlawfully repudiating the APA issued to PEM which continues to remain legally valid and binding on the SAT in relation to the 2010 to 2014 years.

b) seeking to retroactively nullify the APA based on improper grounds.

c) issuing unlawful retroactive Reassessments.

d) refusal by the SAT to accept from PEM the administrative appeals filed to challenges the retroactive tax assessments.

e) seeking to collect arbitrarily inflated amounts purportedly as taxes, penalties and interest without any legal basis.

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[180] *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, dated June 24, 1998, ¶ 66, **CL-0003**. *See also The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)983, Decision on Jurisdiction, dated January 5, 2001, ¶ 40 (noting the "breadth of this inclusive definition" of "measure" in Article 201), **CL-0004**; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB044, Decision on Jurisdiction and Liability, dated June 6, 2012, ¶ 364, **CL-0005**.

[181] *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Partial Award on Jurisdiction, dated August 7, 2002, ¶ 147, **CL-0006**.

f) engaging in unlawful collection methods that violate Mexico's own laws and the Mexican Constitution.

g) refusing to engage in the process for resolution of double taxation pursuant to the MAPs under three DTTs which impose legal obligation on Mexico.

h) refusing to suspend its collection of amounts purportedly claimed by Mexico to be taxes, penalties and interest notwithstanding the request for the MAPs filed by PEM.

i) refusing to accept a guarantee from PEM for amounts purportedly claimed by Mexico to be taxes, penalties and interest.

j) pursuing a dubious [redacted]

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.

m) leaking information required under Mexican law to be confidential and protected concerning First Majestic and PEM to the national and international media;

n) bringing multiple [redacted], after each prior proceeding is rejected by the Courts, and antecedent to establishing any underpayment of taxes and without any evidence of [redacted].

o) limiting and restricting First Majestic and PEM from relying on all available domestic and international avenues for seeking redress.

p) unlawfully failing to refund to PEM unduly imposed penalties.

q) unlawfully seizing merchandise.

159. With respect to the foregoing measures of Mexico, whether by the executive or the judiciary, these measures have detrimentally impacted the Claimant's ability to do business in Mexico, and there is therefore a "legally significant connection" between these measures and Claimant's "investments."

Mexico's Acts Are Not "Taxation Measures" Within the Meaning of Article 2103(1) of NAFTA.

160. While NAFTA defines the word "measure," it does not contain a definition of what constitutes "taxation measures." As noted above, the term "measure" includes any law, regulation, procedure, requirement or practice.[182]

161. In one of the earliest cases to consider the term "taxation measures," *EnCana Corporation v. Republic of Ecuador*, the tribunal, noting that the investment treaty in question did not define the term "taxation measures," stated that "it should be given its normal meaning *in the context of the Treaty*."[183] It then went on to make several "observations" as to the meaning of the term, including the following:

a) "It is in the nature of a tax that it is imposed by law";[184]

b) "Tax authorities are not robber barons writ large, and an arbitrary demand unsupported by any provision of the law of the host State would not qualify for …";[185]

[182] Art. 201, North American Free Trade Agreement, dated January 1, 1994 (measure includes any law, regulation, procedure, requirement or practice), **CL-0001**.

[183] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, dated February 3, 2006, ¶ 142, **CL-0007**.

[184] *Id.*, ¶ 142(1).

[185] *Ibid.*

c) "A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes";[186] and

d) "The economic impacts or effects of tax measures may be unclear and debatable; nonetheless ***a measure is a taxation measure if it is part of the regime for the imposition of a tax***."[187]

162. The *EnCana* decision and the observations enumerated in that case provided the early foundation for interpreting the meaning of and applying the term "taxation measures." Since then other tribunals have emphasized that tribunals should not be deferential to the point of entirely adopting the Respondent's interpretation or construction of what constitutes a "taxation measure." Ultimately, the question of what is or is not a "taxation measure" has to be decided in the context of the relevant treaty and applicable international law.

163. In *Nissan Motor Co., Ltd. v. Republic of India,* the tribunal noted that the search for the meaning of "taxation measure" begins "with the international law meaning of the word 'taxation.'"[188] The starting point for the interpretation is Article 31 of the Vienna Convention on the Law of Treaties (VCLT) which states that "[a] treaty shall be interpreted *in good faith* in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[189]

164. The following provisions of the VCLT are also relevant to the interpretation of the term "taxation measures," especially in this case where the Respondent claims the ability to resolve

[186] *Id.*, ¶ 142(4).

[187] Ibid.

[188] *Nissan Motor Co., Ltd. v. Republic of India,* PCA Case No. 2017-37, Decision on Jurisdiction, dated April 29, 2019, ¶ 384, **CL-0008**.

[189] Vienna Convention on the Law of Treaties, United Nations Treaty Collection Archives, dated 1969, entry into force January 27, 1980, pp. 12-13 (emphasis added), **YB-0001**.

its dispute with the Claimant and its investment based exclusively on Mexican laws (without regard to the applicable treaties it has signed, including DTTs):

a) Article 26, "*Pacta sunt servanda*" – "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[190]

b) Article 27, *Internal law and observance of treaties* – "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

165. In addition to the requirement of "good faith" in the conduct of the Respondent, whether judged against the requirements of Mexican law and the Constitution, the Respondent's conduct must also be measured against its treaty obligations under DTTs and the provisions of NAFTA, which requires compliance with international law standards of treatment of foreign investors.

166. Furthermore, the Respondent has to be able to demonstrate that its measures are *bona fide* taxation measures. They cannot be discriminatory, arbitrary and *ad hoc* means for raising revenues when Mexico runs into periods of revenue shortfalls but is unable for political reasons to implement tax increases based on a systematic and public policy based budgetary plan for the raising of revenues from defined classes of person, supported by legislation and approved for implementation by Mexico's legislators.

167. In the decision in *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, the tribunal interpreted the term "taxation measure" by considering whether it is a *bona fide* measure relating to taxation:

> Secondly, and independently from the above reasoning, the Tribunal concludes that it has jurisdiction to rule on Claimants' claims under Article 13 of the ECT due to the fact that the Article 21 carve-out does not apply to the Russian Federation's

[190] *See id.*, at Art. 26; *see also* Expert Report of Prof. [redacted], dated April 22, 2022, p. 18, [redacted]**0000**.

measures ***because they are not, as the Tribunal has concluded above, on the whole, a bona fide exercise of the Russian Federation's tax powers***.

This accords with Claimants' view that Article 21 of the ECT can apply only to ***bona fide*** taxation actions, i.e., ***actions that are motivated for the purpose of raising general revenue for the State***.

By contrast, actions that are taken only "under the guise" of taxation, but in reality - aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent), argue Claimants, cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).

The Tribunal essentially accepts the latter interpretation of Article 21.

To find otherwise would mean that the mere labelling of a measure as "taxation" would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, and produce a loophole in the protective scope of the ECT. Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as "taxation", effectively avoid the control of that measure under the ECT's other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT.[191]

168. Therefore, in addition to the requirement that "taxation measures" be implemented, administered and enforced in "good faith," the Respondent must satisfy the requirement that the measures are *bona fide* taxation measures. This has been confirmed in a line of cases that follows the approach in the *Yukos* arbitration.[192]

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[191] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated July 18, 2014, ¶¶ 1430-1433 (emphasis added), **CL-0009**.

[192] Markus Burgstaller and Agnieszka Zarowna, "*The Growing Importance Of Investment Arbitration In Relation To Tax Measures In The Energy And Natural Resources Sectors*," Turkish Commercial Law Review (2018), pp. 87-88, **CL-0010**. The authors summarize the seminal cases on the requirement of the *bona fide* nature of the taxation in circumstances where the Respondent intends to rely on "taxation measures" to exclude application of investment protection standards of a treaty:

An exception may be of a general character stipulating that the provisions of an investment treaty shall not apply to tax matters. The tribunal in Quasar de Valores v Russia found that to interpret such a blanket exception as to 'provide a loophole to escape the central undertakings of investment protection would be absurd. Complaints about types and levels of taxation are one thing. Complaints about abuse of the power ***to tax are something else***.' Similarly, the tribunal

169. The Claimant's experts support the view that "taxation measures" are excluded from the scope of protections in an investment treaty, like Chapter 11 of NAFTA, when there are *bone fide*:

> [redacted]
>
> From the perspective of tax law and policy the unavoidable conclusion is therefore that only bona fide "taxation" measures may be considered as meeting the requirements for exclusions of this type."[193]
>
> The interactions between the investor and Mexico, based on the facts presented to me and my knowledge of enforcement behavior around the world, were extraordinary even beyond the revocation of the APA. Unique and harsh collection activities should be subject to particular scrutiny due to the extraordinary power given to tax authorities, power that is further exacerbated by the choice of states in tax treaties to leave procedural matters to the parties. The activities in this case, as presented by… when viewed in combination must lead one to the conclusion that some goal beyond the mere collection of due taxes stood behind them. All should therefore also be considered as non bona fide and actions merely disguised as taxation measures.[194]
>
> [redacted]
>
> Based on the facts provided to the Author and the assessment contained in this Expert Opinion, these measures of Mexico, as well as others referenced in this Expert Opinion, undermined the Rule of Law in a way that was neither necessary, nor proportionate to secure a genuine or *bona fide* collection of taxes. Those measures breached the international law obligations of Mexico, resulting in severe damages to the investment of the Claimant, who had acted in good faith.[195]

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in RosInvest v Russia, when faced with arguments pertaining to a general exception, proceeded on the basis that it would 'not consider an expropriation by way of taxation, but rather an expropriation by a cumulative combination of measures (…) of which taxation is only one.'

An argument based on that reasoning (that the imposition of tax itself is not the measure from which the dispute arose, but merely one of the actions that resulted in a breach of an investor's rights under the treaty or that the host State's actions were merely under the guise of taxation rather than bona fide taxation), has been raised by claimants in a number of cases.

[193] Expert Report of [redacted], dated April 6, 2022, ¶ 173, [redacted]**0000**.

[194] *Id*., ¶ 190.

[195] Expert Report of [redacted] dated April 22, 2022, ¶ 8, [redacted]**0000**.

> This Expert Opinion does not want to question the right of Mexican tax authorities to conduct tax audits, but only assess whether they have exercised such power bona fide and to determine the repercussions for the right of the investor, as non-State actor of international law, to be treated in conformity with the Rule of Law.[196]

170. It should also be emphasized that the burden of proving that the measures at issue are "taxation measures" falls on the Respondent.

171. In summary, the Respondent's impugned measures are subject to the dispute resolution procedure in Chapter 11 of NAFTA because they are *not* taxation measures.

172. As noted by the tribunal in the *Yukos* case, "actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose … cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out."[197]

173. First Majestic's claim is that the Respondent is not enforcing its tax law. In fact, the SAT's actions either ignore or directly contradict Mexico's domestic tax laws, its federal Constitution and its obligations under international double-taxation treaties. Instead, in the guise of enforcing tax laws, the SAT has acted illegally to extract from PEM highly inflated and unsupportable amounts disguised as taxes, interest, and penalties. These actions have been taken for an improper, political purpose, namely, to make up for huge budgetary shortfalls caused by the Government's failed economic policies. There is ample evidence of the Government using its powers on a discriminatory and unlawful basis against foreign investors to shore up its budgetary revenue deficits.

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[196] *Id.*, ¶ 370.

[197] *Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. 2005-04AA227, Final Award, dated July 18, 2014, ¶ 1407, **CL-0009**. *See also Quasar de Valores SICAV SA, Orgoer de Valores SICAV SA, GBI 9000 SICAV SA, and ALSO 34 SL v. The Russian Federation*, SCC Case No. 242007, Award, dated July 20, 2012, ¶ 179 (opining that "[i]t is no answer for a state to say that its courts have used the word "taxation" . . . in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels"), **CL-0011**.

174. Moreover, the Respondent's impugned conduct has well gone beyond enforcing tax laws. The Government has interfered with the operation of PEM's business and its contractual commitments with its customers. These actions cannot be considered as taxation measures.

3. First Majestic Is Entitled to Bring Its Claims Under Articles 1116 and 1117

175. The Claimant is entitled to bring its claims both in its own right and on behalf of PEM.

176. Pursuant to Article 1116(1), "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A … and that the investor has incurred loss or damage by reason of, or arising out of, that breach."

177. Pursuant to Article 1117(1), "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A … and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."

178. The Claimant, which, as explained, is "[a]n investor of a Party," submits its claims for losses and damage incurred in its capacity as an investor. These include claims for loss of its shares in PEM. The Claimant also bring claims on behalf of PEM for losses to that company's investments. PEM is an "enterprise of another Party," Mexico, that is "a juridical person that the investor owns or controls directly or indirectly." As explained, the Claimant wholly owns and controls PEM, a corporate entity that is incorporated under the laws of Mexico. Accordingly, the Claimant is entitled to claim on its behalf and in its own right.

4. First Majestic Has Satisfied All Temporal Requirements

179. This submission satisfies all of the temporal requirements set forth in Chapter 11 of NAFTA.

180. Article 1118 provides that the "disputing parties should first attempt to settle a claim through consultation or negotiation."[198] As expressly noted in the Claimant's Notice of Intent and NAFTA Request for Arbitration, the Claimant has attempted to resolve this dispute with the Respondent in good faith through negotiations.[199] Despite these efforts to resolve the dispute amicably, the dispute remains unsettled.

181. The Claimant has satisfied the six-month "waiting" period set forth in Article 1120. Under NAFTA Article 1120(1), an investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to [the] claim."[200] More than six months elapsed between the events that gave rise to First Majestic's claims and their submission to arbitration. Some of the key events giving rise to this claim occurred during 2019 and 2020, when the SAT issued its reassessments and began its collection actions, and First Majestic waited to file its Request for Arbitration until March 1, 2021.

182. Pursuant to Article 1119, the Claimant has also satisfied the 90-day "amicable settlement period" between the filing of its Notice of Intent to File a Claim in Arbitration and its Request for Arbitration. Article 1119 provides that the disputing investor "shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted" to arbitration.[201] First Majestic delivered its Notice of Intent on May 13, 2020, more than 90 days before it submitted the Request for Arbitration on March 1, 2021.[202]

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[198] Art. 1118, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**, ("The disputing parties should first attempt to settle a claim through consultation or negotiation.").

[199] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Intent, dated May 13, 2020, p. 1, **RP-0015**.

[200] Art. 1120(1), North American Free Trade Agreement, dated January 1, 1994, ("Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: (a) the ICSID Convention […].")**, CL-0001**.

[201] Art. 1119, North American Free Trade Agreement, dated January 1, 1994, ("The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted […].")**, CL-0001**.

[202] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Intent, dated May 13, 2020, p. 1, **RP-0015**.

183. In addition, pursuant to Articles 1116(2) and 1117(2), Claimant has filed its Request for Arbitration within three years from the date on which it first acquired knowledge of the alleged breaches and loss or damage at issue in this case, which occurred after the Claimant became the subject of the unlawful reassessments in August 2019.

5. First Majestic Has Satisfied All Waiver Requirements

184. First Majestic also complied with the conditions for the submission of its claims to arbitration set forth in Article 1121 of NAFTA.

185. *First*, pursuant to Article 1121(1) and (2), First Majestic and PEM consented in writing to submit their dispute with Mexico to arbitration in the Consent/Waiver Letter. They ratified this consent in the Request for Arbitration.[203]

186. *Second*, in accordance with Article 1121(1) and (2), in the Request for Arbitration and the Consent/Waiver Letter, First Majestic and PEM expressly "waive[d] their rights to initiate or continue before any administrative tribunal or court under the law of any Party to NAFTA, or other dispute settlement procedures, any proceedings with respect to the measures alleged to be a breach referred to in Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Mexico."

187. The Consent/Waiver Letter was delivered to the Respondent and included in the Request for Arbitration as required by Article 1121(3).

6. The Fork-In-The-Road Provision Is Inapplicable

188. The fork-in-the-road provision in Annex 1120.1 of NAFTA has not been triggered in this case. This provision bars an investor from alleging in an arbitration that Mexico breached an obligation under Chapter 11 of NAFTA if the investor or its Mexican enterprise have alleged

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[203] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Request for Arbitration, dated March 1, 2021, **C-0005**.

in proceedings before a Mexican court or administrative tribunal that Mexico breached that obligation.

189. Neither First Majestic nor PEM has initiated proceedings before a Mexican court or administrative tribunal alleging that Mexico has breached its obligations under NAFTA Chapter 11. First Majestic, therefore, is not precluded by NAFTA Annex 1120.1 from pursuing its NAFTA claims in this arbitration.

B. First Majestic Is Entitled to Bring Its Claims Against Mexico Under the ICSID Convention

190. Article 1120 of NAFTA permits the Claimant to pursue arbitration against the Respondent under the Convention on the Settlement of Disputes between States and Nationals of Others States (ICSID Convention) and the ICSID Rules of Procedure for Arbitration Proceedings.[204] The Claimant has satisfied the requirements for initiating arbitration under the ICSID Convention, the ICSID Institution Rules, and the ICSID Arbitration Rules.

191. The jurisdiction of the Centre is established by Article 25(1) of the ICSID Convention which provides:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[205]

192. The Claimant has demonstrated that (1) there is "a legal dispute arising directly out of an investment"; (2) Mexico and Canada are both Contracting Parties to the ICSID Convention; and (3) the Claimant and the Respondent have "consent[ed] in writing" to submit to ICSID.

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[204] Art. 1120, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

[205] Art. 25(1), ICSID Convention, dated October 14, 1966, **CL-0012**.

1. There Is a "Legal Dispute Arising Directly Out of an Investment" (*Jurisdiction Ratione Materiae*)

a) There is a "Legal Dispute"

193. This case unquestionably concerns a legal dispute between First Majestic and Mexico. The term "dispute" has been defined as a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties."[206] To be a "legal dispute," the controversy "must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[207]

194. The claims at issue here involve a disagreement or conflict of views between the parties about the Claimant's rights and the Respondent's obligations under NAFTA and international law, and the extent of damages owed by Mexico for its breaches of NAFTA.

b) The Dispute "Arises Directly Out of an Investment"

195. As explained in Section III.C, First Majestic has made significant "investments" in Mexico within the meaning of Article 25(1) of the ICSID Convention. The legal dispute at issue here arises directly out of those investments.

196. As explained above, the dispute centers around several adverse measures adopted by Mexico, including (i) Mexico's repudiation of the APA, (ii) its illegal efforts to collect unlawful Reassessments, (iii) its unlawful [redacted] against PEM, (iv), its unlawful [redacted] against PEM and its officials, (v) its public shaming of First Majestic in the Press and (vi) the SAT's refusal to engage in the mutual agreement procedure.

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[206] *See, e.g.*, Christopher Schreuer, THE ICSID CONVENTION: A COMMENTARY, 2009, Article 25, ¶ 42 (quoting *Mavrommatis Palestine Concessions*), **CL-0013**.

[207] *See, e.g.*, Report of the Executive Directors on Settlement of Investment Disputes between States and Nationals of Other States, in HISTORY OF THE ICSID CONVENTION, II-2, 1070, p. 1078, **CL-0014**.

2. The Dispute Is between a "Contracting State" and a "National of Another Contracting State" (*Jurisdiction Ratione Personae*)

a) Mexico Is a "Contracting State"

197. The United Mexican States signed the ICSID Convention on January 11, 2018, and ratified it on July 27, 2018, with an effective date of August 26, 2018.[208]

b) First Majestic is a "National of Another Contracting State"

198. First Majestic qualifies as a "national of another Contracting State" because, as a corporation incorporated in the Province of British Columbia, Canada, it is a national of Canada, a State Party to the ICSID Convention since 2013.[209]

3. The Disputing Parties "Have Consented in Writing" to ICSID Arbitration (*Jurisdiction Ratione Voluntatis*)

a) Mexico Has Consented to Consented to ICSID Arbitration

199. Mexico has expressed its written consent to submit investment disputes to ICSID arbitration in Article 1122 of NAFTA, which provides:

> 1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
>
> 2. The consent given by paragraph by paragraph 1 and the submission of a claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre ….[210]

200. Mexico's consent to ICSID jurisdiction, expressed in Article 1122, applies to claims that meet the requirements set forth in NAFTA Articles 1116(1) and 1117(1): (i) that the claimant is an investor of a Party; (ii) that the dispute arises out of a breach of an obligation under

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[208] Database of ICSID Member States, ICSID, printed on April 25, 2022, https:icsid.worldbank.orgaboutmember-statesdatabase-of-member-states, **CL-0015**. First Majestic served its Notice of Intent to Submit a Claim to Arbitration on 13 May 2020 and its Request for Arbitration on March 1, 2021; after Mexico became a Contracting State to the ICSID Convention.

[209] *Ibid.*

[210] Art. 1122, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

Section A of Chapter 11 of NAFTA; and (iii) that the investor, or the enterprise on whose behalf the investor is submitting the claim, has incurred loss or damage by reason of that breach.

201. First Majestic satisfies these conditions because: (i) as a Canadian company, it is an investor of a Party; (ii) the dispute arises from Mexico's breaches of the provisions of Section A of Chapter 11 of NAFTA, specified in Section V.B below; and (iii) as discussed in Section VI below, First Majestic and PEM, which First Majestic wholly owns, have incurred loss or damage by reason of those breaches.

b) First Majestic Has Consented to ICSID Arbitration

202. In accordance with Article 1121(1) and (2) of NAFTA, First Majestic and PEM consented to submit their dispute with Mexico to arbitration through their Notice of Intent to submit a claim to arbitration under NAFTA Chapter 11, delivered to Mexico on May 13, 2020 (Notice of Intent), their executed instrument of consent and waiver dated March 1, 2021 (Consent/Waiver Letter), and the Request for Arbitration.[211]

4. First Majestic Has Satisfied the Requirements of the ICSID Institutional Rules

203. The Claimant has satisfied the requirement of Rule 2 of the ICSID Institution Rules, having precisely designated each party to the dispute and its address in Section II above, having indicated the date of consent to submit the dispute to ICSID arbitration and identified the instruments in which such consent is recorded in Section IV.B.3, having indicated the Claimant's nationality on the date of consent and its nationality on the date of the Request for Arbitration and that it did not have the nationality of the Respondent either on the date of consent or on the date of the Request for Arbitration in Sections IV.B.2; and having indicated that there is a legal dispute arising directly out of an investment in Section IV.B.1.

[211] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Intent, dated May 13, 2020, p. 1, **RP-0015**; *see also First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Request for Arbitration, dated March 1, 2021, **C-0005**.

204. The Claimant also paid the USD 25,000 filing fee required under ICSID Administrative and Financial Regulation 16. Accordingly, all procedural requirements under the ICSID Convention and ICSID Institution Rules are met.

