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

FIRST MAJESTIC SILVER CORP.

Claimant

and

UNITED MEXICAN STATES

Respondent

(ICSID Case No. ARB/21/14)

DECISION ON RESPONDENT'S REQUEST FOR REVOCATION OF PROVISIONAL MEASURES

Members of the Tribunal

Prof. Giorgio Sacerdoti, President of the Tribunal
Prof. Stanimir A. Alexandrov, Arbitrator
Prof. Yves Derains, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

1 September 2023

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I. THE TRIBUNAL'S DECISION OF 26 MAY 2023 GRANTING THE PROVISIONAL MEASURE

A. The proceedings leading to the Tribunal's Decision of 26 May 2023

1. Respondent's Request dated 19 June 2023 (the "Revocation Request") has as its object the Revocation of the Provisional Measure granted by the Tribunal by its Decision of 26 May 2023 (the "PM Decision"). By this PM Decision, the Tribunal recommended, as a provisional measure:

> "*that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.*"[1]

2. The Tribunal briefly recalls hereafter the proceedings that lead to the PM Decision by which the Tribunal addressed a Request for a number of provisional measures submitted on 4 January 2023 by Claimant (the "PM Request"), on its own behalf and on behalf of its Mexican subsidiary Primero Empresa