V. ARGUMENT

A. Applicable Law

205. Article 42(1) of the ICSID Convention provides that the "Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."[212] Article 1131 of NAFTA contains the Parties' agreement on choice of law.[213] Pursuant to that provision, the Tribunal "shall decide the issue in dispute in accordance with [NAFTA] and applicable rules of international law."[214]

206. Accordingly, the provisions of NAFTA and other rules of international law, including customary international law, govern this arbitration.[215] The Claimant does not base its claims on Mexican law, except insofar as relevant to set out the factual context of the dispute.

B. Mexico's Breaches of NAFTA

1. Mexico Breached Article 1105 of NAFTA (Minimum Standard of Treatment)

a) The Applicable Standard for Fair and Equitable Treatment

207. Article 1105 of NAFTA, entitled "Minimum Standard of Treatment", established the applicable standard of treatment. The first paragraph of that article provides:

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[212] Art. 42(1), ICSID Convention, dated October 14, 1966.

[213] Christopher Schreuer, THE ICSID CONVENTION: A COMMENTARY, Cambridge University Press, 2009, Article 42, ¶ 85 (discussing NAFTA Article 1131), **CL-0016**.

[214] Art. 1131, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

[215] *International Thunderbird Gaming Corporation v. The United Mexican* State, UNCITRAL, Arbitral Award, dated January 26, 2006, ¶ 90, **CL-0017**.

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.[216]

208. It is well established that arbitral decisions, while themselves do not *create* customary international law, may *reflect* customary international law.[217] With respect to the customary standard of fair and equitable treatment, the overwhelming majority of investor-State arbitration tribunals have followed the standard articulated in *Waste Management v. Mexico*.[218]

209. In that case, applying Article 1105 of NAFTA, the tribunal stated the standard as follows:

> [t]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant ***if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*** – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in ***breach of representations made by the host State which were reasonably relied on by the claimant***.[219]

210. Under the *Waste Management* standard, different types of State misconduct may produce a result or outcome that is so fundamentally unfair, unjust or prejudicial as to fall below the minimum standard of fair and treatment. These types of misconduct roughly fall into four

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[216] Art. 1105, North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

[217] *See Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 277, (finding that "the writings of scholars and the decisions of tribunals may serve as evidence of custom."), **Exhibit CL-0018**; *see also Mercer International v. Government of Canada*, ICSID Case No. ARB(AF)123), Submission of the United Mexican States pursuant to Article 1128 Submission, dated May 8, 2015, ¶ 18, **CL-0019**.

[218] See, e.g., William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability, dated March 17, 2015, ¶¶ 427, 442, **CL-0020**; TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB1017, Award, dated December 19, 2013, ¶¶ 262, 455 (adopting Waste Management standard in principal part), **CL-0021**; Railroad Development Corp. Republic of Guatemala, ICSID Case No. ARB0723, Award, dated June 29, 2012, ¶ 219, **Exhibit CL-0022**.

[219] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)003, Award, dated April 30, 2004, ¶ 98 (emphasis added), **CL-0023**.

distinct, yet potentially overlapping categories, namely arbitrariness, lack of due process, discrimination and a breach of legitimate expectations.

211. Notably, Respondent has supported the statement of the fair and equitable treatment standard in *Waste Management*. For example, in its pleadings in *GAMI v. Mexico*, Respondent recalled the *Waste Management* standard and affirmed that "[i]ts analysis is in accordance with the arguments of respondent."[220]

212. Other NAFTA tribunals have identified the fair and equitable treatment standard in line with *Waste Management*. Many have adopted the standard wholesale.[221] Others have added their own gloss on the types of misconduct that trigger a fair and equitable treatment violation in light of the facts of a particular case.

213. In *Cargill v. Mexico*, for example, the tribunal observed:

> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[222]

214. The *Cargill* tribunal thus fleshed out aspects of the *Waste Management* standard, observing that State conduct that unjustifiably repudiates domestic law or policy violates the fair and equitable treatment standard.

215. In *International Thunderbird v. Mexico*, the tribunal described the standard of fair and equitable treatment similarly, though more efficiently, using more concise terminology:

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[220] *GAMI Investments, Inc. v. United Mexican States*, (UNCITRAL) Ad hoc, Mexico's Post-Hearing Brief, dated May 24, 2004, ¶¶ 48, 50, **CL-0024**.

[221] *See supra* note 218.

[222] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 296, **CL-0018**.

> [T]he Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, ***amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards***.[223]

216. The *International Thunderbird* tribunal's statement of the fair and equitable treatment standard thus groups various concepts identified in *Waste Management* – such as lack of due process, unjustness, unfairness, and discrimination – under the single rubric of "denial of justice."[224] It identifies two basic elements of the fair and equitable treatment standard: manifest arbitrariness and denial of justice.

217. Notably, Respondent has expressed the standard in similar terms. For example, in *Windstream v. Canada*, Mexico intervened to take the position that Article 1105(1) covered "egregious conduct, such as serious malfeasance, manifestly arbitrary behavior or denial of justice."[225] Respondent's position on the scope of the fair and equitable treatment standard thus generally corresponds to the approaches in *Waste Management*, *Cargill*, and *International Thunderbird*.

218. Thus, the decisions of arbitral tribunals and Mexico's well-established positions confirm that the minimum standard of fair and equitable treatment guards against various types of State misconduct, which are roughly grouped into three distinct, yet potentially overlapping categories: (a) arbitrariness; (b) lack of due process; (c) discrimination; and (d) legitimate expectations. As explained below, numerous tribunals have found breaches of the customary

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[223] *International Thunderbird Gaming Corp. v. United Mexican States*, (UNCITRAL) Ad hoc, Award, dated January 26, 2006, ¶ 194, **CL-0017**.

[224] Notably, in *Iberdrola v. Guatemala*, the tribunal aptly defined "denial of justice" as follows: "under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed.", *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB095, Award (Unofficial English Translation), dated August 17, 2012, ¶ 432, **CL-0025**.

[225] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Submission of Mexico Pursuant to NAFTA Article 1128, dated January 12, 2016, ¶ 7, **CL-0026**.

standard of fair and equitable treatment based on State conduct failing into one or more of the categories.

i. Arbitrariness

219. Mexico has consistently taken the position that the fair and equitable treatment standard under NAFTA addresses arbitrariness in State decision-making.[226] In *Cargill v. Mexico*, for example, the Respondent cited the judgment of a chamber of the International Court of Justice in the *ELSI* case as defining the concept.[227] That decision provided, in relevant part:

> Arbitrariness is not so much something opposed to *a* rule of law, as something opposed to *the* rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law'. It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[228]

220. In other words, a State acts arbitrarily, in violation of international law, when it conducts itself not on the basis of a system of law, but rather based on its own unrestricted will.

221. One NAFTA Tribunal observed that arbitrariness breaches Article 1105 "when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive."[229]

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[226] *See e.g., ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)001, Second Article 1128 Submission of Mexico, dated July 22, 2002, ¶ 2-3, **CL-0027**; *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)983, Second Article 1128 Submission of Mexico, dated November 9, 2001, ¶ 16, **CL-0028**.

[227] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)052, Rejoinder of the Respondent, dated May 2, 2007, ¶ 328, **CL-0029**.

[228] *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15, dated July 20, 1989, ¶ 128 (emphasis added) (citation omitted), **CL-0030**.

[229] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 293, **CL-0018**.

222. Similarly, another NAFTA tribunal observed that a determination of arbitrariness often depends on context. It posited: "The imposition of a new license requirement may for example be viewed quite differently if it appears on a blank slate or if is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied."[230] Accordingly, an abrupt change in the treatment of a foreign investor contrary to law breaches Article 1105.

223. Tribunals applying the customary standard of fair and equitable treatment have often found that a breach has occurred when the host State's conduct is unsupported by a reasonable and established policy rationale. Two cases decided under NAFTA are illustrative.

224. In *Cargill v. Mexico*, the tribunal found a breach of Article 1105 based on Mexico's arbitrary treatment of U.S. producers of high fructose corn syrup. Following NAFTA's entry into force, U.S. producers of high fructose corn syrup made significant inroads into Mexico's sweetener market, to the detriment of Mexico's struggling sugar cane industry. In response, Mexico demanded greater access to U.S. sugar markets. Unhappy with the U.S. response, Mexico levied a heavy tax on soft-drink bottlers that used high fructose corn syrup and subjected U.S. imports of high fructose corn syrup to a new import permit requirement. These measures had the effect of eliminating Cargill from the Mexican market and destroying its investment in Mexico.

225. The tribunal found that Mexico's actions breached, among other obligations, the fair and equitable treatment standard because they were arbitrary. As the tribunal ruled:

> [T]he sole purpose of the import permit requirement was to change the trade policy of the United States; while the sole effect was to virtually remove Claimant from the Mexican HFCS market. *There is no other relationship between the means and the end of this requirement*."[231]

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[230] *GAMI Investments, Inc. v. United Mexican States*, (UNCITRAL) Ad hoc, Final Award, dated November 15, 2004, ¶ 91, **CL-0031**.

[231] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 299, (emphasis added), **CL-0018**.

226. According to the tribunal, this "complete lack of objective criteria put forth by the Mexican government by which a company could obtain a permit" made the process not only "manifestly unjust," but also so egregious as to "surpass the standard of gross misconduct [required for a breach of Article 1105] and be more akin to an action in bad faith."[232]

227. Similarly, in *Bilcon v. Canada*, the tribunal found that Canada's arbitrary acts in connection with its consideration of a proposed quarry and marine terminal project breached Article 1105.[233] That case focused on the actions of an advisory body tasked by law with advising Canadian authorities on the environmental soundness of the quarry project. Under intense pressure from the local community, the advisory body recommended against the project – a recommendation that Canadian authorities ultimately adopted. Notably, the decision was reached not on the basis of any of the environmental factors established under the law, but rather on a novel and vague concept of "core community values."

228. The tribunal found that the advisory body acted arbitrarily in breach of Article 1105 because its denial of the project was based on an "unprecedented"[234] and "fundamentally novel and adverse approach."[235] As the tribunal observed, the advisory body "effectively created, without legal authority or fair notice to *Bilcon*, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law."[236]

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[232] *Id.*, ¶¶ 298-299, 301.

[233] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, dated March 17, 2015, ¶ 604, **CL-0020**.

[234] *Id.*, ¶ 450.

[235] *Id.*, ¶ 573.

[236] *Id.*, ¶ 591; *see also Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)971, Award, dated August 30, 2000, ¶¶ 91-92 (Mexico denied claimant a permit at a hearing "of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear" and for reasons unrelated to "the physical construction of the landfill or to any physical defects therein."), **CL-0032**.

229. Two cases applying the customary standard of fair and equitable treatment under the CAFTA-DR similarly found the State's arbitrary conduct as the decisive factor for establishing a breach.

230. In *RDC v. Guatemala*, the tribunal found that Guatemala's arbitrary application of its *lesivo* process violated the fair and equitable treatment standard. After RDC was granted a 50-year concession to run Guatemala's national railway system, Guatemala's President declared one of the project's critical contracts to be "*lesivo*" or legally injurious to the state. The tribunal found not only that the *lesivo* process "may be easily abused in its application,"[237] but also that it was, in fact, abused in that instance. According to the tribunal, "the *lesivo* remedy has been used under a cloak of formal correctness in defense of a rule of law, in fact for exacting concessions unrelated to the finding of lesivo."[238] The tribunal therefore found a breach of the fair and equitable treatment standard because Guatemala had arbitrarily applied the *lesivo* remedy to seek to undo what it perceived to be unfavorable contract terms.

231. Likewise, in *TECO v. Guatemala*, Guatemala's arbitrary conduct was again found in breach of the standard of fair and equitable treatment. That case centered on the establishment of electricity rates by the Guatemalan government, which the investor disputed. Although the law required the government to consider the views of an Expert Commission under those circumstances, the government failed to do so. The tribunal found that the government's decision to "ignor[e] without reasons" the views of the Expert Commission was "manifestly inconsistent with the regulatory framework."[239] Namely, the government had "repudiated the . . . fundamental principles upon which the regulatory framework bases the tariff review process."[240]

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[237] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB0723, Award, dated June 29, 2012, ¶¶ 222, 233, **CL-0022**.

[238] *Id.*, ¶ 234.

[239] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB1023, Award, dated December 19, 2013, ¶ 708, **CL-0021**.

[240] *Id.*, ¶ 710.

ii. Lack of Due Process

232. A serious failure in the administration of justice also gives rise to a breach of the customary fair and equitable treatment standard. Such misconduct is sometimes described in terms of a *"complete lack of transparency and candour in an administrative process*"[241] or a "*denial of justice*." As explained by a leading commentator, "*the delict of denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner*."[242]

233. The criteria for determining a denial of justice were aptly summarized in *Iberdrola v. Guatemala*:

> [U]nder international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that "… denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.[243]

234. As explained in *Loewen v. United States*, a denial of justice entails "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[244] The test for determining a denial of justice, as stated in *Mondev v. United States*, is therefore "whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available

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[241] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)003, Award, dated April 30, 2004, ¶ 98, **CL-0023**.

[242] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 62 (2005), **CL-0033**.

[243] *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB095, Award (Unofficial English Translation), dated August 17, 2012, ¶ 432, **CL-0025**.

[244] *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)983, Award, dated June 26, 2003, ¶ 132, **CL-0034**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 296 ("an utter lack of due process so as to offend judicial propriety"), **CL-0018**.

facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."[245]

235. The hallmarks of a denial of justice are a State's failure to provide foreign investors notice of, or an opportunity to be heard in, administrative and judicial proceedings such that the process is rendered fundamentally unfair.

236. Investor-State tribunals have found a breach of the customary fair and equitable treatment standard, in whole or in part, based on procedural impropriety in an administrative process.

237. In *Metalclad v. Mexico*, for example, Metalclad constructed a hazardous-waste landfill in a Mexican municipality after receiving assurances from the Mexican government that all necessary permits would be provided.[246] However, faced with local opposition to the landfill, the municipality's town council denied Metalclad a municipal construction permit on a basis not set forth in the law, namely on environmental grounds. The tribunal found Mexico's conduct violated Article 1105. Critical to the tribunal's finding was the fact that "the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."[247]

238. Similarly, in *Bilcon v. Canada*, described above, Bilcon argued that Canada breached Article 1105 when it provided no notice that the concept of "community core values" would be a factor considered by the advisory body in assessing Bilcon's proposed project—let

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[245] *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)992, Award, dated October 11, 2002, ¶ 127, **Exhibit CL-0035**.

[246] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)971, Award, dated August 30, 2000, ¶¶ 33-34, **CL-0032**.

[247] *Id.*, ¶ 91; *see also id.*, ¶ 99 ("The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.").

alone the decisive factor.[248] The tribunal agreed, finding that there was "no reasonable notice" that the advisory body "was going to adopt this unique approach and therefore had no opportunity to seek to clarify or contest it."[249] As a consequence, the tribunal found Canada's conduct to be "a serious breach of the law on procedural fairness …."[250]

239. In addition, in *TECO v. Guatemala*, described above, Guatemala was found to have breached the customary fair and equitable treatment standard for failing to provide a fair process in connection with the establishment of electricity rates.[251] Under Guatemalan law, the government was required to consider the views of an Expert Commission regarding recommended rates and, if the government disagreed, to provide reasons as to the basis for disregarding those rates.[252] The government failed to do so. The tribunal observed that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard."[253] Accordingly, it found: "In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules."[254]

240. A maladministration of justice may also occur in the context of judicial proceedings. Fair and equitable treatment requires that a State provide an adequate system of justice that affords foreign investors fundamental procedural fairness.

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[248] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, dated March 17, 2015, ¶ 24, **CL-0020**.

[249] *Id.*, ¶¶ 451, 543.

[250] *Id.*, ¶ 534.

[251] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB1023, Award, December 19, 2013, ¶ 780(b), **CL-0021**.

[252] *Id.*, ¶¶ 545, 564.

[253] *Id.*, ¶ 457.

[254] *Id.*, ¶ 780(b); *see also id.* ¶ 583 ("The obligation to provide reasons derives from both the regulatory framework and from the international obligations of the State under the minimum standard.").

241. As explained in *Azinian v. Mexico*, a denial of justice exists "if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."[255] The latter situation covers at least two types of misconduct where the State engages in unfair discrimination or commits gross incompetence in the administration of justice.

242. In *Loewen v. United States*, the tribunal found that "a decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."[256] In that case, a U.S. state trial court failed to properly guard the jury against inflammatory arguments seeking to target the Canadian defendant based on its nationality, race, and economic status. As a consequence, the jury not only found against the Canadian defendant, but also imposed and excessive monetary judgment against it. Although the claim was dismissed on other grounds, the tribunal concluded that "the trial judge failed to afford Loewen the process that was due."[257] In particular, the tribunal noted that it is the responsibility of the State under international law "to provide a fair trial" and "to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not be the victim of sectional or local prejudice."[258]

243. Another situation involving denial of justice is gross incompetence in judicial decision-making. As Gerald Fitzmaurice has observed:

> In almost all such cases it is probably that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the

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[255] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)972, Award, dated November 1, 1999, ¶ 102, **CL-0036**.

[256] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)983, Award, dated June 26, 2003, ¶ 135, **CL-0034**.

[257] *Id.*, ¶ 119.

[258] *Id.*, ¶ 123.

> responsibility of the state is also engaged for failing in its duty of providing competent judges.[259]

244. The *Azinian* tribunal described a denial of justice in judicial decision-making as a "clear and malicious misapplication of the law."[260] "This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law."[261]

iii. Discrimination

245. Discriminatory treatment by a NAFTA Party is prohibited by Article 1105 under certain circumstances. Whereas Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment) address nationality-based discrimination relative to the treatment of domestic and third-party nationals, Article 1105 precludes unjustified targeting of investors and their investments. According to UNCTAD, "[a] measure is likely to be found to violate the FET standard if it evidently singles out (*de jure* or *de facto*) the claimant and there is no legitimate justification for the measure."[262]

246. NAFTA tribunals have recognized this aspect of the customary fair and equitable treatment standard. In *Waste Management v. Mexico*, the tribunal observed that "a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1)."[263] It added: "[a] basic obligation of the State under Article 1105(1) is to act in

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[259] Gerald Fitzmaurice, THE MEANING OF THE TERM "DENIAL OF JUSTICE", 13 British Yearbook of International Law 113-114 (1932), **CL-0037**.

[260] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)972, Award, dated November 1, 1999, ¶ 103, **CL-0036**.

[261] *Ibid*.

[262] UNCTAD, FAIR AND EQUITABLE TREATMENT: SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 82 (2012), **CL-0038**; *see also* Martins Paparinskis, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 247 (2013) ("discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases."), **CL-0039**.

[263] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)003, Award, dated April 30, 2004, ¶ 138, **CL-0023**.

good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[264]

247. In *Cargill v. Mexico*, discussed above, the tribunal found that Mexico violated Article 1105, in large part, because it unjustifiably targeted Cargill's investment for destruction in retaliation for the U.S. government's refusal to grant Mexican companies increased access to U.S. sugar markets. The tribunal adamantly found Mexico's "willful targeting, by its nature, to be manifest injustice."[265]

248. Importantly, the tribunal underscored that Cargill's U.S. nationality was irrelevant to the assessment of wrongdoing:

> The fact that the targeted investors are corporations with U.S. nationality is of no significance in the Tribunal's view. If the import permit requirement had been instituted to influence the trade policy of a country other than the country of the nationality of the investors, the manifest injustice is, in the Tribunal's view, patent.[266]

249. The Tribunal found that Mexico's conduct in the case "surpass[ed] the standard of gross misconduct and is more akin to an action in bad faith …."[267]

250. Similarly, in *Loewen v. United States*, described above, the tribunal found that a state court's unjustified singling out of a Canadian investor and subjecting it to "discrimination" on the basis of "sectional or local prejudice" violated Article 1105. The tribunal's finding, as a reflection of customary international law, was later incorporated into the fair and equitable treatment standard set forth in *Waste Management v. Mexico*; to recall, that standard provides, in relevant part, that "the minimum standard of treatment… of fair and equitable treatment is

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[264] *Ibid.*

[265] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September 18, 2009, ¶ 300, **CL-0018**.

[266] *Ibid.*

[267] *Id.*, ¶ 301.

infringed by conduct attributable to the State and harmful to the claimant if the conduct … is discriminatory and exposes the claimant to sectional or racial prejudice."

iv. Legitimate Expectations

251. Article 1105 also requires a NAFTA Party to safeguard a protected investor's legitimate expectations.[268] Legitimate expectations are formed on the basis of promises and commitments made by the host State that positively factor into the investor's decision to invest. When a NAFTA Party acts contrary to an investor's legitimate expectations, a breach of Article 1105 occurs.

252. Whether legitimate expectations exist, for purposes of obtaining protection under Article 1105, can vary depending on the level of the host State's promises or commitments. The tribunal in *Glamis Gold Corp. v. United States* aptly commented on the applicable standard. Citing *International Thunderbird v. Mexico* approvingly, the *Glamis* Tribunal observed:

> legitimate expectations relate to an examination under Article 1105(1) in such situations 'where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct'. . .[269]

253. The tribunal continued:

> a violation of Article 1105 based on the unsettling of investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.[270]

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[268] The inclusion of legitimate expectations in the fair and equitable treatment standard should be uncontroversial. *See* Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept 15*, Society of International Economic Law, 3rd Biennial Global Conference, 2013, p. 15 ("there is in fact no single tribunal on record that has steadfastly refused to find that – at least in principle – [the FET] standard encompasses legitimate expectations."), **CL-0040**.

[269] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, dated June 8, 2009, ¶ 621, **CL-0041**.

[270] *Id.* ¶ 766.

254. The existence of more than "a quasi-contractual relationship" provides definitive evidence of an investor's legitimate expectations. As leading commentators have observed: "It is clear that a firm contractual commitment will rank high [as proof of legitimate expectations], whereas various general assurances will give rise to lower or no legitimate expectations."[271]

255. International tribunals confirm that a host State's repudiation of its contractual commitments violates the standard on legitimate expectations, as formulated in *Glamis*. For example, in *Eureko v. Poland*, the investor entered into a contract with the Polish government for the purchase of shares as part of the privatization of a state-owned insurance company. Under the terms of the contract, the Polish government was obligated to hold an IPO to sell additional stock in the company. However, under significant domestic politic pressure, the Polish government refused to further privatize the company and, at one point, even brought a law suit in Polish courts to seek to declare the contract null and void.[272]

256. The *Eureko* Tribunal found that the Polish government's repudiation of its contractual obligation was a clear violation of the fair and equitable treatment protections afforded under the Netherlands-Poland bilateral investment treaty. Specifically, the tribunal ruled:

> Eureko's investments, its contractual rights to an IPO, which would have led it to acquire majority control of PZU, have been, in the opinion of the Tribunal, unfairly and inequitably treated by the Council of Ministers and Minister of the State Treasury. Those organs of the R[epublic] o[f] P[oland], consciously and overtly, breached the basic expectations of Eureko that are at the basis of its investment in PZU and were enshrined in the S[hare] P[urchase] A[agreement], and, particularly, the First Addendum.
>
> The Tribunal has found that the R[epublic] o[f] P[oland], by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.[273]

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[271] August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards*, 2020, p. 503, **CL-0042**.

[272] *Eureko B.V. v. Republic of Poland*, UNCITRAL Ad hoc, Partial Award, dated August 19, 2005, ¶¶ 46, 50, **CL-0043**.

[273] *Id.*, ¶¶ 232-233.

257. Notably, the tribunal measured the respondent's conduct by reference to the "shocking" and "egregious" standard found in the customary international law minimum standard of treatment:

> The Tribunal has no hesitation in concluding that the "fair and equitable" provisions of the Treaty have clearly been violated by the Respondent. In the opinion of the Tribunal, in the present case, the conduct of the R[epublic] o[f] P[oland] could even be characterized as "outrageous" and "shocking", even though, to constitute breach of treaty, actions and inactions need not be of that degree of extremity.[274]

258. Thus, a NAFTA Party's repudiation of a contractual commitment, which served as a predicate for its investment, gives rise to a violation of Article 1105 of NAFTA.

b) Mexico's Conduct Violated the Fair and Equitable Treatment Standard

259. Mexico violated Article 1105 of NAFTA through its repudiation of the APA and related measures and by denying the Claimant access to the MAPs under Mexico's DTTs, as explained below.

i. Mexico's Repudiation of the APA and Failure to Abide by the Stay of Enforcement of the Tax Assessments Violated Article 1105

(a) Mexico Acted in an Arbitrary Manner

260. The conduct of the SAT in repudiating the APA has from the outset been arbitrary and plainly in breach of its legal obligation to act in good faith[275] and in accordance with the rule of law, whether examined using the standards of Mexican law or international law, the latter of which in the case of transfer pricing disputes provides the basis for the applicable Mexican law.

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[274] *Id.*, ¶ 234.

[275] Expert Report of [redacted], dated April 22, 2022, p. 9, **0000**.

The Respondent blatantly disregarded foundational international tax law and OECD norms.

261. In repudiating the APA, the SAT has blatantly flouted the basic framework of international tax law and well-established OECD norms governing the treatment of APAs.

262. The Respondent is obligated to adhere to the terms of its DTTs [redacted], which incorporate firmly established OECD international tax norms, including the "arm's length principle." As explained by the Claimant's international tax law expert, [redacted] "Tax treaty mechanisms to avoid double taxation are complemented by *inter alia* the transfer pricing rules and treaty provision titled associated persons/enterprises, all of which are fashioned after OECD Model Art. 9 [of the OECD Model Tax Convention on Income and on Capital **(OECD Model Convention**)]."[276]

263. According to the *OECD Transfer Pricing Guidelines* (OECD Guidelines), Article 9 of the OECD Model Convention contains the "authoritative statement of the arm's length principle."[277] As the *Guidelines* explain:

> By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances (i.e. in "comparable uncontrolled transactions"), the arm's length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business. Because the separate entity approach treats the members of an MNE group as if they were independent entities, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions.[278]

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[276] Expert Report of [redacted], dated April 6, 2022, ¶ 37, [redacted]**0000.**

[277] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, p. 31, ¶ 1.6, **MS-0012**; *see also* Expert Report of [redacted], dated April 25, 2022, ¶ 214, ("The part of the OECD TP Guidelines that regulates the arm's length standard has an even stronger influence on international tax practice, up to the point that, from a technical perspective, they are the main source for a correct interpretation of the binding rules of international tax law on transfer pricing contained in tax treaties."), [redacted]**0000**.

[278] *See* OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, p. 31, ¶ 1.6, **MS-0012**.

264. In other words, OECD Model Article 9 establishes the norm that, in order to avoid double taxation, the Parties to a DTT with such a provision should determine the appropriate amounts of taxation based on comparable fair market transactions.[279]

265. Critically, each of the Respondent's DTTs with [redacted] contains an article closely modeled on OECD Model Article 9. For example, Article 9(2) of the [redacted]Mexico DTT, entitled "Associated Persons," provides:

> 2. Where a Contracting State includes in the income or profits of an enterprise of that State - and taxes accordingly - income or profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the amount so included is income or profits which would have accrued to the first-mentioned enterprise if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall, where it agrees with the inclusion, make an appropriate adjustment to the amount of tax charged therein on that income or those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.[280]

266. As [redacted] observes:

> Once [Article 9 is] embedded in a treaty, the ALS becomes an international law obligation for both involved states. Consequently, when a treaty with an equivalent to OECD Model Art. 9 applies (like all three treaties that are relevant to the dispute between the Investor and Mexico), all transfer pricing matters between the treaty partners are subject to treaty discipline and the [Arm's Length Standard or] ALS.[281]

267. A widely accepted approach for avoiding double taxation of "associated persons" is for one or more taxpayers in a related business group to enter into an APA with the relevant tax authorities. As explained in the *Guidelines*, "APAs are intended to supplement the traditional … treaty mechanisms for resolving transfer pricing issues"; they "provide a greater level of certainty

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[279] *Ibid.*

[280] *S*[redacted]

[281] Expert Report of [redacted], dated April 6, 2022, ¶ 40, [redacted]**0000**.

in both treaty partner jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes."[282]

268. The APA entered into between PEM and Mexico's SAT[283] thus was an application of Mexico's obligation under Article 9 of its DTTs to resolve transfer pricing issues on the basis of the arm's length principle

269. The SAT's repudiation of PEM's APA represents a complete departure from the Respondent's international tax treaty obligations and OECD norms (and, as addressed in the following section an arbitrary abuse of power at the domestic level). As the Claimant's second international tax law expert, [redacted] explains, there are only "exceptional circumstances" that would permit the Respondent to repudiate an APA under international standards.[284] These circumstances are explained in Paragraph 4.149 of the *Guidelines* which regulates the termination of APAs:

> An APA should be subject to cancellation, even retroactively, in the case of fraud or misrepresentation of information during an APA negotiation, or when a taxpayer fails to comply with the terms and conditions of an APA. Where an APA is proposed to be cancelled or revoked, the tax administration proposing the action should notify the other tax administrations of its intention and of the reasons for such action.[285]

270. Thus, there are only two narrow exceptions to the sanctity of APAs: (1) fraud and misrepresentation; or (2) non-compliance with the terms and conditions of the APA.

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[282] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, (**OECD Transfer Pricing Guidelines**), p. 213, ¶ 4.134, **MS-0012**; *see also* Mexico Dispute Resolution Profile, dated October 24, 2020, p. 5, **C-0020**; *see also* Expert Report of [redacted] dated April 25, 2022, ¶ 221, ("APAs have become a very successful legal instrument for securing effective tax compliance by MNEs and transfer pricing issues between associated enterprises. The main reason for success is that they help preventing disputes, instead of approaching them on an *ex post* basis."), [redacted]**0000**.

[283] *See* SAT PEM Ruling, No. 900-08-2012-52885, dated October 4, 2012, p. 4, **C-0002, p. 43**.

[284] Expert Report of [redacted], dated April 25, 2022, ¶ 261, [redacted]**0000**.

[285] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, (**OECD Transfer Pricing Guidelines**), p. 217, ¶ 4.149, **MS-0012**.

271. As [redacted] opines: "[redacted] and misrepresentation do not occur accidentally and are not mere formal violations."[286] Rather, as he continues:

> [redacted] and misrepresentation presuppose a willful behavior, a deliberate falsification of the relevant information, which misleads tax authorities to an extent that prevents them from having a correct representation of the framework to which the proposed methodology applies, or even perceiving the need for requesting additional clarification before approving the APA.[287]

272. Upon a review of the facts of the present case, [redacted] [redacted] found only "indicators of good faith by the taxpayer,"[288] PEM. Specifically, he concludes:

> the information provided by the Claimant shows that the proposed methodology (reflecting sale at market value) complies with the arm's length and that the proposal included a comprehensive overview of all relevant facts and circumstances in support of the adopted methodology for the years 2010/2014.151 Moreover, the Mexican tax authorities had ample time to review (about 12 months) and process it, also requesting additional information, which the Client duly supplied.[289]

273. Similarly, [redacted] found no wrongdoing on PEM's part in relation to the second ground for termination of an APA, non-compliance. First, he takes the view that APAs cannot be revoked retroactively on this ground, noting constitutional prohibitions on such action by a tax authority.[290] Second, and more importantly, his review of the facts of this case found no instance in which PEM "failed to submit the documentation requested by the Mexican tax authorities for monitoring the compliance with the implementation of the APA."[291]

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[286] Expert Report of [redacted], dated April 25, 2022, ¶ 279, [redacted]**0000**.

[287] Expert Report of [redacted], dated April 25, 2022, ¶ 280, [redacted]**0000**.

[288] See id., ¶ 289.

[289] *See id.*, ¶ 287, (citation omitted).

[290] See *id*., ¶ 313.

[291] See *id*., ¶ 308.

274. Based on his expert review of the SAT's conduct in relation to international law and norms, [redacted] notably concludes that the Respondent's conduct "raises serious concerns for the Rule of Law in connection with the retroactive repudiation of the APA."[292]

The Respondent illegally ignored domestic law restraints on the repudiation of PEM's APA.

275. The Respondent's international law obligations are implemented into its domestic law through Article 34-A of the Federal Mexican Tax Code.[293] Thus, Mexican law recognizes the "arm's length principle" and the need to respect APAs in conformity with Mexico's obligations under its DTTs. Therefore, at the domestic level, the SAT's repudiation of PEM's APA also represents a serious departure from the rule of law in Mexico

276. While there are currently 90 APAs issued by the SAT applicable to investors from several foreign countries,[294] it has arbitrarily targeted PEM and decided that the binding legal agreement entered into with PEM in 2012 must be revoked even if there simply is no legal basis that would justify revocation of the APA.[295]

277. In targeting PEM and First Majestic, the SAT has acted in a manner that is unprecedented, egregious, shocking and outside anything that is considered acceptable in a democratic country that claims to abide by the rule of law.

278. As stated in [redacted] witness statement:

> PEM is the only taxpayer [in Mexico] that has had its APA issued by the SAT, now approximately 10 years ago, being put into question not due to any wrongdoing by PEM or PMC, but based supposedly on errors attributed exclusively and

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[292] See *id.*, ¶ 319.

[293] *See id.*, ¶ 225. (acknowledging "that APAs are regulated by Article 34-A of the Federal Mexican Tax Code with a wording that reflects the principles enshrined in the OECD TP Guidelines").

[294] *See* Request for Information, No. 330027722000399, dated February 28, 2022, p. 1, (the SAT has issued a total of 90 APAs as of February 2022: 81 to U.S. nationals, 4 to entities in Luxembourg, 2 to entities in Hong Kong, 2 entities from Canada, and 1 from Japan), **C-0002, p. 387**.

[295] Expert Report of [redacted], dated April 22, 2022, p. 19, **0000**.

> unilaterally by the SAT. The Government of Mexico's actions are not grounded in Mexico's tax legislation or its international obligations under double-taxation treaties. These discriminatory and arbitrary measures are also unlawful under Mexican law and Mexico's international treaty obligations under the relevant DTTs.[296]

279. The unlawfulness and arbitrariness of the SAT's actions in seeking to repudiate the APA issued to PEM are apparent from the pressure tactics that began seven years ago in 2015, when the SAT had not as yet even initiated a legal proceeding to supposedly provide the veneer of legality for its unlawful demands and subsequent illegal behavior. Since then, the Respondent has consistently taken various measures, all unlawful under Mexican law, to extract from PEM and First Majestic approximately [redacted].

280. As stated in the witness statement of [redacted] who was present at the meeting in early 2015 between the SAT and PMC's Chief Financial Officer:

> Notwithstanding full compliance by PEM with the terms of the APA, the SAT advised the Chief Financial officer (CFO) of PMC at a meeting convened by the SAT, that the government needed to raise additional revenues and PEM would have to abandon the APA, or otherwise deal with the consequences that would follow. I was present at that meeting in early 2015 with PMC's CFO when this discussion took place. It was made abundantly clear to PMC in that meeting that it would face serious repercussions if it failed to agree to SAT's demand. When PMC refused to abandon the APA, as this would be inconsistent with the company's legal and fiduciary obligations to its shareholders and also expose PMC to civil action by its shareholders and other stakeholders, PMC and PEM became the targets, as of March 30, 2015, of the SAT's campaign of illegal and coercive tax collection practices, despite the company still holding a legally valid APA. Under Mexican law, an APA is valid and binding on the SAT for a period of five years. Furthermore, the SAT cannot revoke an APA if the taxpayer has fulfilled its obligations under the terms of the APA.[297]

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[296] Witness Statement of [redacted] dated April 25, 2022, ¶¶ 124-125, [redacted]**0000**.

[297] *See id.*, at ¶ 15.

281. The issuance of an APA is provided for in Article 34-A of the Federal Fiscal Code.[298] This provision reflects the principles of the OECD Guidelines. As explained above, the Guidelines also confirm that, while the APA remains valid, the tax authorities must not make adjustments to the declared transfer prices that have been determined in accordance with the methodology agreed upon with the taxpayer.

282. Furthermore, the OECD Guidelines impose strict limitations on when the APA can be cancelled or revoked by the state. As explained, without evidence of fraud or misrepresentation by the taxpayer when providing information to the authorities to obtain the APA, or failure to comply with the terms and conditions of the APA, the state's tax authority does not have grounds to cancel or revoke the APA.[299]

283. As indicated by [redacted], under Mexican law as interpreted and applied by the Supreme Court of Mexico, the OECD Guidelines are to be considered as applicable to APAs issued by the SAT, and that APAs can only be repudiated in "the case of fraud or misrepresentation of information during the APA negotiation, or when the taxpayer fails to comply with the terms and conditions of the APA."[300]

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[298] *See* Art. 34-A, Mexican Federal Tax Code, last reform dated November 12, 2021, p. 80, (Article 34-A: "The tax authorities may resolve the queries made by the interested parties regarding the methodology used in determining the prices or amounts of the consideration, in operations with related parties, in the terms of article 179 of the Income Tax Law, always that the taxpayer present the information, data and documentation, necessary for the issuance of the corresponding resolution. These resolutions may derive from an agreement with the competent authorities of a country with which there is a treaty to avoid double taxation.

The resolutions that are issued under the terms of this article, may take effect in the year in which they are requested, in the immediately preceding year and up to the three fiscal years following the one in which they are requested**.** The validity may be longer when they derive from a friendly procedure, under the terms of an international treaty to which Mexico is a party.

The validity of the resolutions may be conditioned to the fulfillment of requirements that demonstrate that the operations object of the resolution are carried out at prices or amounts of consideration that independent parties would have used in comparable operations"), **MS-0015**.

[299] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, dated January 2022, p. 246, ¶ 4.139, **MS-0012**.

[300] Expert Report of [redacted], dated April 22, 2022, p. 19, [redacted]**0000**.

284. Nevertheless, the SAT has blatantly ignored the requirements of Mexican law and has conducted itself throughout these past seven years far outside the bounds of "rule of law." All of its measures undertaken in pursuit of collection of close to [redacted] have no legal justification.

285. On August 4, 2015, without any evidence that would provide the legal basis for revoking or cancelling the APA, the SAT began a *Lesividad* proceeding. Through these proceedings, the SAT claimed to be seeking to have the APA declared null and void.

286. The *Lesividad* proceeding is provided for in Article 36 of the Federal Fiscal Code[301] and its validity in the realm of taxation, for the purpose of invalidating a contractual agreement, has been questioned.[302]

287. If considered as a valid exercise of the SAT's powers under the Mexican legal system, it would allow the SAT to request, not before the Judicial Branch, but before a court belonging to the Executive Branch, the nullity of a binding agreement that was in the first instance authorized and entered into by the same authority.

288. In other words, it appears to be highly problematic to let the same decision maker that agreed to enter into a binding legal agreement, to then seek to revoke its own prior acceptance of a contractual commitment (which was for the benefit of the counter-party that is a taxpayer, in the case of an APA) by nullifying the APA.

289. According to [redacted]:

> In the case of an APA, it is clearly an agreement signed by a taxpayer and the tax authorities, so its terms are mandatory for both parties. In my opinion, although there are no specific court precedents regarding the revocation of an APA, there are no elements that would allow the authorities to unilaterally cancel or revoke an act

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[301]" *See* Art. 36, Mexican Federal Tax Code, last reform dated November 12, 2021, p. 81, (**Article 36.: "**Administrative resolutions favorable to an individual may only be modified by the Federal Court of Fiscal and Administrative Matters through a lawsuit initiated by the fiscal authorities"), **MT-0016**.

[302] Witness Statement of [redacted], dated April 25, 2022, ¶¶ 40, [redacted]**0000**.

> of this nature." Furthermore, in his opinion there is no basis to imply a power of revocation when none is expressed in Article 34-A, which contains requirements for compliance by the taxpayer, but "if these requirements are met, in the terms of the resolution itself, it must in any case remain in force and produce its effects.[303]

290. Furthermore, as explained by [redacted] in his witness statement, "APAs are legal acts, not favorable resolutions, and therefore are not susceptible to be challenged through a *Lesividad* trial. In other words, the SAT was following a legal procedure that should not have been available to challenge the APA."[304]

291. Whether or not the APA can be invalidated without the required grounds (that require bad faith behavior on the part of the taxpayer or non-compliance), the simple and obvious conclusion one can draw from these sequence of events is that the SAT had done nothing further than file the *Lesividad* proceeding in August 2015. It had not obtained a decision from the administrative court, namely, the High Chamber of the TFJA. That decision would not come until September 23, 2020, and the administrative court found no evidence of [redacted] misrepresentation or non-compliance on the part of PEM.[305]

292. The full implications of that decision are discussed elsewhere, here it suffices to note that the SAT's subsequent measures which were undertaken beginning in 2015 have been conducted in contravention of its obligation to act in good faith and to comply with the laws of Mexico.

293. Collectively, these measures taken in 2015 had the potential of shutting down the operations of PEM at the San Dimas mine. These included revoking PEM's ability to enter into import and export activities, having the state-owned utility unlawfully assert a claim that PEM owed approximately [redacted] for energy consumption. Similarly the state-owned water

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[303] Expert Report of [redacted], dated April 25, 2022, p. 11, [redacted]**0000**.

[304] Witness Statement of [redacted] dated April 25, 2022, ¶ 39, [redacted]**0000**.

[305] *See* High Chamber of the TFJA Sentence, dated September 23, 2020, p. 370, **C-0002, p. 702**.

utility also initiated an investigation into the amount of PEM's water consumption. All of these measures had the aim of having PEM capitulate its legal right to rely on the APA.

294. It was only through the intervention of the PRODECON that some of these measures were suspended as against PEM. As explained in [redacted] witness statement:

> On May 29, 2015, PRODECON issued a resolution requiring the SAT to provide to PEM the reasons why they were carrying out the coercive collection of taxes, considering that PEM had a valid APA and there was no legal basis for these strong-arm tactics. PRODECON requested the customs authorities to reinstate PEM into the importer and exporter's registry, as well as required the release of the merchandise that had been seized.[306]

295. The SAT thereafter began the *Lesividad* proceeding on August 4, 2015 with the aim of having the APA declared null and void, even though it had no legal grounds for the initiation of these proceedings.[307] It used the initiation of the *Lesividad* proceeding to renew its efforts to compel PEM to pay amounts it claimed as being taxes and as a *quid pro quo* it would withdraw its *Lesividad* proceeding. The discussion and negotiations that took place between the SAT and PMC's management, and later with First Majestic's involvement, are recounted in the witness statements of [redacted] and [redacted]

296. However, these negotiations and discussions were thereafter unilaterally abandoned by the SAT when it became apparent that the national election would likely result in the election of President López Obrador . The SAT officials feared that by reaching a compromise with PEM, they would be viewed by the new administration as having engaged in corruption by accepting less than the full amount they had claimed as being owed by PEM.

297. After the election of the current President, the SAT continued to pursue the *Lesividad* proceeding and thereafter, even though the proceedings were ongoing and the validity of the APA was still under contention, the SAT, with even greater zeal under its new head, Ms.

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[306] Witness Statement of [redacted], dated April 25, 2022, ¶ 37(i), **[redacted]0000**.

[307] *See* Juicio de Lesividad Complaint of the SAT, No. 900 0 02-2015-31276, dated August 4, 2015, p. 1, **C-0002, p. 185**.

Raquel Buenorostro, Chief of the SAT, continued unlawfully to issue reassessments for the years that are covered by the APA – by simply ignoring the existence of a valid APA – undertaking illegal collection proceedings notwithstanding the fact that a court injunction prohibited it from seizing lands, mining concessions, merchandise belonging to PEM, and freezing bank accounts.

298. The SAT was also hiding behind the cover of the *Lesividad* proceeding to unlawfully block PEM's right to challenge the reassessments under the administrative process established by the SAT, and also to reject PEM's requests for resolution of the transfer pricing dispute under the universally accepted MAP provisions contained in these treaties. The MAP procedure is the accepted procedure embedded even within Mexican law for the resolution of transfer pricing disputes under the rules contained within Mexico's DTTs.

299. In so acting, the SAT engaged in conduct amounting to a denial of justice, as discussed in the following section. Namely, the SAT acted unlawfully by blocking the usual avenues of redress that should have been available to resolve issues of transfer pricing, so that it could make up, through its own calculation of amounts owed as taxes and surcharges, which it will not allow to be challenged. In coming up with its own numbers for taxes and surcharges claimed to be owed, the SAT has entirely ignored the APA methodology for establishing transfer pricing that it had previously approved in a binding legal agreement.

300. The impetus for this disingenuous set of actions, which demonstrates a total lack of good faith and a complete departure from the rule of law on the part of the Respondent is clear. President López Obrador has directed the Head of the SAT and the Fiscal Prosecutor to target selected foreign companies and force them to pay what he terms as "back taxes" owed by a foreign company from Canada that refuses to pay its taxes.

301. Furthermore, it is also clear that the current administration under President López Obrador views the APA as a tax concession or benefit to a foreign company that should never have been granted and that the previous administration was wrong to permit.

302. These views have been expressed publicly by each one of these individuals. The President has gone so far as to speak directly to the Mexican public, on numerous occasions, that

in his view a particular Canadian mining company (i.e., First Majestic) operating in Tayoltita, in the State of Durango, is refusing to pay taxes that are owed to the country, and that its legal challenges are simply a means to avoid the payment of taxes the company owes.[308] He has asserted that PEM and First Majestic have engaged in immoral and [redacted] behavior, have failed to pay taxes, and have exploited the natural resources of Mexico by sending silver out of the country. Such proclamations are reckless and menacing.

303. Moreover, these statements are blatantly false, as the APA continues to be valid under Mexican law and therefore there has been no final determination that PEM in fact owes even one dollar more than it has already paid when filing its returns for the 2010 to 2014 fiscal years.[309] The President is very much aware of the fact that the final determination is pending, and has alluded to the fact that he would like the Supreme Court of Mexico to issue a decision on the *amparo* proceeding that will justify his position that PEM in fact owes taxes to the Respondent.

304. The following three passages confirm that the behavior of the SAT is arbitrary and plainly in breach of adherence to the rule of law, whether measured as against Mexican law or international law. The first passage is from the witness statement of [redacted] the other from the expert report of [redacted] who explains the current state of disregard for the rule of law by the SAT when the provisions of the tax law benefit the taxpayer, and the third from [redacted]:

> [redacted]
>
> In my entire career, I have never seen the Government of Mexico renege on its promise to a foreign investor in such a manner. In the entire history of APAs since their implementation in the Mexican legal system, not a single APA has ever been challenged by tax authorities until now. Furthermore, it is well-established practice that APAs can only be revoked retroactively when there exists evidence of bad faith, breach of the agreement, or fraud.[310]

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[308] Press Conference: AMLO defendió reforma eléctrica ante Trudeau y lo invitó a visitar Mexico, YouTube, dated November 22, 2021, available at: https://www.youtube.com/watch?v=tTACDFatzXI.

[309] Witness Statement of [redacted], dated April 25, 2022, ¶ 50, [redacted]**0000**.

[310] Witness Statement of [redacted], dated April 25, 2022, ¶ 41, [redacted]**0000**.

[redacted]

> It has become common for the SAT and the Attorney General's Office to openly intimidate taxpayers and threaten them with the initiation of criminal proceedings against not reaching a satisfactory settlement for the tax authority. Unfortunately, this attitude and practice of threat and intimidation is not limited to taxpayers who, when audited (which in every civilized country should be a common practice, always respecting the rights of the audited) are found to be at fault with respect to the fulfillment of their tax obligations. On many occasions, threats and pressures are made to taxpayers who are in dialogue with the authority before PRODECON and even to those who are in administrative litigation before the federal courts (without ever having even discussed the possibility that there was a crime in the conduct under discussion).[311]

[redacted]

> As far as the Mexican legal system is concerned, the principle of good faith is recognized in various legal rules. It is important to mention that various courts of law of the Federal Judiciary have indicated that good faith translates into a rule of conduct that imposes on legal subjects —whether natural or corporate persons—a loyal and honest conduct that excludes any malicious intent. This rule is applicable in substantive legal relationships, both contractual and non-contractual.[312]

305. The following quote from a law professor and a former prosecutor for the Mexican tax authority, Max Diener, echoes the views expressed above concerning the breakdown of the rule of law in the sphere of tax administration and enforcement in Mexico. When asked about his views on the current Head of the SAT:

> "I believe it's fiscal terrorism," said Max Diener, a professor and former federal tax prosecutor. He called Ms. Buenrostro an "excellent public servant" but feared she had enormous, and "very dangerous", discretionary power.[313]

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[311] Expert Report of [redacted], dated April 25, 2022, p. 22, [redacted]**0000**.

[312] Expert Report of [redacted] Ph.D., dated April 22, 2022, p. 9, [redacted]**0000**.

[313] Jude Webber, Mexico's 'Iron Lady' cracks whip on multinationals' taxes, dated June 22, 2020, Financial Times. p. 1, (emphasis added), **C-0003, p. 192**.

306. The Respondent's conduct in this case is a classic example of arbitrariness. The SAT and other agencies of the Government have failed to conduct themselves based on a system of law. Rather, they have departed from the rule of law – both at the international and domestic level – in order to carry out the populist policies of a Government strongly slanted against foreign corporations. Under the standard for arbitrariness pronounced in *Cargill*, the Respondent has therefore breached Article 1105 of NAFTA because "the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking reputation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive."[314] In this case, the Respondent has very clearly sacrificed foundational international and domestic tax law obligations and norms to exact revenge against First Majestic and PEM.

(b) Mexico Breached First Majestic's Legitimate Expectations

307. First Majestic made its investments in Mexico only because of the legally binding assurances made by the SAT in the APA with PEM. The acquisition of Primero Canada was preceded by a comprehensive and exhaustive due diligence process.[315] First Majestic vetted both the financial viability of PEM and the legal security of the investment climate in Mexico. As explained by [redacted] First Majestic's [redacted] at the time:

> Given our knowledge and experiences in Mexico prior to 2019, it was inconceivable to us that there would not be an amicable solution to the dispute that PEM had with the SAT. ***The legal framework applicable to the APA between the SAT and the PEM clearly established the binding nature of the APA*** for the five-year period that it covered. ***The SAT had not previously revoked any of its APAs***, and to my knowledge, has with the exception of the APA issued to PEM, not taken any steps to revoke any of the other ninety existing APAs issued to other foreign

[314] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/052, Award, dated September 18, 2009, ¶ 293, **CL-0018**.

[315] *See* Witness Statement of [redacted], dated April 25, 2022, ¶¶ 45, 47, 69, 70, [redacted]**0000**.

> companies including from Hong Kong, Japan, Luxembourg and the United States.[316]

308. Thus, despite some pre-acquisition difficulty relating to the APA, First Majestic had a reasonable basis for concluding the terms of the APA would be honored and that its investment in Mexico could be made on conditions that would yield reasonable returns.

309. Notably, Mexico's own tax ombudsman, PRODECON, agreed with First Majestic's position that the APA was valid and took action to have the SAT reverse some of the coercive measures it had taken to force PEM to abandon its entitlement to rely on the APA.[317]

310. First Majestic's conclusion is also supported by a reasonable interpretation of Mexican law, as explained by the Claimant's experts. In his expert report, [redacted] observes that reliance on the APA may be expected because an APA, as an agreement negotiated between taxpayer and tax regulator, enjoys a higher level of legal security than a unilateral tax ruling.[318] He explains that, unlike tax rulings, "the APA deal[s] with methodologies used for determining prices, based on information reviewed by the tax authorities themselves."[319] Further, APAs are binding for a fixed period of time, whereas tax rulings may be changed unilateral through changes in the tax law.

311. The Claimant's expectations were also legitimate because they were based on well-established Mexican law that expressly protects the taxpayer's interests once the Government has made promises on which the taxpayer relied. As [redacted] states:

> There is a concept developed by the doctrine and collected by mandatory court precedents (jurisprudence) known as "legitimate expectations," that implies the

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[316] *See Id.*, ¶ 11.

[317] *See* Chronology, dated April 25, 2022, p. 3, ("PRODECON issues a resolution requiring the tax authorities to provide the reasons for why they were carrying out the coercive collection of taxes, considering that PEM had a valid APA. PRODECON requires the customs authorities to reinstate PEM into the importer and exporter's registry"), **C-00002**; *see also* Complaint, No. 07471-I-QRA-1681-2015, dated May 29, 2015, pp. 1-10, **C-0002, p. 171**.

[318] Expert Report of [redacted], dated April 25, 2022, pp. 8-9, [redacted]**0000**.

[319] Expert Report of [redacted], dated April 25, 2022, p. 9, [redacted]**0000**.

> need to safeguard, to defend, as part of the legal system, the expectations that have been created by the authorities in favor of private parties and, according to which, private parties adjust their subsequent actions. This concept implies that, if the authorities unilaterally change or revoke their actions they unduly affect the sphere of rights of private parties, whether these are of an economic nature, or of any other type.[320]

312. [redacted] echoes [redacted] views on the importance of the concept of "legitimate expectations" in Mexican law and explains its roots in the Mexican Constitution:

> The principle of good faith is based on the legitimate expectations that govern the actions of the authorities so that they do not unilaterally modify their actions, in order to guarantee legal certainty. Indeed, the Supreme Court of Justice of the Nation has established that legitimate expectations are a manifestation of the right to legal certainty recognized in Articles 14 and 16 of the Constitution, which protect the prerogative of the ones who are governed never to find themselves in a situation of legal uncertainty and, consequently, in a state of defenselessness. That is to say, the ones who are governed must "know what to expect" regarding the contents of the laws and the authority's actions.[321]

313. The legally binding commitments made by the SAT in favor of PEM under the APA, girded by strong constitutional protections under Mexican law, assured First Majestic that it could safely invest in Mexico based on agreed upon and predictable tax terms. The SAT's commitments created "reasonable and justifiable expectations" on the part of First Majestic "to act in reliance" on those commitments.[322] Thus, when the SAT sought to repudiate the APA through the *Lesividad* proceeding and imposed a new tax burden on PEM that was exponentially higher than that owed under the APA, the SAT "unsettle[ed] [the] investment-backed expectation" of the Claimant.[323]

314. Accordingly, the Respondent breached Article 1105 of NAFTA.

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[320] *Id.*, p. 13.

[321] Expert Report of [redacted]., dated April 25, 2022, p. 140, **JC-0000**.

[322] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, dated June 8, 2009, ¶ 621, **CL-0041**.

[323] *Id.*, ¶ 766. *See also Eureko B.V. v. Republic of Poland*, UNCITRAL Ad hoc, Partial Award, dated August 19, 2005, ¶ 234, **CL-0043**.

(c) Mexico Targeted First Majestic Discriminatorily

315. President López Obrador has taken to an unprecedented level the policy of targeted discrimination against foreign companies, including First Majestic and PEM.[324] In an attempt to increase Mexico's tax revenues, the Government has threatened and coerced selected foreign corporations into paying large amounts under the guise of "back taxes." In many instances, the demands for payment have amounted to hundreds of millions of dollars and have been coupled with threats of criminal proceedings and public humiliation, if the debt is not paid.[325]

316. Some of the largest multinational corporations, with the means to pay these ransoms, did so.[326] For a smaller company, like First Majestic, to acquiesce to the Government's shakedown would be financially devastating. Because it refused to submit to the Government's bullying and abuse of its tax power, First Majestic was singled out for retaliation. Its Canadian nationality and role as operator in the mining sector further served the Government's media campaign to blame such companies for allegedly exploiting Mexico's natural resources.[327]

317. The improper measures applied against First Majestic and PEM – and only to these foreign companies – are described below:

Repudiation of the APA

318. Based on available information, to date, there are 90 APAs in force between the SAT and investors from United States, Canada, Luxembourg, Hong Kong and Japan.[328] PEM is

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[324] *See, e.g.,* Mexico Is No Longer Hospitable To Canadian Investors, dated April 25, 2022, pp. 1-4, **C-0005***; see also* Media, dated April 25, 2022, pp. 1-16, **C-0003**.

[325] *See, e.g., ibid.*

[326] *See* Daina Beth Solomon and Carlos Gonzalez Galvan, Exclusive: 'There will be people in jail': Mexico plans arrests soon in tax crackdown, Reuters, dated July 15, 2020, p. 1, (Walmart de Mexico's corporate affairs director said she did not have knowledge of a criminal complaint, after the company said it paid 8.08 billion pesos ($359.94 million) in an agreement with the tax authority over the sale of a restaurant chain… Femsa, which pledged to pay 8.8 billion pesos in taxes, was not presented with a criminal charge,") **C-0003, p. 12**.

[327] *See supra* ¶ 140.

[328] Request for Information, No. 33300027722000399, dated February 28, 2022, p. 1, **C-0002, p. 387;** *see supra* ¶ 54.

the first company *ever* to have its APA repudiated by the SAT. The unprecedented situation is described by the Claimant's witness, [redacted], a leading Mexican tax attorney:

> In my entire career, I have never seen the Government of Mexico renege on its promise to a foreign investor in such a manner. In the entire history of APAs since their implementation in the Mexican legal system, not a single APA has ever been challenged by tax authorities until now. Furthermore, it is well-established practice that APAs can only be revoked retroactively when there exists evidence of bad faith, breach of the agreement, or fraud.[329]

319. [redacted] adds that the SAT's decision to invoke the *Lesividad* process to have PEM's APA declared null and void is equally unparalleled. He attests that "notwithstanding the impropriety of using the *Lesividad* trial process for challenging the APA, the SAT prevailed in having the issue of the legal validity of the APA admitted by the Online Chamber of the Federal Court on Administrative Matters."[330]

320. [redacted], the Claimant's international tax law expert, was similarly taken aback by the SAT's repudiation of the APA. He observes: "This action is so rare that at least until 2010 Mexico had not revoked any APAs, and to the best of my knowledge it has not done so to date other than in the case of the APA issued to PEM."[331]

321. There is thus no rational basis for repudiating PEM's APA.

Denial of Access to the MAPs

322. As explained in detail in Section above, by denying PEM access to the MAP process, the SAT entered unchartered territory. For the first time ever, it appears, the SAT sought to justify the non-application of the MAPs in three of Mexico's DTTs on the spurious ground that

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[329] Witness Statement of [redacted] dated April 25, 2022, ¶ 41, (noting in a footnote to this statement: "The OECD's position that an APA cannot be revoked with retroactive effect by the issuing government has been adopted in multiple legislations around the world), [redacted]**0000**.

[330] *See id.*, at ¶¶ 43-45.

[331] Expert Report of [redacted], dated April 6, 2022, ¶ 109, [redacted]**0000**.

its domestic law supersedes its international tax treaty obligations.[332] On that flawed basis alone, the SAT refused to proceed through the mandatory steps of the MAPs, including seeking a resolution of the APA dispute with the competent authorities of Mexico's DTT partners. [redacted]

[redacted][4]

324. There is no evidence of such egregious treatment being directed against any other foreign investor in Mexico, let alone a party to an APA, such as PEM.

325. [redacted] provides a broader perspective on Mexico's aberrant conduct. With the exception of its treatment of PEM, Mexico has been (and is still technically on record as) supporting strong adherence to the dispute resolution process provided for in the MAPs. He explains:

> Mexico is a member of the OECD and has for many years been an important player in international tax forums, including taking on the responsibility of chairmanship of the prestigious UN Tax Committee. ***Mexico's long-standing position prior to***

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[332] *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;** *see also* Official Letters, Nos. 900-06-01-00-00-2020-000319, 900-06-01-00-00-2020-000320 and 900-06-01-00-00-2020-000321, dated May 8, 2020, pp. 1-2, **C-0002, p. 4831**.

[333] *See, e.g.*, Email From [redacted] First Majestic Republic, Primero – [redacted] dated February 6, 2020, p. 1, **C-0028,** Email from [redacted] to First Majestic, Primero – [redacted] dated March 5, 2020, p. 1, **C-0029;** [redacted] Witness Statement, dated April 25, 2022, ¶ 125, **Exhibit [redacted]-0000**.

[334] *See* Email from [redacted] to First Majestic, Primero – [redacted], dated 31 May 2021, p. 1, **C-0030**.

> ***2018 included a clear commitment to bilateral tax treaties, and specifically to MAPs, including transfer pricing related MAPs and APAs***. In fact, a recent Dispute settlement Profile reported by Mexico to the OECD claims that this is still Mexico's position to date. Moreover, Mexico made only two reservations on the provisions and Commentary of the 2017 OECD Model, none of which is relevant to the dispute between the Investor and Mexico, manifesting its commitment to the official OECD position regarding the obligations of states to meet their MAP commitments under tax treaties.[335]

326. Based on Mexico's record at the international level, [redacted] concludes that "Mexico's refusal to engage in a MAP in this particular case [with PEM] should be viewed therefore as contrary to its prior position or an aberration."[336]

327. The Respondent's highly usual mistreatment of a foreign taxpayer is without justification.

[redacted]

328. Based on available information, the Claimant believes that PEM is the only mining company operating in Mexico that has ever been investigated for [redacted] In fact, mining companies have not been considered to be subject to [redacted] which apply primarily to retail players down the supply chain. As [redacted], explains:

[redacted]

[335] Expert Report of [redacted], dated April 6, 2022, p. 5, (emphasis added), [redacted]**0000**.

[336] *Id.*, at p. 6.

[337] Witness Statement of [redacted], dated April 25, 2022, ¶ 154, [redacted]**-0000**.

329. The Government's initiation of an investigation on June 4, 2020 regarding PEM's 2018 sales of precious metals was thus one of kind.[338] It also followed PEM's refusal to voluntarily abandon the APA and pay exorbitant, unjustified amounts as taxes.

330. The motive to attack PEM with [redacted] is not therefore based in law, but rather politics.

Public Naming and Shaming Media Campaign

331. Finally, the Government, including at its highest levels, has used the press to publicly brand First Majestic as [redacted].

332. Such harassment began soon after First Majestic filed its Notice of Intent in this arbitration in May 2020.[339] One month later, on June 9, 2020, President López Obrador , in his "mañanera," his public address to the nation, pointed out that "there are Mining Companies from Canada, initiating proceedings, in International Courts, to fight taxes they owe in Mexico."[340] He then encouraged Canada's Ambassador to Mexico to try to persuade such companies to avoid such international proceedings.[341]

333. As explained by [redacted] "it was clear that the President was addressing the fact that First Majestic had served the Government of Mexico with a Notice of Intent. By that time, based on our news release, the media in Mexico was aware of a NAFTA case being initiated by First Majestic."[342]

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[338] *See id.*, at ¶¶ 152-154; *see also* Official Letter, No. 500-23-00-02-01-2020-07943, dated September 3, 2020, p. 32, **C-0002, p. 5061**.

[339] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Notice of Intent, dated May 13, 2020, p. 1, **RP-0015**.

[340] Pedro Dominguez, AMLO dice que pidió ayuda a Trudeau para que mineras de Canadá paguen impuestos, Milenio, dated June 17, 2020, p. 1, (informal translation), (emphasis added), **C-0003, p. 212;** *see also* Witness Statement of [redacted] dated April 25, 2022, ¶ 135**,** [redacted]**0000**.

[341] *See* Witness Statement of [redacted]n, dated April 25, 2022, ¶ 134, [redacted]**0000**.

[342] *Ibid.*

334. Thereafter, First Majestic became the regular target of the Government's media campaign. In early 2021, the SAT Chief, Ms. Buenrostro, intentionally leaked confidential financial information about First Majestic to the press. Specifically, on February 1, 2021, a *Reforma* article reported that the "SAT seeks to collect [redacted] from Canadian mining company First Majestic Silver Corp in what it says is a debt for taxes stemming from keeping silver prices artificially low over the past decade."[343]

335. The next day a second story ran, indicating that "[o]fficials are also redoubling their efforts to [redacted] First Majestic's local unit, Primero Empresa Minera, for [redacted] related to the pricing scheme, even after a judge stayed charging on Thursday."[344]

336. A few weeks later, in an interview with Mr. Carlos Romero, the tax prosecutor responsible for handling the case against First Majestic, a reporter posed the following loaded question:

> to explain it [the case] to the people, First Majestic w[as] reporting a cost on the silver artificially so that they could report less income and therefore take more. This mining company basically takes silver from Mexico….[345]

337. While Mr. Romero declined to discuss the specifics of the case, his response was clearly slanted against First Majestic. He said: "what I can tell you is that any natural or legal person who [redacted] the federal treasury can be denounced and in the relevant cases we will not let the issue pass."[346]

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[343] Reuters, Busca SAT cobrar [redacted] a minera canadiense, Reforma, dated February 1, 2021, **RP-0008**.

[344] *Ibid.*

[345] Ni First Majestic ni otras se irán sin pagar lo que le deben al SAT, asegura el Procurador Fiscal, sinembargo, dated April 29, 2021, p. 1, **C-0004**.

[346] *Ibid.*

338. The campaign to impugn First Majestic's good name continues to this day, and remains peculiarly high on President López Obrador 's agenda. On February 22, 2022, the following exchange occurred between a journalist and the President:

> Journalist Érika Ramírez: President, during the conference of February 22, 2021, you reported that in Tayoltita, Durango, the mining company First Majestic was refusing to pay taxes, so you asked the Canadian ambassador in Mexico, Graeme Clark, to request the company to comply with its tax obligations. Today we know that this company is still litigating in international courts and that it is even waiting for a ruling from the Supreme Court of Justice of the Nation to stop paying more than 11 billion pesos to Mexico for the extraction of the nation's precious minerals. In this sense, President, what has been the result of the rapprochement you had with the Ambassador? And we also understand that this issue was discussed with Prime Minister Justin Trudeau.
>
> President Andrés Manuel López Obrador: Yes, with the Canadian mining companies we have only two issues, or we have two issues, there is one left, this is the fiscal one and I did discuss it with Prime Minister Trudeau. The Cosalá issue has already been resolved, but we still have the Tayoltita, Durango issue pending, because it is a fiscal issue, they [First Majestic] do not want to pay taxes.[347]

339. The President's response is rather extraordinary. He has publicly prejudged the outcome of litigation pending before both Mexican courts, including the Mexican Supreme Court, and this Tribunal. To declare that First Majestic does not "want to pay taxes" presupposes that the company is legally required to do so – a matter still to be resolved under Mexican law.

340. The President's statement, and the Government's media campaign generally, can only be explained as motivated to stain First Majestic's reputation in retaliation for its failure to pay illegitimate "back taxes."

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341. The Government's discriminatory treatment of First Majestic, which is unique to that company, breached Article 1105. As explained in Section V.B.1.a.iii above, a fair and

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[347] Versión estenográfica de la conferencia de prensa matutina del presidente Andrés Manuel López Obrador, dated February 7, 2022, p. 1, **C-0004**.

equitable treatment violation occurs when a NAFTA Party "singles out"[348] or "willfully targets"[349] a protected investor for mistreatment. Namely, a violation of Article 1105 occurs when a NAFTA Party inflicts harm on an investor of another Party, regardless of its nationality, without a reasonable basis in public governance, such as through retaliatory acts.[350]

342. The above-described measures taken against the Claimant and its investments, individually and collectively, are the clear manifestation of the Government's populist policies to reclaim Mexico's resources industry and to punish western companies for their perceived exploitation. Although other western companies have also come under pressure from the Respondent to pay unfounded "back taxes," First Majestic has been exceptionally singled out for the harshest of treatment, solely because it failed to be shaken down for unjustified and exorbitant tax demands.

343. The decision to repudiate PEM's (and only PEM's) APA and to deny PEM (and only PEM) access to the MAPs are extraordinary events in themselves, indicating Mexico's willingness to break long-established international tax norms and practice just to punish First Majestic. In addition, an unparalleled [redacted] and defamatory media campaign, led by President López Obrador himself, confirms First Majestic's mistreatment as an abject failure to provide fair and equitable treatment.

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[348] *See* UNCTAD, FAIR AND EQUITABLE TREATMENT: SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 82 (2012), **CL-0038**; *see also* Martins Paparinskis, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 247 (2013) ("discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases."), **CL-0039**.

[349] *See Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)052, Award, dated September, 18 2009, ¶ 300, **CL-0018**.

[350] *Ibid.*, ("The Tribunal finds this willful targeting, by its nature, to be a manifest injustice. The fact that the targeted investors are corporations with U.S. nationality is of no significance in the Tribunal's view. If the import permit requirement had been instituted to influence the trade policy of a country other than the country of the nationality of the investors, the manifest injustice is, in the Tribunal's view, patent.).

ii. Mexico's Refusal to Engage in the MAP Process, Despite Its International Tax Obligations, Violated Article 1105

344. Fair and equitable treatment requires not only the fair and proper functioning of legal and administrative proceedings, but also full access to those proceedings. As Paulsson explains in the context of judicial proceedings: "The right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice."[351] Borchard agrees, noting the existence of "the denial of justice arising prior to trial or hearing of a case" in the case of "a wrongful failure by the authorities to have recourse to judicial proceedings."[352]

345. It is well established that a denial of justice may occur in the context of administrative proceedings. The tribunal in *Amco Asia Corp. v. Republic of Indonesia* made clear that "no provision of international law that makes impossible a denial of justice by an administrative body."[353] This rule was echoed in *ECE Projektmanagement International GmbH, et al. v. The Czech Republic* where the tribunal pronounced that "denial of justice is not limited to judicial proceedings but may equally occur in administrative proceedings."[354] The Respondent's refusal to engage in the MAP processes requested by PEM in relation to the transfer pricing issues under Mexico's DTT [redacted], on the basis that the dispute has to be revolved under Mexican law, is thus capable of giving rise to a denial of justice, and has done so.

346. As explained below, each of Mexico's DTTs with [redacted] contain remedies for resolution of transfer pricing disputes through the MAP. These MAPs create an administrative process, controlled by the SAT, based on which PEM was entitled to seek relief, particularly when the agreed upon transfer price established under PEM's APA was

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[351] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) 134, **CL-0033**.

[352] Edwin Borchard, *Diplomatic Protection of Citizens Abroad* (1917), p. 336, **CL-0044**.

[353] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding, dated March 31, 1990, ¶ 137, **CL-0045**.

[354] *ECE Projektmanagement International GmbH, et al. v. The Czech Republic*, PCA Case No. 2010-05, Final Award, dated September 19, 2013, **CL-0046**.

being unlawfully rejected by the SAT. PEM was entitled to have its dispute over repudiation of the APA considered resolved under the binding rules contained in the DTTs, including, in the case of the [redacted] DTT, a resolution over whether Mexico had avoided the application [redacted] limitation period for adjusting the transfer prices. By denying First Majestic and other entities in its business group access to the remedies provided under the MAP, the Respondent has violated Article 1105 of NAFTA.

(a) MAPs Resolve Double Taxation Disputes in Connection with APAs

347. MAP dispute resolution mechanism contained in the DDTs are the universally accepted means for resolution of transfer pricing disputes. They were developed as the principal means of enforcing the object and purpose of DDTs, which seek to avoid the double taxation of foreign investors and traders. As explained by [redacted]:

> … the goal of DTTs is to facilitate and enhance trade and investment between the treaty partners by providing clarity and legal certainty related to the imposition of taxes. They purport to do so by: (1) limiting taxation by the host state of the investment (known in international tax terminology as the "source state"), and (2) by ensuring that the state of the investor (known in international tax terminology as the "residence state") alleviates double taxation while respecting the "first bite" taxing rights preserved by source states in step (1).[355]

348. Like virtually all DTTs, Mexico's DTTs with [redacted] avoid double taxation. In the case of transfer pricing disputes, DTT's set out prescriptive rules and the MAP mechanism to constrain each signatory State from imposing taxes that result in double taxation, including in the case of affiliated companies doing business with one another but are resident in different States. DDTs achieve this aim by applying transfer pricing rules which ensure that related entities are treated not as a single taxpayer, but rather as separate legal entities subject

[355] Expert Report of [redacted] dated April 6, 2022, p. 13, ¶ 10, [redacted]**0000**.

to distinct taxation jurisdictions. Under this approach, DDTs require the apportionment of tax burdens as between affiliated corporate entities based on their place of residence.[356]

349. An example of the transfer pricing provision on taxation is found in Article 9(2) of the [redacted] Mexico DTT, entitled "Associated Persons." That provision states:

> Where a Contracting State includes in the income or profits of an enterprise of that State - and taxes accordingly - income or profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the amount so included is income or profits which would have accrued to the first-mentioned enterprise if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall, where it agrees with the inclusion, make an appropriate adjustment to the amount of tax charged therein on that income or those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.[357]

350. Mexico, as with many States, which have voluntarily entered into DTTs, are required to comply with such transfer pricing provisions and the means of resolution of such disputes. In the present case, by entering into an APA with PEM, the SAT provided its commitment to PEM on what it would accept as the appropriate price it could charge its affiliate in Barbados for the silver supplied for the San Dimas Mine. APAs effectively provide legally binding assurances to the taxpayer, in the present case, PEM, that it will not, during the five-year period of its validity, disagree with the allocation of income between PEM and its affiliated entity, which in the case of sale of silver was STB.

351. The MAPs in Mexico's DTTs with [redacted] are thus the appropriate and universally accepted means of resolving disputes relating to transfer pricing, when they do arise. Here, the dispute has arisen due to the repudiation of the APA by the SAT.

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[356] *See ibid.*

[357] [redacted]

352. An example of commonly used MAP provisions is found in Article 23 of the [redacted]Mexico DTT, which provides in relevant part:

> 1. Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Convention, that person may, irrespective of the remedies provided by the domestic law of those States, address to the competent authority of the Contracting State of which that person is a resident an application in writing stating the grounds for claiming the revision of such taxation. To be admissible, the said application must be submitted within three years from the first notification of the action which gives rise to taxation not in accordance with the Convention.
>
> 2. The competent authority referred to in paragraph 1 shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Convention.[358]

353. According to OECD statistics, the vast majority of disputes arising under MAP involve matters relating to transfer pricing, such as PEM's dispute with the SAT.[359]

354. As seen in the example above, MAPs establish an administrative process which is clearly defined and with obligatory steps which were agreed upon by Mexico when it entered into the DTTs with its three treaty partners. [redacted] summarizes the procedure in Mexico's MAPs with [redacted] as follows:

> First, a state must allow a taxpayer, at the taxpayer's choice, to initiate the MAP, and to present the case to the competent authorities of the state.
>
> Second, the state (represented by its competent authorities) *must* consider the case presented by the taxpayer.

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[358] [redacted]

[359] *See* Expert Report of [redacted], dated April 6, 2022, ¶ 18, (citing Ekkehart Reimer & Alexander Rust eds., Klaus Vogel on Double Taxation Conventions, 4th ed., Kluwer L. Int'l., dated 2015, ¶ 61, **YB-0008**), [redacted]**0000**.

> Third, the state *must* determine whether the case presented by the taxpayer is justified, i.e., that the action or actions of a party or both parties to the treaty will result in taxation not in accordance with the provisions of the treaty.
>
> Fourth, if the state determined that the case is justified (in step three above) then it must determine whether it can unilaterally resolve it.
>
> Fifth, if a state has reached the fourth step above and determined that it cannot unilaterally resolve the case, the state *must* "endeavor… to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the convention." This means that merely engaging in aimless conversations or trying by presenting unfeasible options for compromise but not a maximal effort to be flexible and resolve the dispute would not meet the treaty standard.[360]

355. The provisions of each MAP in Mexico's DDTs with [redacted] are thus not only clearly articulated, but legally binding under international law. Such mandatory language obligates Mexico to pursue each step of the MAPs affirmatively and in good faith,[361] and bars Mexico from invoking domestic law to avoid its international law obligations under its DTTs.[362]

356. International practice indicates the use of the MAPs is highly effective. As [redacted] explains:

> An active MAP (where both competent authorities actually discuss a case, as expected) provides a genuine opportunity to resolve a case in multiple manners: each of the competent authorities may convince the other to forgo taxation, or they may reach a compromise pursuant to which they both concede some taxation. Moreover, bilateral discussion of the substance of a case makes it difficult for a competent authority to use arbitrary, baseless, or lawless arguments in support of its position since the other competent authority both has "skin in the game" and carries legal and constitutional burdens of its own. Finally, it is often the case that the involved competent authorities are repeat players, which is certainly the case

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[360] *See* Expert Report of [redacted], dated April 6, 2022, ¶¶ 43-47, [redacted]**0000**. On the meaning of "taxpayer," [redacted] cites the Model Tax Convention on Income and on Capital, OECD (2017) [OECD Model Tax Convention], p. 1180 (noting that the threshold that OECD Model Art. 25(1) provides is that the taxpayer should be resident or a national of a state to have the right ("…he may… present his case…") to trigger the MAP).

[361] Model Tax Convention on Invoice and on Capital, OECD 2017, p. 1180.

[362] *See* Expert Report of [redacted] dated April 6, 2022, ¶¶ 117-118, [redacted]**0000**.

with Mexico and Canada, and therefore would be even more incentivized to avoid uncooperative or illegitimate stances.[363]

357. The MAPs in Mexico's DTTs with [redacted] were thus both the mandatory and most effective channel for resolving PEM's dispute with the SAT over its repudiation of the APA.

(b) The SAT Barred the First Majestic Entities from Utilizing the MAPs

358. Beginning in late 2019, various members of First Majestic's corporate group exercised their rights under Mexico's DTTs with [redacted] to initiate the MAPs.[364] Such action was taken to object to and seek a resolution of transfer pricing adjustments made by SAT in relation to the sale of silver, interest expenses and management/technical expenses.[365]

359. Notably, the SAT dismissed the requests made under the [redacted] DTTs on February 14, 2020, only a few weeks after they were filed.[366] It also rejected

[363] *See id.*, at ¶ 48.

[364] *See* MAP Request for Fiscal Year 2010, dated November 1, 2019, pp. 1-16, **C-0002, p. 4089**; *See* MAP Request for Fiscal Year 2010, dated November 6, 2019, pp. 1-21, **C-0002, p. 4105**; *See* MAP Request for Fiscal Year 2011, dated December 10, 2019, pp. 1-21, **C-0002, p. 4126**; MAP Request for Fiscal Year 2011, dated December 11, 2019, pp. 1-29, **C-0002, p. 4147**; *See* MAP Request for Fiscal Year 2012, dated January 15, 2020, pp. 1-31, **C-0002, p. 4176;** MAP Request for Fiscal Year 2012, dated January 20, 2020, pp. 1-24, **C-0002, p. 4207;** MAP Request for Fiscal Year 2010, dated November 5, 2019, pp. 1-5, **C-0002, p. 4362**; MAP Request for Fiscal Year 2011, dated December 16, 2019, pp. 1-7, **C-0002, p. 4679**; MAP Request for Fiscal Year 2011, dated December 18, 2019, pp. 1-23, **C-0002, p. 4686**; MAP Request for Fiscal Year 2012, dated January 8, 2020, pp. 1-7, **C-0002, p. 4709**; MAP Request for Fiscal Year 2012, dated January 16, 2020, pp. 1-21, **C-0002, p. 4716**; MAP Request for Fiscal Year 2012, dated April 21, 2020, pp. 1-13, **C-0002, p. 4737**; MAP Request for Fiscal Year 2010, dated April 24, 2020, pp. 1-18, **C-0002, p. 4750**; MAP Request for Fiscal Year 2010, dated April 24, 2020, pp. 1-18, **C-0002, p. 4750**; MAP Request for the Fiscal Year 2010, dated May 20, 2020, pp. 1-14, **C-0002, p. 4804**; MAP Request for the Fiscal Year 2011, dated May 29, 2020, pp. 1-13, **C-0002, p. 4818**.

[365] *See ibid.*

[366] *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**.

the requests made under the [redacted] DTT equally summarily on May 8, 2020 (after they were filed in early April).[367]

360. While the repudiation of the APA only implicated the sales of silver from the San Dimas Mine to the affiliate in Barbados, and therefore only the DTT with [redacted] Mexico rejected requests for MAP under [redacted] DTTs, including the ones with [redacted] that related to management/technical expenses and interest expenses, respectively.[368]

361. Mexico's stated justification for each of these rejections was that the contested measures were domestic in nature and thus the MAPs were inapplicable:

> [T]he initiation of friendly proceedings was not appropriate because, regardless of whether the operation referred to has been carried out between related parties, the present case concerns determinations made by the Mexican Tax Authority resulting from the taxpayer's failure to comply with deductibility requirements established in domestic tax provisions, as well as the interpretation and application of Mexican law, breaches that could only be addressed and, if necessary, resolved through the domestic means of defense available to the taxpayer.[369]

362. Both the timing and contents of the SAT's rejection of the MAP requests demonstrate the Respondent's blatant disregard for the obligatory MAP procedures, which is intended to deal with issues of transfer pricing that by necessity implicate the domestic laws of both DTT signatory states.

363. As explained, the first two steps require Mexico, respectively, to allow the taxpayer to initiate the process and to consider the taxpayer's case. The SAT's abrupt, perfunctory and misguided rejections of the MAP requests indicate a complete failure to comply. While the SAT may have physically received the MAP requests, it failed to accept or consider them in good faith. Each of the requests made by the First Majestic entities detailed the transfer pricing objections

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[367] *See* Official Letters, Nos. 900-06-01-00-00-2020-000319, 900-06-01-00-00-2020-000320 and 900-06-01-00-00-2020-000321, dated May 8, 2020, pp. 1-2, **C-0002, p. 4831**.

[368] *See ibid; see also* 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**.

[369] *See id.*, at p. 6.

with lengthy legal and economic analysis (generally totally over 15 pages) and raised serious concerns about Mexico's compliance with its transfer pricing obligations under Article 9 of its DTTs.[370] Yet the SAT summarily declared that the requests involved domestic tax issues and were thus inadmissible. It therefore disingenuously foreclosed access to the MAPs under all of the applicable DTTs.

364. The SAT's non-compliance with the first two steps inevitably led the SAT to breach the third and fourth steps, which require good faith consideration of each request by a First Majestic entity. The MAP demands consideration by the SAT "if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution."[371] As explained by the OECD, under the MAPs, "the competent authorities are obliged to seek to resolve the [taxpayer's] case in a fair and object manner, on the merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties."[372] Thus, to determine the merits of the MAP requests, the SAT was obliged to engage on the merits of those requests and to consider the availability of solutions. The SAT's wholesale rejection of each request indicates no such consideration occurred. Rather, the rejection letters simply reiterate the measures

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[370] *See, e.g.*, MAP Request for Fiscal Year 2010, dated November 1, 2019, pp. 1-16, **C-0002, p. 4089**; *see* MAP Request for Fiscal Year 2010, dated November 6, 2019, pp. 1-21, **C-0002, p. 4105**; *see also* MAP Request for Fiscal Year 2011, dated December 10, 2019, pp. 1-21, **C-0002, p. 4126**; MAP Request for Fiscal Year 2011, dated December 11, 2019, pp. 1-29, **C-0002, p. 4147**; MAP Request for Fiscal Year 2012, dated January 15, 2020, pp. 1-31, **C-0002, p. 4176;** MAP Request for Fiscal Year 2012, dated January 20, 2020, pp. 1-24, **C-0002, p. 4207;** MAP Request for Fiscal Year 2010, dated November 5, 2019, pp. 1-5, **C-0002, p. 4362**; MAP Request for Fiscal Year 2011, dated December 16, 2019, pp. 1-7, **C-0002, p. 4679**; MAP Request for Fiscal Year 2011, dated December 18, 2019, pp. 1-23, **C-0002, p. 4686**; MAP Request for Fiscal Year 2012, dated January 8, 2020, pp. 1-7, **C-0002, p. 4709**; MAP Request for Fiscal Year 2012, dated January 16, 2020, pp. 1-21, **C-0002, p. 4716**; MAP Request for Fiscal Year 2012, dated April 21, 2020, pp. 1-13, **C-0002, p. 4737**; MAP Request for Fiscal Year 2010, dated April 24, 2020, pp. 1-18, **C-0002, p. 4750**; MAP Request for Fiscal Year 2010, dated April 24, 2020, pp. 1-18, **C-0002, p. 4750**; MAP Request for the Fiscal Year 2010, dated May 20, 2020, pp. 1-14, **C-0002, p. 4804**; MAP Request for the Fiscal Year 2011, dated May 29, 2020, pp. 1-13, **C-0002, p. 4818**.

[371] *See* Expert Report of [redacted], dated April 6, 2022, (emphasis added), ¶¶ 110, 139, [redacted]**0000**; *see also* [redacted]

[372] *See* OECD Model Commentary on Article 25 Concerning The Mutual Agreement Procedure, dated 2017, ¶¶ 5.1, p.429, **YB-0004**.

taken by the SAT against PEM and conclude that, because such measures implicate domestic tax law, they may not serve as the basis for consideration under each of the MAP under the DTTs.[373]

365. The fifth step of the MAP requires the SAT to engage with the competent authority of the other treaty Party to seek to resolve the dispute. If a legitimate objection is raised which the SAT cannot resolve unilaterally, it "shall endeavor … to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the convention."[374] In other words, the SAT was obligated to seek a remedy with the competent authorities in [redacted]. More importantly, the First Majestic entities were entitled under the DTTs to have such engagement take place on a bilateral basis with the aim of reducing the burdens of double taxation.

366. [redacted][376]

367. In violation of its MAP obligations, Mexico refused to engage whether on its own, in response to Mexican-generated requests, or when asked to consult by the [redacted] competent

[373] *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, 4-5, 8-9, **C-0002, p. 2148**.

[374] *See* Expert Report of [redacted] dated April 6, 2022, ¶ 73, [redacted]**0000**; *see also* [redacted]

[375] *See* MAP Request for Fiscal Year 2010, dated November 1, 2019, pp. 1-16, **C-0002, p. 4089**.

[376] *See* Email from [redacted] dated March 5, 2020, **C-0029**.

authority. [redacted]

[redacted]

368. The correspondence continued to describe the unparalleled nature of the situation:

[redacted]

369. By foreclosing access to the MAPs from all avenues—in Mexico, [redacted]—the SAT not only breached the plain terms of its DTTs, but also Article 1105 of NAFTA. For the First Majestic entities, the MAPs were the only means of resolving the transfer pricing dispute between the SAT on an international basis. A denial of access to this exclusive forum for redress is therefore a clear denial of justice

[377] Email from [redacted] First Majestic, Primero – [redacted], dated May 31, 2021, p. 1, **C-0031**.

[378] *Ibid.*

2. Mexico Breached Article 1110 of NAFTA (Expropriation and Compensation)

370. The evidence in this case demonstrates that the Respondent has unlawfully expropriated the Claimant's investments in breach of Article 1110 of NAFTA.

371. By repudiating the APA, which protected PEM and First Majestic against injurious changes in Mexico's tax treatment of PEM's silver mining and exporting activities, the SAT has destroyed PEM's rights under the APA.

372. The evidence also shows that through a series of actions the Respondent has substantially impeded the Claimant's ability to utilize PEM, its principal investment, to operate its mining business in Mexico. In addition to the repudiation of the APA, by issuing unfounded and exorbitant reassessments, by seizing local bank accounts and mining rights and properties, by initiating baseless collateral investigations and audits, threatening [redacted] and abusing the [redacted] process, by harassing PEM's employees, and by denying First Majestic entities access to the MAPs, the Respondent has expropriated the Claimant's shares in PEM and PEM itself.

373. Article 1110(1) prohibits unlawful expropriation:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose
>
> (b) on a non-discriminatory basis
>
> (c) in accordance with due process of law and Article 1105(1); *and*
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.[379]

[379] Art. 1110(1), North American Free Trade Agreement, dated January 1, 1994, **CL-0001**.

374. Accordingly, a NAFTA Party commits an unlawful expropriation when it takes an investment without satisfying any one of the conditions set forth in Article 1110(1)(a)-(d).

375. By its own terms, Article 1110 prohibits all acts of unlawful expropriation, regardless of form. Namely, a NAFTA Party may not unlawfully expropriate "directly or indirectly" or "take a measure tantamount to … expropriation." Article 1110 thus covers direct expropriation, indirect expropriation, and measures "tantamount to expropriation."[380] As explained in *Marvin Roy Feldman Karpa v. United Mexican States*, the misapplication or abuse of taxation measures may give rise to an indirect expropriation sometimes in the form of a "creeping expropriation":

> By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as "creeping," which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms "indirect" expropriation or "tantamount to expropriation" in Article 1110(1).
>
> …
>
> The Restatement defines "creeping expropriation" in part as a state seeking "to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned."[381]

376. The tribunal went on to note that a creeping expropriation, as defined in the Restatement, is a form of indirect expropriation, and may accordingly constitute measures "tantamount to expropriation."[382]

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[380] For discussion on the various forms of expropriation, see Reinisch, August, "Expropriation", in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Muchlinski, Ortino and Schreuer, Oxford: Oxford University Press, 2008), pp. 408-456, **CL-0042**.

[381] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, dated December 16, 2002, ¶ 101 (citing Restatement, Section 712, Reporter's Note 7), **CL-0002**.

[382] *Ibid.*

377. On the plains terms of Article 1110, in determining the existence of an unlawful expropriation, "the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied."[383] Further to prove a breach of Article 1110 there is no requirement that an investor establish a State's bad faith or intent.[384]

378. Applying the three-step approach below demonstrates conclusively that Respondent unlawfully expropriated the Claimant's investments in breach of Article 1110. As explained further below: (1) First Majestic, in its own right and through PEM, acquired numerous valuable investments, including tax stabilization rights under the APA and ownership rights to the investment enterprise PEM, all of which were capable of being expropriated; (2) the SAT expropriated PEM's rights under the APA when it took steps to repudiate that agreement and the Respondent is perilously close to expropriating PEM itself; (3) the SAT's expropriation was unlawful because it failed to pay compensation to the Claimant, it discriminatorily targeted PEM, it proceeded without due process, and it engaged in the misuse and abuse of Mexican tax law which was not in the public interest.

a) First Majestic's and PEM's Investments Were Capable of Being Expropriated

379. The Claimant's investments readily meet the first step of the three-step approach, which involves establishing whether they had investments capable of being expropriated. As explained below, there are three principal types of investment at issue in this arbitration: rights under a contract established by the APA which guaranteed tax stability for a five-year period;

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[383] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, dated August 2, 2010, ¶ 242, **CL-0047**.

[384] *See Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)0201, Award, dated July 17, 2006, ¶ 176(f) ("The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation."), **CL-0048**; *see also Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)971, Award, dated August 30, 2000, ¶ 111 ("The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree."), **CL-0032**.

rights of ownership of PEM; and rights of ownership of shares in PEM. Each of these types of investment is capable of being expropriated.

i. Contract Rights Under the APA

380. Under international law, it is well established that contractual rights, including those granted by governmental approval to a corporation, are capable of being expropriated.[385]

381. On October 17, 2011, PEM applied to the SAT for an APA.[386] As explained, an APA is a binding agreement between a taxpayer and the tax authority that determines the transfer pricing methodology for pricing the taxpayer's international transactions in future years.[387] It contractually obligates the tax authority to assess taxes on the taxpayer based on the agreed transfer pricing methodology, so that the taxpayer can manage its business affairs accordingly and with predictability.

382. PEM's application to the SAT explained in detail the company's proposed methodology for calculating cumulative income for fiscal years 2010 through 2014.[388] These calculations were based on the price at which it had agreed to sell mined silver pursuant to the streaming agreement with Wheaton.[389] On October 4, 2012, the SAT agreed to the terms proposed

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[385] With respect to contract rights, see, e.g., Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary, ICSID Case No. ARB/12/2, Award, dated April 16, 2014, ¶ 164 (finding "a right conferred by contract may therefore constitute an asset for this purpose [i.e., constituting an "investment"]), **CL-0049**; Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Award, dated August 20, 2007, ¶ 7.5.19 (finding "the ownership rights which are subject to deprivation are Claimants' contractual rights themselves, ie the right to the use, enjoyment and benefit of those rights"), **CL-0050**. With respect to administrative rights, see Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, dated April 12, 2002, ¶ 101 (resolution destroying pre-existing license expropriated investor's rights), **CL-0051**; Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, dated May 29, 2003, ¶ 117 (resolution denying renewal of permit expropriated investor's rights), **CL-0052**.

[386] *See* APA Request Letter, dated October 17, 2011, p. 1, **C-0002, p. 1**

[387] *See* Expert Report of [redacted]r, dated April 6, 2022, ¶¶ 19-21, [redacted]**-0000**; *see also* Expert Report of [redacted], dated April 22, 2022, ¶ 221**,** [redacted]**-0000**.

[388] *See* SAT PEM Ruling, No. 900-08-2012-52885, dated October 4, 2012, p. 4, **C-0002, p. 43**.

[389] *See supra* ¶ 48.

by PEM and issued the company an APA which established PEM's realized revenues, based on amounts actually received, rather than based on "spot prices," for calculating taxes payable to the SAT.[390]

383. The APA created contract rights that were commercially significant and highly valuable to PEM. Because of the SAT's binding commitments, PEM, and, in turn, First Majestic, were provided legal assurances that PEM would not be taxed at a rate higher than agreed under the APA beginning in 2010. Like any other contractual rights that afford a party commercial value, PEM's rights under the APA were capable of being expropriated.

ii. Shares in PEM

384. It is well established in international law that rights to company shares and rights to company returns are rights that are capable of being expropriated.[391] In May 2018, First Majestic acquired all shares in PMC, a Canadian company, which wholly owned PEM, thereby indirectly acquiring all shares in PEM.[392]

iii. PEM as an "enterprise"

385. PEM is a *Sociedad Anónima de Capital Variable* ("S.A de C.V."), an enterprise incorporated under the laws of Mexico.[393] As many international tribunals have found, a corporation owned by a protected investor can be expropriated.

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[390] *See* SAT PEM Ruling, No. 900-08-2012-52885, dated October 4, 2012, pp. 1, 37, **C-0002, p. 43**.

[391] *See, e.g.*, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, dated July 17, 2003, ¶¶ 65, 68, **CL-0053**; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated June 27, 1990, ¶ 95, **CL-0054**.

[392] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 7(b), [redacted]**0000**.

[393] *See supra* ¶ 10.

b) First Majestic's and PEM's Investments Have Been Expropriated

386. The facts of this case clearly evidence an expropriation of the Claimant's investments and, thus, readily satisfy the second prong of the three-prong test in determining whether Respondent breached Article 1110.[394]

387. According to *Burlington Resources v. Ecuador*, "[w]hen assessing the evidence of an expropriation, international Tribunals have generally applied the sole effects test and focused on substantial deprivation."[395] The tribunal continued:

> When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment.[396]

388. Finally, the tribunal concluded:

> In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.[397]

389. Similarly, in *Glamis Gold v. United States*, the tribunal held: "[A] State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that 'unreasonably interferes with, or unduly delays, effective enjoyment' of the property."[398]

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[394] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, dated August 2, 2010, ¶ 242, **CL-0047**.

[395] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability, dated December 14, 2012, ¶ 396, **CL-0055**.

[396] *Id.*, ¶ 397 (citation omitted).

[397] *Ibid.*

[398] *Glamis Gold, Ltd. v. United States* (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 354 (citing Rudolf Dolzer, *"Expropriation and Nationalization,"* in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf

According to the tribunal in *Grand River Enterprises v. United States*, "expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests."[399]

390. In the same vein, in *Fireman's Fund v. Mexico*, the tribunal ruled that "[e]xpropriation requires a taking (which may include destruction) by a government-type authority of an investment" and "[t]he taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment)."[400]

391. The substantial deprivation test set forth by NAFTA tribunals involves consideration of two factors: the severity of the economic impact and its duration.[401] An expropriation involves "the deprivation or impairment of all, or a very significant proportion of, an investor's interests."[402] In addition, "[t]he taking must be permanent, and not ephemeral or temporary."[403] In making this determination, tribunals may consider the full panoply of State action

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Bernhardt, ed. 1995), **CL-0041**. In one non-NAFTA case, the tribunal similarly provided that "[a] necessary condition for expropriation is the neutralization of the use of the investment." *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated October 31, 2011, ¶ 233(2), **CL-0056**.

[399] *Grand River Enterprises Six Nations, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated January 12, 2011, ¶ 147, **CL-0057**.

[400] *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176 (a), (c), **CL-0048**.

[401] *See Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 359, **CL-0018**; *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 356, **CL-0041**.

[402] *Grand River Enterprises Six Nations, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated January 12, 2011, ¶ 147, **CL-0057**. *See also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 360 ("It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant's economic use and enjoyment of its investment."), **CL-0018**.

[403] *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176(d), **CL-0048**; *see also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 348, **CL-0018**; *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 360, **Exhibit CL-0041**.

or inaction against an investor and whether multiple events taken in concert amount to expropriation.[404]

392. As explained, Article 1110 of NAFTA covers direct expropriation, indirect expropriation, and measures "tantamount to expropriation."

393. A direct expropriation entails an "open, deliberate and acknowledged taking[] of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State . . . ."[405] It consists of "[t]he forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action."[406] Direct expropriation "usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights)."[407]

394. An indirect expropriation, by contrast, constitutes conduct that, in the absence of a forced transfer or destruction of title, nevertheless has the effect of significantly devaluing the investment. In the *Glamis* case, the tribunal observed:

> In an indirect expropriation, the property is still "taken" by the host government in that the economic value of the property interest is radically diminished, but such an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor.[408]

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[404] *See Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 356, **CL-0041**.; *Pope & Talbot Inc. v. Government of Canada*, (UNCITRAL) Ad hoc, Interim Award, dated June 26, 2000, ¶ 99, **CL-0058**.

[405] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated August 30, 2000, ¶ 103, **CL-0032**; *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 355, **CL-0041**.

[406] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, dated October 3, 2006, ¶ 187, **CL-0059**.

[407] *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176, **CL-0048**.

[408] *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 355 (emphasis added), **CL-0041**.

395. Similarly, according to UNCTAD, an indirect expropriation occurs when measures short of a direct expropriation nevertheless "result in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor."[409]

396. Article 1110 also contains a third category of expropriation—"measures tantamount to ... expropriation"—which generally has been regarded as consistent in content with the concept of indirect expropriation.[410] As the *Glamis* Tribunal explained: "'Tantamount' means equivalent and thus the concept should not encompass *more* than direct expropriation; it merely differs from direct expropriation which effects a physical taking or property in that no actual transfer of ownership rights occurs."[411]

397. Regardless of its form, a NAFTA Party's conduct constitutes an expropriation when it destroys the value or commercial viability of an investment, including by depriving investors of their "capacity to earn a commercial return" on their investment or their ability to use, enjoy or otherwise benefit from his investment.[412]

* * *

398. In this case, as explained below, the Respondent's misconduct resulted in the expropriation of PEM's rights under the APA, First Majestic's shares in PEM, and PEM itself as the "enterprise."

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[409] UNCTAD, TAKING OF PROPERTY, SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 2 (2000), **CL-0060**.

[410] *Pope & Talbot Inc. v. Government of Canada*, (UNCITRAL) Ad hoc, Interim Award, dated June 26, 2000, ¶ 107, **CL-0058**.; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, dated December 16, 2002, ¶ 101, **CL-0002**; *S.D. Myers v. Government of Canada*, (UNCITRAL) Ad hoc, Partial Award, dated November 13, 2000, ¶ 286, **CL-0061**.

[411] *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 355, **CL-0041**.

[412] *See Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability, dated December 14, 2002, ¶ 396, **CL-0055**; *see also Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 354, **CL-0041**.

i. Mexico Expropriated PEM's Rights Under the APA

399. The SAT's repudiation of the APA constituted an expropriation. Not only did the SAT breach its legally binding commitments under the APA and issue exorbitant reassessments for the 2010-2014 fiscal years, but it also flouted Mexican constitutional law and the rulings of the Mexican judiciary that existed to protect PEM's rights. As explained below, the SAT's conduct amounts to a taking of PEM's rights under the APA to be assessed a fixed and reasonable tax burden from 2010 through 2014.

400. The SAT's misconduct proceeded along two paths, both reinforcing the tax regulator's confiscatory action:

401. *First*, the SAT took affirmative and coercive steps to nullify the APA. At first, beginning in early 2015 PEM naturally refused and would suffer for its insistence on the rule of law.[413]

402. Soon after, on August 4, 2015, the SAT commenced legal action (the *Juicio de Lesividad* proceeding) to have the APA declared null and void.[414] As explained, the lawsuit had no legal basis under Mexican tax law.[415] Not only does no such cause of action exist in the Mexican Tax Code, but also similar cases in other contexts require proof of the taxpayer's malfeasance of which PEM was never accused.[416]

403. Through the intervention of PRODECON, the tax ombudsman's office, which acted to restrain the SAT's pursuit of the *Juicio de Lesividad* proceeding, the short period of respite

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[413] Witness Statement of [redacted], dated April 25, 2022, ¶ 10, [redacted]**0000;** *see also supra* ¶ 86.

[414] *See* Juicio de Lesividad Complaint of the SAT, No. 900 0 02-2015-31276, dated August 4, 2015, p. 1, **C-0002, p. 185**.

[415] *See supra* ¶ 97.

[416] *See supra* ¶¶ 78-79; *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 31, [redacted]**0000**.

and negotiations between the SAT and PEM ended abruptly in mid-2018 with the election of President López Obrador .[417]

404. Under strong pressure from President López Obrador , the TFJA thereafter declared the APA null and void.

405. In sum, the SAT has aggressively executed a plan through coercion and threats to nullify the APA; when PEM refused to yield to such lawlessness, the SAT pressured the Mexican courts to yield to its desired result.

406. *Second*, the SAT actively took steps to solidify and ensure the effectiveness of its repudiation of the APA: (1) it issued exorbitant reassessments against PEM, even while PEM's *amparo* in relation to the *Lesividad* proceeding prevented it from doing as a legal matter; and (2) it violated orders of the TFJA enjoining the SAT from execution and collection of the reassessments. These actions cemented the SAT's decision to destroy PEM's APA rights.

407. The reassessments for the 2010-2012 fiscal years—while the 2013 and 2014 years were under audit—that followed were an assault on both PEM and the rule of law. In addition to imposing an outrageously high tax burden on PEM retroactively, [redacted],[418] the SAT contravened well-established principle of Mexican law. Namely, under Articles 14 and 16 of the Mexican Constitution, acts of Mexican authorities, including tax authorities, are valid unless otherwise determined by a court by rendering a definitive and non-appealable decision.[419] PEM's *amparo* in relation to the *Lesividad* proceedings is still pending before the Mexican Supreme Court.[420] Nevertheless, in defiance of that important constitutional stricture, the SAT audited PEM

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[417] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 7(f), [redacted]**0000**.

[418] *See* Expert Report of [redacted] dated April 25, 2022, ¶ 28, [redacted]**0000;** *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 127(b), [redacted]**0000**.

[419] *See* Witness Statement of [redacted], dated April 25, 2022, p. 54, [redacted]**0000**.

[420] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 22, [redacted]**0000**.

and issued enormous reassessments against it for the 2010-2013 fiscal years with the clear intention to reassess for 2014 when the audit is completed.[421]

408. Further, the SAT flouted the Mexican courts when it violated injunctions intended to protect PEM's interests. In late 2019, PEM filed an annulment complaint before the Online Chamber of the TFJA to challenge the SAT's 2010-2012 reassessments.[422] On January 3, 2020, the TFJA admitted the complaint and, notably, granted PEM provisional injunctions against the execution and collection of the 2010-2012 reassessments.[423]

409. Despite these legally binding commands from the Mexican judiciary, the SAT proceeded with the execution and collection of taxes. In addition to other measures (and as explained in further detail in the next section), the SAT dismissed all MAP requests and proceeded to seize PEM's assets demanding a guarantee to suspend the execution of the tax deficiency.[424]

410. The SAT's cumulative actions against PEM resulted in an expropriation of the APA because they "'unreasonably interfere[d] with, or unduly delay[ed], effective enjoyment' of the [PEM's] property."[425] These measures unquestionably resulted in "the deprivation or impairment of all, or a very significant proportion of, an investor's [PEM's] interests."[426] While technically the

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[421] *See id.*, at ¶¶ 88-90.

[422] *See* Annulment Complaint, No. 19/3171-24-01-02-02-OL, dated December 13, 2019, pp. 1-280, **C-0002, p. 1862**; *see* Application for Annulment, No. 20/770-24-01-01-04-OL, dated May 4, 2020, pp. 1-299, **C-0002, p. 3021**.

[423] Admission Resolution of the Claim and Provisional Suspension, dated January 3, 2020, p. 13, **C-0002, p. 2142**; *see also* Provisional Injunction No. 20/770-24-01-01-04-OL, dated May 7, 2020, **C-0002, p. 5801**.

[424] *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**.

[425] *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 354 (citing Rudolf Dolzer, "Expropriation and Nationalization," 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995), **CL-0041**. In one non-NAFTA case, the tribunal similarly provided that "[a] necessary condition for expropriation is the neutralization of the use of the investment." *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated October 31, 2011, ¶ 233(2), **CL-0056**.

[426] *Grand River Enterprises Six Nations, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated January 12, 2011, ¶ 147, **CL-0057**. *See also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 360 ("It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant's economic use and enjoyment of its investment."), **CL-0018**.

APA is still valid (at least based on black-letter Mexican law), in reality, it is all but eviscerated. The value in PEM's APA rights lies in its government guarantees to stabilize the company's tax burden from 2010-2014. That security—based on an agreed arm's length assessment of its annual revenue—permitted PEM to fund its operations and to earn a reasonable profit. Importantly, it also allowed First Majestic to plan for the expansion of PEM's operations in Mexico. The massive reassessments—retroactively applied against PEM—have sapped the APA of all its worth and, in fact, its *raison d'être*.

411. By effectively rewriting the investment climate for PEM from 2010 to 2014 years later, the SAT has deprived First Majestic of the consequences of all of its business decisions during that period based on the agreed formulation for determining revenues that would provide the basis for taxation. The APA, along with Mexico's DTTs, was meant to protect PEM against double taxation across tax jurisdictions—a guarantee with significant value. It also safeguarded against fluctuations in PEM's tax burden caused, in particular, by changes in the SAT's view on transfer pricing methodology in the case of PEM's supply of silver to export markets. Such protections were also invaluable to First Majestic as the ultimate investor in Mexico. The SAT's mission to fully negate the benefits of the APA left PEM's rights under that contract devoid of any value. As a consequence, First Majestic and PEM "have lost the economic use of their investment."[427]

412. The SAT's conduct is also "not ephemeral or temporary," but enduring in nature.[428] Since 2015 until the present, the SAT has relentlessly pursued a plan to destroy the APA, with total disregard for any practical or legal obstacles in its way. When PEM would not abandon the APA willingly, the SAT initiated the *Lesividad* proceeding; when PEM appealed by filing an *amparo* proceeding, the SAT ignored PEM's constitutional protections and issued huge

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[427] *Ibid.*

[428] *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176(d), **CL-0048**; *see also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 348, **CL-0018**; *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 360, **CL-0041**.

reassessments anyway; and when the TJFA enjoined the SAT, the tax regulator ignored those rulings and executed and collected on the reassessments against PEM. Nothing has stopped the SAT from negating the legal effect of the APA, as planned, and nothing will so long as its actions are being exemplified by the current President as justified actions against a Canadian company that is unwilling to pay its taxes.

413. Though PEM's *amparo* action is pending before the Mexican Supreme Court, this turn of events was brought about by a rare intervention by a Member of the Court who was appointed by the current President, and is viewed as supporting of his policies and positions.[429] The personal interest that the President has taken in ensuring that PEM pays what his government says it is owed, has extended throughout his tenure to date, including his latest statements indicating that he expects that the Supreme Court of Mexico will act with "rectitude" (a word that carries a moral implication and expectation of righteousness).[430] With the Court backlogged for many years,[431] and with no check on the SAT's power which is acting in accordance with directions from the President, Respondent's clear policy to nullify the APA will not change.

414. Accordingly, PEM's rights under the APA have been expropriated.

ii. Mexico Expropriated First Majestic's Shares in PEM and PEM Itself

415. [redacted] As explained by [redacted] in the Claimant's damages report:

[429] *See* Chronology, dated April 25, 2022, **C-0002, p. 5**.

[430] Versión estenográfica de la conferencia de prensa matutina del presidente Andrés Manuel López Obrador, dated February 7, 2022, p. 1, (emphasis added), **C-0003, p. 89**.

[431] *See supra* ¶ 104; *see also* Exhorto de 173 abogados a la Corte, Milenio, dated February 10, 2022, p. 1, **C-0032**.

[redacted]

416. The result of this action was what [redacted] of PEM:

[redacted][433]

417. The series of wrongful and illegal measures that accompanied the repudiation of the APA and compounded the catastrophic consequences for PEM are set forth below:

(a) The SAT Compromised PEM's Financial Position

418. [redacted], notwithstanding the fact that the APA continues to be valid under Mexican law pending appeals lodged by PEM.

419. [redacted]

[432] Expert Report of [redacted] dated April 25, 2022, ¶ 24, **0000**.

[433] *Id.*, ¶ 30 (emphasis added).

[redacted]

421. The SAT exacerbated PEM's current economic injury by naming and shaming First Majestic and PEM in the press. It not only publicized highly confidential tax-related information belonging to First Majestic and PEM,[436] but it also revealed that PEM owned [redacted] in back taxes,[437] while related legal proceedings were pending.[438] Such malicious conduct, without any legitimate governance purpose, could only be designed to undermine the Claimant's value and credibility as an international mining company.

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[434] *See supra* ¶ 114.

[435] Witness Statement of [redacted], dated April 25, 2022, ¶ 21, [redacted]**0000**.

[436] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 122, fn. 95, [redacted]**0000**.

[437] *See ibid*.

[438] *See id.*, (Under Article 69 of the Mexican Tax Code, public officials are prohibited from disclosing information of taxpayers obtained through their powers of verification, as well as information pertaining to tax dispute proceedings. Since 2019, government officials such as President Lopez Obrador and Rachel Buenrostro, the head of the SAT, have publicly disclosed information regarding the illegal tax reassessments imposed on PEM by the SAT as well as ongoing legal proceedings. *See* Art. 69, Mexican Federal Tax Code, *supra* note 1, at p. 128; *see also e.g.*, Versión estenográfica de la conferencia de prensa matutina del presidente Andrés Manuel López Obrador, dated February 7, 2022, (President Lopez Obrador: "we still have the Tayoltita, Durango issue pending, because it is a fiscal issue, they do not way to pay taxes"), **C-0003, p. 89**; Reuters, Mexican President Urges Canadian Mining Firms to Pay Taxes, The New York Times, dated June 9, 2020, p. 1, (President Lopez Obrador: "it's very clear that [the Canadian mining companies] have these debts with the tax authority"), **C-0003, p. 200**; Press Conference: Amlo defends Electric reformation before Trudeau and invites him to Mexico, YouTube, dated November 22, 2021, p. 1, available at: https://www.youtube.com/watch?v=tTACDFatzXI, ("the problems with the Canadian mining companies have been resolved, we only have one pending issue that has to do with the tax issue in Taylotita, Durango)**;** Digital Millennium and Silvia Rodriguez, SAT could seize Group Elektra if it does not pay tax debt, games for you, dated January 26, 2022, (Raquel Buenrostro: "What we have to prove in the case of First Majestic that we are applying the law to them the same as everyone else, that is going to be one of the things that we do not have to go to prove, to say: look, all the processes that were followed with First Majestic they are the ones that continue with any company"), **C-0003, p. 87**.

422. Further adding to PEM's financial difficulties, in April 2020, the SAT ordered the freezing and seizure of PEM's financial and real estate assets.[439] At the time, PEM had been granted injunctions on the collection of its alleged 2010 and 2011 tax deficiencies.[440] Despite these court-ordered protections, the SAT moved forward and executed seizures against PEM's bank accounts – ironically on the basis of a law, Article 151 of the Federal Fiscal Code, that required that the tax deficiencies be first determined by a court.[441] In addition, in April 2020, the SAT [redacted] in the course of its unjustified tax collection efforts.[442]

423. These measures were part of a concerted effort to interfere with PEM's business operations and contractual relationships. [redacted]

[439] *See* Official Letters, Nos. 400-24-00-02-00-2020-000968, 400-24-00-02-00-2020-000969 and 400-24-00-02-00-2020-000970, dated April 3, 2020, p. 2, **C-0002, p. 4954**.

[440] *See* Admission Resolution of the Claim and Provisional Suspension, dated January 3, 2020, p. 13, **C-0002, p. 2142**; *see also* Admission Resolution of the Claim and Provisional Suspension, dated January 5, 2020, p. 2, **C-0002, p. 2724**; *see also* Provisional Injunction No. 20/770-24-01-01-04-OL, dated May 7, 2020, **C-0002, p. 5801**.

[441] *See* Official Letters, Nos. 400-24-00-02-00-2020-000968, 400-24-00-02-00-2020-000969 and 400-24-00-02-00-2020-000970, dated April 3, 2020, p. 2, **C-0002, p. 4954**.

[442] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 131, [redacted]**0000**; *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 104, [redacted]**-0000**; *See* Tax Collection Orders, Payment Requirements and Seizure Orders, dated April 3, 2020, p. 2, **C-0002, p. 4952.**

[443] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 131(d) ("On April 7, 2020, the SAT froze the bank account of PEM with 2,113,319,121 pesos in it, creating challenges to pay the workers at the mine who relied on PEM for pay during the COVID-19 pandemic that was raging through the country (without at that time any vaccines)"), [redacted]**0000**.

[444] *See id.*, ¶ 8(c).

[445] *See id.*, ¶ 8(j).

(b) The SAT Stymied PEM's Business Operations

424. The SAT has also significantly interfered with PEM's day-to-day business operations, including the management activities of its executives and its personnel. Moreover, it has acted against PEM under difficult circumstances during the COVID-19 pandemic. According to the Claimant's witness, [redacted], on April 3, 2020, while the Government had ordered a broad lockdown and the Mexican courts were closed due to the pandemic, the SAT's tax collections personnel demanded an in-person collection of tax debts at PEM's Durango offices, despite an existing court injunction against such action.[446]

425. At the same time, the SAT also launched an unprecedented [redacted] against PEM (again during the COVID-19 lockdown) for the 2018 fiscal year, requiring numerous in-person interactions and thereby putting PEM's employees at risk of being infected with the COVID-19 virus.[447]

(c) The SAT Deprived PEM of Its Right to Redress Under the MAPs

426. Upon the SAT's repudiation of the APA, the Claimant and other First Majestic entities invoked their rights to access the MAPs in Mexico's DTTs [redacted]. The MAP established a dispute resolution provision whereby "a competent authority should engage in discussions with other competent authorities in a principled, fair, and objective manner, with each case being decided on its own merits and not by reference to any balance of results in other cases."[448] DTT Parties must allow a taxpayer, at the taxpayer's choice, to initiate the MAP, and to present the claim of double taxation to the competent authorities of the state.[449]

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[446] *See* Official Letter, No. 500-23-00-02-01-2020-07943, dated September 3, 2020, p. 32, **C-0002, p. 5061**.

[447] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 121, **0000**.

[448] OECD MANUAL ON EFFECTIVE MUTUAL AGREEMENT PROCEDURES (MEMAP) February 2007, p.11, *see at* https://www.oecd.org/ctp/38061910.pdf.

[449] *See supra* ¶ 129(a).

427. PEM's (and other First Majestic entities') requests under the MAP under all three DTTs were squarely and consistently rebuffed by the SAT. According to the Claimant's witness, [redacted]:

> The SAT response to these MAPs requests was to summarily dismiss them without giving the required consideration. On December 5, 2019, we were served with a resolution by the SAT of the administrative appeal and dismissal of the MAP as not relevant to the dispute between PEM and the SAT. The only ground provided was that the MAP were inapplicable, as they were being superseded by Mexican domestic law.[450]

428. By refusing to engage in the MAP, in violation of its international obligations, the SAT denied PEM its only avenue of redress under the mandatory international process and thus forced the Claimant and PEM to defend its interests in protracted, costly and biased domestic proceedings.

(d) Mexico's Conduct Resulted in an Expropriation

429. The Respondent's conduct has resulted in "a substantially complete deprivation of the economic use and enjoyment of the rights to the property" owned by the Claimant, including its shares in PEM and PEM, the enterprise.[451]

430. By repudiating the APA, by issuing unfounded and exorbitant reassessments, by seizing local bank accounts and mining rights and properties, by initiating baseless [redacted], by harassing PEM's employees, and by denying access to the MAP, PEM's operations in Mexico have been severely compromised.

431. [redacted]

[450] *See* Witness Statement of [redacted] dated April 25, 2022, ¶ 109, [redacted]**0000**.

[451] *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176 (a), (c), **CL-0048**.

[redacted] Not only has the Government, with the President in the lead, targeted PEM for destruction for its failure to pay false "back taxes," but there is also no chance for redress under the MAPs or in the Mexican courts which are backlogged for years and have succumbed to political pressure by the Government.

433. Accordingly, the Claimant's shares in PEM and PEM itself have been expropriated.

c) Mexico's Expropriation Was Unlawful

434. The Respondent may only lawfully expropriate the Claimant's investment if the express conditions set forth in Article 1110(1)(a)-(d) of NAFTA have been met. These include the taking of property on payment of compensation, for a public purpose, on a non-discriminatory basis, and in accordance with due process and the fair and equitable treatment standard. Respondent has failed to satisfy any of these conditions in connection with its expropriation of the Claimant's investment in Mexico. Its expropriation is therefore unlawful, as explained below.

i. Mexico Has Paid No Compensation

435. Payment of compensation for an expropriation, pursuant to the terms of Article 1110(2)-(6), is a fundamental prerequisite for a lawful expropriation. This rule is well established in international practice. As explained in *Feldman v. Mexico*, "[i]f there is a finding of

[452] It is thus not "ephemeral." *See Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, dated July 17, 2006, ¶ 176(d), **CL-0048**; *see also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated September 18, 2009, ¶ 348, **CL-0018**; *Glamis Gold, Ltd. v. United States*, (UNCITRAL) Ad hoc, Award, dated June 8, 2009, ¶ 360, **CL-0041**.

expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1)."[453]

436. At no time has the Respondent ever offered payment or made payment to the Claimant in compensation for the destruction of its investment in Mexico. Quite the contrary, as of the time of this filing, PEM remains subject to exorbitant reassessments. Having failed to compensate the Claimant for its losses in connection with the expropriation of its investments, the Respondent committed an unlawful expropriation in breach of Article 1110.

ii. Mexico Acted Without Public Purpose

437. According to Article 1110(1)(a), an expropriation is only lawful if it is pursued for a public interest.[454] As observed in *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, international tribunals should "accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies."[455] As explained throughout this submission, there was no legitimate public purpose behind the SAT's actions. Rather, the SAT's actions either ignored or directly contravened Mexico's tax laws, its federal Constitution, and its obligations under international double taxation treaties. Under the pretext of enforcing its tax laws, the SAT has acted unlawfully to extract enormous sums in the form of disguised taxes, interest, and penalties.

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[453] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, dated December 16, 2002, ¶ 98, **CL-0002**.

[454] *See Guaracachi America, Inc. v. State of Bolivia*, PCA Case No. 2011-17, Award, dated January 31, 2014, ¶ 437, ("If the expropriation had not been made 'for a public purpose and for a social benefit related to the internal needs of that Party' it would have then been illegal per se."), **CL-0062**.

[455] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, dated April 15, 2016, ¶ 294, **CL-0063**.

iii. Mexico Acted Discriminatorily

438. Pursuant to Article 1110(1)(b), to be lawful an expropriation must also be non-discriminatory.[456] The Respondent's expropriation of the Claimant's investments was discriminatory. As explained in Section V.B.1.b.cAs a consequence, the SAT repudiated PEM's – and only PEM's – APA rights as part of President López Obrador 's populist movement to retake Mexico's natural resources sector.

iv. Mexico Breached Due Process and Fair and Equitable Treatment Standards

439. Finally, for Respondent's expropriation to be lawful, pursuant to Article 1110(1)(c), it must also be pursued in accordance with due process and the standards of fair and equitable treatment. As explained in Section V.B.1 above, the Respondent has failed to afford the Claimant due process and fair and equitable treatment when it lawlessly repudiated the APA and issues reassessments against PEM, and when it denied First Majestic and PEM access to the MAPs under Mexico's DTTs.

3. Mexico Breached Article 1109 of NAFTA (Transfers)

a) NAFTA Free Transfers Standard

440. The purpose of free transfer provisions generally is to "set forth a host country's obligation to permit the payment, conversion and repatriation of the funds that relate to an investment."[457] Free transfers provisions are beneficial for both the host State and the foreign investor. For the foreign investor, these provisions obligate the host State to permit funds to be freely transferred into and out of the host State, thus providing security that the investor can move

[456] *See, e.g.*, *Eureko B.V. v. Republic of Poland*, (UNCITRAL) Ad hoc, Partial Award, dated August 19, 2005, ¶ 242 (finding expropriation where the state's actions were "clearly discriminatory" in order to prevent foreign investor from obtaining control of investment company), **CL-0043**; *see also El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated October 31, 2011, ¶ 241 (finding discriminatory conduct may constitute an expropriation), **CL-0056**.

[457] UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES 258 (2004); UNCTAD, Transfer of Funds 5, 2000, **CL-0064**.

capital into and out of the host State as necessary to operate its investment. In turn, the investor's ability to transfer funds freely enhances the host State's attractiveness as a venue for foreign investment and promotes increased inward investment.[458]

441. Article 1109 of NAFTA defines the types of payments that are covered by the guarantee of transferability (paragraph 1), stipulates time constraints for transfers (paragraph 1), provides for exchange rates and currency convertibility (paragraph 2), and sets forth permissible restrictions on the right to transfer freely (paragraphs 3, 4, 5 and 6).

442. The core of Article 1109 is set forth in its first paragraph, which provides:

> Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include
>
> (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
>
> (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
>
> (c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
>
> (d) payments made pursuant to Article 1110; and
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> (e) payments arising under Section B.[459]

443. Thus, Article 1109 requires not only that transfers relating to an investment be made "freely," but also that they be made "without delay." While NAFTA does not specify what

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[458] Meg Kinnear, Andrea Kay Bjorklund, et al., *Article 1109 – Transfers*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Supplement No. Main work (Kluwer Law International; Kluwer Law International), 2006, pp. 1109-1-13, **CL-0065**.

[459] Art. 1109(1), North American Free Trade Agreement, dated 1 January 1994, **CL-0001**.

constitutes "without delay," NAFTA commentators have observed that it means a "reasonable time."[460]

444. Article 1109(4) includes certain limited exceptions to the transfers obligation. That provision provides:

> Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
>
> (a) bankruptcy, insolvency or the protection of the rights of creditors;
>
> (b) issuing, trading or dealing in securities;
>
> (c) criminal or penal offenses;
>
> (d) reports of transfers of currency or other monetary instruments; or
>
> (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

445. Thus, NAFTA makes clear that a NAFTA Party cannot deny an investor's right to freely transfer funds in relation to its investment except in specifically enumerated circumstances and, in any event, can only do so "through the equitable, non-discriminatory, and good-faith application of its laws." As explained below, the Respondent has unlawfully prohibited the Claimant's ability to make transfers relating to its investment.

b) <u>The Respondent's Conduct Violated the Free Transfer Standard</u>

446. In April 2020, the SAT froze PEM's Mexican bank accounts located in Mexico.[461] These bank accounts were necessary for all aspects of the company's activities, such as mining operations, meeting payroll obligations, depositing VAT refunds and dividends and managing day-

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[460] *See* Meg Kinnear , Andrea Kay Bjorklund , et al., *Article 1109 – Transfers*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Supplement No. Main work (© Kluwer Law International; Kluwer Law International, 2006, pp. 1109-1-13, **CL-0065**.

[461] Official Letters, Nos. 400-24-00-02-00-2020-000968, 400-24-00-02-00-2020-000969 and 400-24-00-02-00-2020-000970, dated April 3, 2020, p. 2, **C-0002, p. 4954**; *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 105(a), **MS-0000**; Witness Statement of [redacted] dated April 25, 2022, ¶ 131(d), [redacted]**0000**.

to-day ordinary expenses.[462] These bank accounts were significant and critical to PEM's business: the aggregate balance of the frozen bank account currently amounts to approximately [redacted][463]

447. [redacted][5]

448. Following the SAT's decision to freeze PEM's bank accounts in Mexico, First Majestic instructed its Mexican legal counsel, the Chevez Law Firm, to contact the SAT's Collection Manager in Durango to resolve the issue. Despite Chevez's numerous efforts, the SAT has refused to lift the freeze.[466] In light of the situation, on April 9, 2020, PEM decided to initiate a lawsuit in the Mexican courts and to file an *amparo* action before the Second Judge of the District of the State of Durango.[467] The matter is currently pending and PEM's bank accounts remain frozen to this day.[468]

449. The SAT's decision to freeze PEM's bank accounts is illegal under Mexican law for several reasons. First, the immobilization of PEM's bank accounts violated Articles 149 and

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[462] Witness Statement of [redacted], dated April 25, 2022, ¶ 118 ("The freezing of our bank accounts which cut us from access to funds to pay our employees was of extremely great concern."), [redacted]**0000**.

[463] Expert Report of [redacted] dated April 25, 2022, ¶ 30, [redacted]**0000**.

[464] *Id.*, p. 4.

[465] Witness Statement of [redacted], dated April 25, 2022, ¶¶ 118, 31(k), [redacted]**0000**.

[466] *See id.*, at p. 38**.**

[467] Amparo Application, dated April 9, 2020, pp. 1-101, **C-0002, p. 4960**; *see also* Witness Statement of [redacted], dated April 25, 2022, ¶ 108, [redacted]**0000**.

[468] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 108, [redacted]**0000**; *see also* Chronology, dated April 25, 2022, **C-00002**.

157(X) of the Federation Tax Code because it "prevents [PEM] from fulfilling [its] labor obligations such as the payment of wages and salaries."[469]

450. Second, the freeze order failed "to justify the reasons why it considered that the embargoed goods [bank accounts] were not sufficient to cover the amounts of the tax credits determined for the fiscal years 2010 and 2011."[470] As noted in PEM's *amparo* pleadings, "in accordance with article 156-bis of the Federation Fiscal Code, the freezing of bank accounts is only appropriate when the embargo has been imposed on goods, the value of which is not sufficient to cover the amount of the tax credit in question."[471]

451. Third, the SAT failed to notify PEM within the mandatory 3-day period prescribed by Article 156-bis of the Federation Fiscal Code of its decision to freeze the company's bank accounts. The lack of notice left PEM in a complete state of uncertainty, "in contravention of the fundamental rights of legality and legal certainty established in Articles 14 and 16 of the Political Constitution of the United Mexican States."[472]

452. These violations of Mexican law establish that the Respondent's freeze of the Claimant's Mexican bank accounts was an inequitable and bad faith application of Mexican law and, as such, do not fall within an exception set forth in Article 1109(4). As the Claimant has been denied the free transfer of its funds held in unlawfully frozen accounts, the Respondent has violated Article 1109 of NAFTA.

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[469] *See id.,* at p. 41.

[470] *See id.,* at p. 46.

[471] *See ibid*.

[472] *See id*., p. 41.

4. Mexico Has Likely Breached Articles 1102 and 1103 of NAFTA (National Treatment and Most-Favored-Nation Treatment)

a) The Test for Less Favorable Treatment under Articles 1102 and 1103

453. Article 1102 and Article 1103 of NAFTA, respectively requires a NAFTA Party to accord to investors and investments of another NAFTA Party treatment "no less favorable than that it accords" its own investors and investments or the investors or investments of third countries "in like circumstances." The scope of the treatment covers "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[473]

454. Three elements must be established to establish a *prima facie* violation of Articles 1102 or 1103:

a) The host State has accorded to the protected foreign investor or its investment "treatment" with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;

b) The protected foreign investor or investment is in "like circumstances" with investors (the "comparator") from the host State or investments of host State nationals (Article 1102) or to investors from other states (Article 1103); and

c) The protected foreign investor or investment has received a treatment that is "less favorable" than that accorded to the comparator.[474]

455. *Treatment.* To constitute a breach of Articles 1102 or 1103, the investor or investment must have been given "treatment" with respect to the establishment, acquisition,

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[473] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, dated September 27, 2016, ¶ 410, **CL-0066**.

[474] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, dated May 24, 2007, ¶ 83, **CL-0067**; *see also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (redacted version), dated September 18, 2009, ¶ 228, **CL-0018**.

expansion, management, conduct, operation, and sale or other disposition of investments. This requirement has been interpreted very broadly:

> This is a broad definition indeed, as it includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity. The treatment is not different than the aggregate of all the regulatory measures applied to that business.[475]

456. *Like circumstances.* Second, treatment of the protected foreign investor must be less favorable than that provided to investors or investments from the host State or third States that are in "like circumstances." The tribunal in *Pope & Talbot II v. Canada* explained that this requirement is flexible: "By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[476] Thus, a wide range of circumstances may qualify as being "like" those of the claimant.[477]

457. Tribunals have looked at three factors to identify comparators in "like circumstances":

a) Investors who operate in the same business or economic sector;[478]

b) Investors who produce or provide competing goods or services;[479] and

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[475] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, dated March 31, 2010, ¶ 79, **CL-0068**.

[476] *Pope & Talbot v. Government of Canada* (UNCITRAL) Ad hoc, Award on the Merits of Phase 2, dated April 10, 2001, ¶ 75, **CL-0069**.

[477] *Id.*, ¶ 75.

[478] *See id.*, ¶ 78; *see also, S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Ad hoc, Partial Award (Merits), dated November 13, 2000, ¶ 250, **CL-0061**; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, dated May 24, 2007, ¶¶ 101-104, **CL-0067**.

[479] See e.g., Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Award, dated November 21, 2007, ¶ 199, **CL-0070**.

c) Investors who are subject to a comparable legal regime or requirement.[480]

458. *Relationship to a rational policy*. Once the claimant has established that it was afforded a treatment that is less favorable than that accorded in like circumstances to national or third-country investors, the burden shifts to NAFTA Party to establish that the discriminatory treatment has a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[481] The tribunal in *Pope & Talbot II* was clear that Article 1102 requires that "any difference in treatment ... be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments."[482] To meet this burden, NAFTA respondent must demonstrate that less onerous alternatives were not available in order to achieve its policy objective.[483]

b) Mexico Has Likely Accorded to First Majestic Treatment Less Favorable Than It Has Accorded to Mexican and Third-Country Investors and Investments in Like Circumstances

459. President López Obrador 's populist reform platform has put certain foreign companies in the cross-hairs of Mexico's tax regulator. The President has made clear that to raise revenue he would not tax his own people. Rather, he has decided to correct Mexico's tax deficit

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[480] See e.g., *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, (UNCITRAL) Ad hoc, Award, dated January 12, 2011, ¶¶ 165-67, **CL-0057**; see also *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (redacted version), dated September 18, 2009, ¶ 205, **CL-0018**; *Pope & Talbot v. Government of Canada*, (UNCITRAL) Ad hoc, Award on the Merits of Phase 2, dated April 10, 2001, ¶¶ 76, 88, **CL-0069**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, dated January 9, 2003, ¶ 156, **CL-0071**; *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, dated March 31, 2010, ¶¶ 82, 89, **CL-0068**.

[481] Pope & Talbot v. Government of Canada,(UNCITRAL) Ad hoc, Award on the Merits of Phase 2, dated April 10, 2001, ¶ 78, **CL-0069**; see also Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Award, dated November 21, 2007, ¶ 205, **CL-0070**.

[482] *Pope & Talbot v. Government of Canada* (UNCITRAL) Ad hoc, Award on the Merits of Phase 2, dated April 10, 2001, ¶ 79, **CL-0069**.

[483] *See, e.g., S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Ad hoc, Partial Award (Merits), dated November 13, 2000, ¶ 255, **CL-0061**.

by ending what he characterized as "tax forgiveness" for Mexico's largest companies, many of which are from G7 countries.[484] On the basis of this pretext, the President's administration has threatened and coerced certain corporations from the United States and Japan, including Walmart, Coca-Cola bottler Femsa, Toyota and IBM.[485]

460. Against the backdrop of Mexico's current populist policies and based on information currently available to the Claimant, the Respondent has likely violated Articles 1102 and 1103 of NAFTA.

461. *First*, the Respondent has afforded "treatment" with respect to the "expansion, management, conduct, operation, and sale or other disposition" of the Claimant and the Claimant's investments in Mexico. The "measures" set forth in Section IV.A.2 above and addressed in detail throughout this submission have directly affected First Majestic's ability to maintain its investment in Mexico and to earn a return on it, and for PEM to manage its operations freely and to operate profitability.[486]

462. *Second*, it is very likely that the Claimant can identify relevant "comparators," i.e., investors from Mexico and from third countries that are "in like circumstances" with the Claimant and its investments. It has already been demonstrated that the SAT entered into 90 APAs with foreign companies, including those that have nationalities other than Canadian.[487] It is very likely that it can be shown that certain of these APAs are with non-Canadian foreign companies that operate in the extractives sector or comparable industries under conditions similar to that of the Claimant and its investments. In addition, upon information and belief, Mexican companies, including some in the extractives industry, have also entered into APAs with the SAT. Thus, as

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[484] *See* Cecila Jamasmie, First Majestic takes Mexico tax row to arbitration, Mining, dated March 3, 2021, p. 1, **C-0033**; *see also supra* ¶ 133.

[485] *See* Daina Beth Solomon, Exclusive: Mexico's tax chief eyes criminal charges as path to tougher corporate enforcement, Reuters, dated June 9, 2020, **C-0003, p. 176**; *see also supra* ¶ 136.

[486] *See supra* ¶ 83.

[487] *See* Request for Information, No. 33300027722000399, dated February 28, 2022, p. 1, **C-0002, p. 387**; *see also supra* ¶ 53.

further evidence is developed through the procedures of this arbitration, the Claimant will very likely be able to prove the existence of comparators in like circumstances with the Claimant and its investments.

463. *Third*, it is very likely the Claimant can demonstrate that the Claimant and its investments were accorded less favorable treatment than investors and investments from Mexico and third countries. The analysis is straightforward. As First Majestic and its investment, PEM, have been singled out as the only company ever to have had its APA repudiated. Even putting aside the lack of legal basis for the SAT's actions under Mexican law and international tax law, qualitative First Majestic and PEM have clearly been mistreated relative to their likely comparators, which have never been denied their rights under the APA in this manner.

464. The Respondent's discriminatory treatment of the Claimant and its investment likely violates Articles 1102 and 1103 of NAFTA, and can be proven at a further stage of the proceedings. The Claimant therefore expressly reserves its right to supplement its submission in the course of the arbitration.

VI. DAMAGES

465. The Respondent has breached Articles 1102, 1103, 1105, 1109 and 1110 of NAFTA. [redacted] Under NAFTA, the Claimant is entitled to damages that will put it in the position it would have been in but for Mexico's breaches of its NAFTA obligations.

466. First Majestic claims compensation equal to the economic losses suffered by it as a result of Mexico's NAFTA breaches, as calculated in the expert report of [redacted] as of the date of the expropriation or as of the date of the award, whichever is highest, plus pre- and post-judgment interest.

A. Legal Standards

467. The standard of damages in the event of breach of NAFTA is governed by international law. As the Permanent Court of International Justice declared in the *Chorzów Factory*

case, damages must compensate for the injuries caused by the internationally unlawful act by placing the aggrieved party in the position it would have been in but for the wrongful act:

> Reparation, must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[488]

468. Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopts the principle of full reparation set forth in *Chorzów Factory* case.[489] The commentary to Article 31 explains that full reparation means compensation for any injury caused by the State in connection with its breach of international law:

> The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury" … is to be understood as including any damage caused by that act. In particular, … "injury" includes any material or moral damage caused thereby.[490]

469. The *Chorzów Factory* standard is widely recognized in investor-State arbitration: "Many tribunals have applied this principle in deciding on damages due for breach of the standard of fair and equitable treatment."[491] For example, in *S.D. Myers, Inc. v. Canada*, a NAFTA arbitration, the tribunal stated, "[t]he principle of international law stated in the Chorzow Factory

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[488] *The Factory at Chorzów (Germany v. Poland)* (Claim for Indemnity) (Merits), 1928 PCIJ Rep. Ser. A, No 17, dated September 13, 1928, p. 47, **CL-0072**.

[489] James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2005) ("ILC Articles on State Responsibility"), Art. 31(1) (Article 31 provides: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."), **CL-0073**; *id.*, Art. 36(3) ("The fundamental concept of 'damages' is . . . reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.") (quoting Lusitania case, UNRIAA, vol. VII (Sales No. 1956.V5), p. 32, at p. 39 (1923)).

[490] *Ibid.*

[491] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. Arb/03/15 Award, dated October 31, 2011, ¶ 701, **CL-0056**.

(Indemnity) case is still recognized as authoritative on the matter of general principles."[492] Further, the tribunal in *ADC Affiliate Ltd. v. Hungary* also stated in 2016, "[t]hus there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice."[493]

470. Accordingly, the prevailing rule in investor-State arbitration is that "compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act.'"[494]

471. This standard of full reparation applies in determining the compensation owed to the Claimant based on the Respondent's breach of Articles 1102, 1103, 1105, and 1109. NAFTA establishes no *lex specialis* regarding the measure of damages or compensation with respect to breaches of the fair and equitable treatment standard. Accordingly, the general international law principles reflected in *Chorzów Factory* apply.[495]

472. In addition, the compensation owed to the Claimant based on the Respondent's breach of Article 1110 also requires full reparation under international law beyond the express standard set forth in NAFTA. Article 1110(2) establishes a *lex specialis* that applies only in the case of lawful expropriation. That provision provides: "[c]ompensation shall be equivalent to the

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[492] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, dated November 13, 2000, ¶ 311, **CL-0061**.

[493] *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16), Award, dated October 2, 2006, ¶ 493, **CL-0074**.

[494] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated January 17, 2007, ¶ 352 **CL-0075**; *see also Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, dated March 29, 2005, ¶¶ 77-78, (holding that "in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred"), **CL-0076**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated August 20, 2007, ¶ 8.2.7 (providing that "regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action"), **CL-0050**; *Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated July 24, 2008) ¶ 774 (observing that "compensation is to cover 'any financially assessable damage including loss of profits insofar as it is established'"), **CL-0077**.

[495] Art. 1131, North American Free Trade Agreement, dated January 1, 1994, ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."), **CL-0001**.

fair market value of the expropriated investment immediately before the expropriation took place [and may include] going concern value … to determine fair market value." However, the Respondent's breach of Article 1110(1) constitutes an unlawful expropriation.

473. Accordingly, in addition to the fair market value of their investments, the Claimant is entitled to supplemental damages for all post-expropriation expenses.[496] As the tribunal in *Siemens AG v. Argentine Republic* stated: "The Tribunal considers that the claim on account of post-expropriation costs is justified in order to wipe out the consequences of the expropriation."[497]

474. Article 1110(2) provides that for lawful expropriation, damages shall be calculated "immediately before the expropriation took place." However, damages for unlawful expropriation need not be calculated as of that date. Instead, as described above, a state responsible for an illegal expropriation is obliged to put the injured party into the position it would be in if the wrongful act had not taken place – an obligation of restitution that applies as of the date when the award is rendered. Tribunals have adopted this approach because compensation for unlawful expropriation and other treaty breaches must take into account events that follow the initial taking or breach, as they may affect the extent of the damage caused by the illegal act and hence must be reflected in the calculation. As Professor Marboe states:

> It follows, thus, from the principle of full reparation as formulated by the PCIJ in Chorzów Factory, that the valuation is not normally limited to the perspective of the date of the illegal act or some other date in the past. An increase in value of the valuation object, consequential damage, subsequent events and information, at least up until the date of the judgment or award, must be taken into account in the evaluation of damages.[498]

475. Tribunals have also held that, just as investors should enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the award,

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[498] Irmgard Marboe, "Compensation and Damages in International Law – The Limits of 'Fair Market Value,'" 7 J. World Invest. & Trade 723 (2006), p. 753, **CL-0083**.

they should not bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period. Consequently, an investor that has been subject to an unlawful expropriation is entitled to elect between a valuation as of the expropriation date and as of the date of the award.[499]

476. This applies equally to damages arising from Mexico's breaches of Articles 1102, 1103, 1105(1), and 1109.[500]

477. First Majestic is entitled to damages in an amount sufficient to eliminate the consequences of Mexico's breaches of Articles 1102, 1103, 1105(1), 1109, and 1110 of NAFTA. As set out in Section III.J above, the series of events that began in 2019 soon after the acquisition of PEM by First Majestic with SAT's first re-assessment of PEM on August 8, 2019, followed by the *Lesividad* proceeding, its refusal to allow PEM to challenge its confiscatory re-assessments or permit PEM access to the MAP under three separate DTTs, its various unlawful collection activities including the freezing of PEM's Mexican bank accounts, and the ongoing harassment and intimidation of both PEM and First Majestic – [redacted]

478. *Damages for breach of Article 1110*. For Mexico's breaches of Article 1110, First Majestic and PEM are entitled to be put in the position it would have been in had the confiscatory steps not been taken, as of the date on which it was substantially deprived of its investments or the date of the award, whichever is higher. As set out in Section V.B.2 above, [redacted]

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[499] *See Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated July 18, 2014, ¶ 1763, **CL-0009**.

[500] *See Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated January 17, 2007, ¶¶ 349, 352, 360, **CL-0075**.

[501] *See Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated August 30, 2000, ¶ 113, **CL-0032**.

persisted in the repudiation of the APA, rendered its confiscatory reassessments, denied access to the domestic appeals process and then refused to permit PEM access to the MAP, followed by its freezing of PEM's Mexican bank accounts, its lands and mining concessions, and its continuous harassment of the company including ongoing threats of [redacted]. Thus, First Majestic is entitled to be put in the position it would have been had these steps not been taken.

479. *Damages for breach of Article 1105(1)*. Mexico breached Article 1105(1) both because Mexico, as out in Section V.B.1 negated through certain measures the APA entered into with PEM, acted in an arbitrary and discriminatory manner, targeted First Majestic and PEM administratively, failed to protect the legitimate expectations it created when issuing the APA which was relied upon by PEM and First Majestic, and thereafter denied access to administrative remedies. Thus, PEM and First Majestic are entitled to damages that put them in the position they would have been in absent the ongoing challenge concerning the validity of the APA and all other measures taken in violation of Article 1105 of NAFTA. In either case, the result is the same: PEM and First Majestic are entitled to be put in the position they would have been in had the measures not been imposed against them resulting in damages and losses being suffered.

480. Damages for breaches of Article 1109. Mexico breached Article 1109, as set out in [redacted] PEM and First Majestic are entitled to be put in the position they would have been in had the measures not been imposed against them resulting in damages and losses being suffered.

481. *Damages for breaches of Article 1102 and Article 1103*. Mexico likely breached Article 1102 by seeking to invalidate the APA issued to PEM while not taking similar measures against APA's of similarly situated Mexican mining companies. Mexico breached Article 1103 by keeping intact the APA's of similarly situated foreign-owned mining companies operating in Mexico and by refusing to accord the same treatment to PEM. PEM's damages resulting from Mexico's breach of Article 1102 and Article 1103 are the same as its damages resulting from Mexico's breach of Article 1105(1).

B. Methodology

482. As noted above, the prevailing rule in investor-State arbitration is that "compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act.'"[502] In other words, the governing principle for the quantification of damages is to determine a monetary amount that would place the damaged party (in this case, the Claimant and PEM as the investment) in the same economic position that it would otherwise have enjoyed had the alleged breaches not occurred.

483. As explained in detail above, the measures taken by the Respondent against the Claimant's key investment – PEM – have rendered PEM's shares and PEM itself worthless because Claimant is unable to realize any ongoing value from shares of PEM (in the form of dividends and capital repayment) and because of the substantial liabilities that have been claimed by the SAT against PEM for the 2010-2014 timeframe, with the prospect of significant additional amounts being reassessed by the SAT against PEM for future years. In these circumstances, no informed buyer would consider buying shares in PEM today. Consequently, Mexico has irreparably injured PEM. As also explained above, the Claimant is entitled to claim for losses on behalf of PEM, and any losses suffered by PEM can be claimed by reference to the lost enterprise value of PEM.

484. In these circumstances, the Claimant quantifies its damages relative to a hypothetical where the Respondent did not undertake the measures that breached NAFTA in this case, a methodology known as the "But-For Scenario." According to this methodology, the Claimant compares its economic position in the "But-For Scenario" (where the measures would

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[502] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated January 17, 2007, ¶ 352 **CL-0075**; *see also Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, dated March 29, 2005, ¶¶ 77-78, (holding that "in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred"), **CL-0076**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated August 20, 2007, ¶ 8.2.7 (providing that "regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action"), **CL-0050**; *Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated July 24, 2008, ¶ 774 (observing that "compensation is to cover 'any financially assessable damage including loss of profits insofar as it is established'"), **CL-0077**.

not have occurred) with its corresponding economic position in the "Actual Scenario," where the measures have (and continue to be) implemented. Put simply, this approach determines the Claimant's damages by calculating its economic position in the ("but for") scenario (that Mexico had not imposed its crippling measures), and compares it to Claimant's actual position. The extent to which that Claimant's economic position is higher in the "but for" scenario than in the actual scenario represents the Claimant's damages.

485. As noted by the Claimant's damages experts, an important consideration when undertaking a damages assessment in any dispute is the date as of which the damages are to be valued (Valuation Date). If the damages analysis is conducted as of the date of the breach, it is considered an ex-ante analysis. An ex-ante analysis only considers information that is known or available as of the date of breach. However, if the damages analysis is conducted as of a current date, it is considered an ex-post analysis. An ex-post analysis considers all known information, including information that became available after the date of breach.

486. Given the creeping and continuing natures of the Respondent's measures, the impact on the Claimant's investments in Mexico continue to evolve, especially as it relates to the Reassessments that are being undertaken by the SAT. For these reasons, the Claimant believes that an ex-post quantification of its damages in this case is appropriate; such a quantification considers all known events/actions impacting the Claimant's investments through the date of this report, and indeed further reports as the arbitration unfolds.

C. Calculation

487. The Claimant has been damaged in the amount which is estimated at this time to be [redacted] as a result of the Respondent's breaches of Articles 1102, 1103, 1105, 1109 and 1110 of NAFTA. The Claimant is also entitled to supplemental expenses including the cost of litigation this proceeding and proceedings in the Mexican courts and in administrative proceedings.

488. The Claimant has retained [redacted] to calculate the quantum of damages. The calculations and economic models employed by [redacted] are set forth in his First Expert Report (First Expert Report).

489. Generally, the Respondent's illegal measures have had two main impacts on the Claimant's investments in Mexico. First, the Respondent's repudiation of the APA and its subsequent reassessments undertaken by the SAT have resulted in devastating impacts on PEM and the San Dimas mine.

490. Second, by way of repeated obstruction, harassment and threats, PEM's ordinary business operations have negatively impacted the Claimant's investment in PEM in numerous ways to date, and have prevented the Claimant from realizing the value of its investments in PEM on an ongoing basis.

1. Calculation of Damages for First Majestic's Investment in PEM

491. As noted above, the Claimant's approach to calculating its damages relating to PEM, is to determine the current value of PEM and the San Dimas asset but for the illegal measures using traditional valuation methods (i.e., by valuing San Dimas using the Discounted Cash Flow method as well as the Market Approach as of a current date). If the total amount of the SAT's claims is higher than the current value of the San Dimas asset, then the damages claim would be limited to the current value of the asset.

492. Conversely, if the total amount of the SAT's claims is lower than the current value of the San Dimas asset, then the damages claim would be limited to the total amount of the SAT's claims (unless the subsequent enforcement/collection actions of the SAT/Respondent force the Claimant to abandon its investment in PEM/San Dimas in its entirety, in which case the damages calculation will be for the full value of the San Dimas asset).

493. However, the situation in relation to the reassessments continues to evolve: the SAT is in the process of issuing additional reassessments on PEM for the post 2015 timeframe. Similarly, the but-for value of the San Dimas asset will continue to evolve as the arbitration progresses due to changes in market conditions (chiefly silver and gold prices). This makes it difficult to undertake a DCF valuation of the San Dimas asset at this time. Furthermore, any valuation conducted as of a current date will need to be revised/updated closer to the hearing date, when further information/events pertaining to the measures will be known.

494. Consequently, for present purposes, the Claimant provisionally assessed PEM's losses by considering only the reassessments issued for the 2010-2014 timeframe and the terms of the acquisition of PEM/San Dimas by the Claimant in May 2018.

495. [redacted]

496. As further explained in the First Expert Report, the Claimant unlocked significant value in PEM/San Dimas by restructuring the streaming arrangement with Wheaton in conjunction with the acquisition. Under the New Stream Agreement, Wheaton would receive only [redacted] of gold and silver production at San Dimas (with silver production measured in gold-equivalent ounces) at a fixed price of [redacted] of gold equivalent, thereby allowing PEM to sell the remaining [redacted] of gold and silver production at spot market prices.

497. The restructured stream arrangement therefore allowed San Dimas and PEM to benefit from selling refined gold/silver at spot prices (whereas [redacted] of the refined silver under the original San Dimas Stream Agreement was sold to Wheaton at a low contractual price). The Claimant also resolved the ongoing labor disputes between PEM/San Dimas and the local labor unions, PEM was expected to be able to re-start production in certain areas that were previously deemed uneconomical under the original San Dimas Stream Agreement. For these reasons, the Claimant was able to unlock additional value in PEM/San Dimas upon its acquisition of PEM and San Dimas in 2018, and will be included in the damages analysis.

498. In order to estimate the value of PEM/San Dimas immediately after it was acquired by the Claimant, the Claimant's damages expert has considered an analyst report issued by BMO Capital Markets ("BMO") in May 2018, shortly after the Claimant's acquisition of Primero.

499. In this report, BMO undertook a sum-of-the-parts ("SOTP") valuation of the different projects/assets that make up First Majestic's project portfolio in Mexico. Of these projects, San Dimas was by far the most valuable. BMO's SOTP valuation implies a fair value of equity for San Dimas of [redacted], and an enterprise value (i.e., fair value of San Dimas asset) of USD [redacted].

500. As can be seen, the implied post-acquisition fair value of the San Dimas asset is very similar to (i.e., within [redacted] of) the total amount of the tax reassessments (of [redacted]) for the 2010-2014 timeframe. Therefore, for present purposes, the Claimant has provisionally equated the lost value of the San Dimas asset to the nominal amount of the reassessments.

501. However, it must be emphasized that, given the evolving situation in relation to the reassessments being undertaken by the SAT as well as the evolving external market conditions that will impact the but-for value of San Dimas, the Claimant will need to update this damages calculation to take into account any relevant ex-post developments. This includes specifically the need to consider any additional Reassessments to be issued for subsequent years (2015 and thereafter) and associated enforcement actions pursued by the Respondent, as well as the current value of the San Dimas asset "but-for" the measures, which will be determined using traditional valuation methods (DCF and Market Approach).

2. Calculation of Damages for Additional Heads of Loss

502. Notwithstanding the damages incurred in relation to the re-assessments and related actions undertaken by the Respondent, the measures have had additional adverse impacts on the Claimant's investments in Mexico. These losses are quantified where possible. Again, however, given the evolving situation in Mexico in relation to the Claimant's investments, the full extent of these losses suffered by the Claimant will depend, in large part, on the future outcome of the pending situation in Mexico. The Claimant thus reserves the right to revisit and/or modify its damages calculations, as needed during the course at the appropriate time.

503. These separate heads of losses resulting from the measures are: 1) loss suffered due to deferred and/or forgone capital expenditures for San Dimas which would have been

implemented but-for the measures; 2) loss suffered in relation to the Claimant's business operations in Mexico; 3) additional costs incurred by the Claimant/PEM due to the measures; 4) adverse impact on valuations of the Claimant's shares (as a listed company) due to the Claimant's diversification away from Mexico as a result of the measures; 5) loss suffered due to deferment of plans for future expansion/extension of San Dimas and seizure of land deeds and concession titles, 6) potential additional damages if the Respondent's enforcement actions result in insolvency/expropriation of the Claimant's investment in PEM/San Dimas, and 7) additional costs associated with employee terminations.

504. The Claimant seeks its due compensation for all of these heads of loss; the detailed calculations concerning each head is set forth in Section 6B of the First Expert Report. Section 7 of the First Expert Report includes Table 5, the Claimant's "Summary of Damages Suffered by Claimant."

3. Interest

505. First Majestic is entitled to interest, compounded annually, applied pre- and post-award, including on costs.

506. It is an "accepted legal principle" that, absent treaty terms to the contrary, tribunals may include an award of interest in the Claimant's favor.[503] The purpose of an award of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive."[504]

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[503] *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated November 21, 2000, ¶ 9.2.1, **CL-0050**; *see also* Draft Articles, Art. 38(1) ("Interest on any principal sum ... shall be payable when necessary to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."), **CL-0073**.

[504] *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated November 21, 2000, ¶ 9.2.3, **CL-0050**; *see also Vivendi II* ¶ 9.2.3. See also Draft Articles, Art. 38(1) ("Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."), **CL-0073**.

507. In the context of lawful expropriation, Article 1110(4) of NAFTA provides that compensation must include interest at a commercially reasonable rate. The Article provides: "If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment."[505] It is even "more appropriate" for a tribunal to order interest on compensation for wrongful expropriation.[506] In the context of expropriation, interest has invariably been calculated from the date of the taking.[507]

508. In applying the *Chorzów Factory* standard of full reparation, it is appropriate for the Tribunal to award compound rather than simple interest. [508] Compound interest reflects the additional sum that an investor would have earned if the money had been reinvested each year at the prevailing rate of interest.[509]

509. Simple interest provides inappropriate reparation because it "fail[s] to account accurately for the time value of money until the date of payment."[510] Compound interest, in

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[505] Art. 1110(4), North American Free Trade Agreement, dated 1 January 1, 1994, **CL-0001**.

[506] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated November 21, 2000, ¶ 9.2.2, **CL-0050**.

[507] *See Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated July 18, 2014, ¶ 1669, **CL-0009**.

[508] *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, dated October 5, 2012, ¶ 834, which describes compound rates as "the norm" in recent ICSID cases, **CL-0078**; *see also Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated November 21, 2000, ¶ 9.2.4, ("To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule"), **CL-0050**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 746 ("The Tribunal shares the view expressed by these awards that compound interest reflects economic reality and will therefore better ensure full reparation of the Claimant's damage."), **CL-0056**.

[509] *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, dated December 8, 2000, ¶ 129, **Exhibit CL-0079**; *see also* Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, dated February 17, 2000, ¶ 104, **CL-0080**; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated July 18, 2014, ¶ 1689, **CL-0009**.

[510] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.*A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, dated June 11, 2012, ¶ 1337, **CL-0081**.

contrast, is consistent with the *Chorzów* principle of full reparation because it more often reflects the actual damages suffered.[511] Contrary to simple interest, compound interest ensures that the amount of compensation reflects the additional sum that an investor would have earned if the money had been reinvested each year at generally prevailing rate of interest.

510. Tribunals that have awarded compound interest have predominantly ordered the annual compounding of interest.[512] Tribunals have also generally granted interest "until the date of full payment of the award."[513] In practice, this "automatically turns pre-award interest into post-award" interest.[514]

511. [redacted] has determined that the appropriate rate of interest is the Canadian bank prime interest rate, compounded annually, because it is a common and widely accepted reference point for financing or investment decisions in Canada.[515]

VII. REQUEST FOR RELIEF

512. The Claimant requests the Tribunal to provide the following relief:

1. DECLARE that Mexico has breached Articles 1102, 1103, 1104, 1105, 1109 and 1110 of NAFTA;

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[511] *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated November 21, 2000, ¶¶ 8.3.20, 9.2.4, 9.2.6,9.2.8., **CL-0050**.

[512] *See Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated July 18, 2014, ¶ 1671, **CL-0009**.

[513] *Id.*, ¶ 1672.

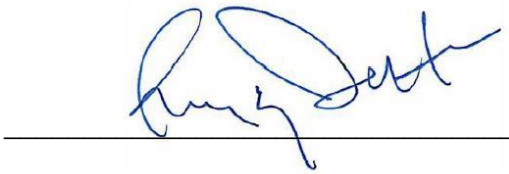
[514] Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW, British Institute of International and Comparative Law, dated November 2008, p. 387, **CL-0082**.

[515] *See* Expert Report of [redacted] dated April 25, 2022, [redacted]**0000.**

2. ORDER Mexico to compensate First Majestic for its losses resulting from Mexico's breaches of NAFTA and international law for an amount of at least [redacted];
3. DECLARE that: (a) the award of damages and interest be made net of all taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;
4. AWARD such other relief as the Tribunal considers appropriate; and
5. ORDER Mexico to pay all costs and expenses of these arbitration proceedings.

Date: April 25, 2022

Respectfully submitted,



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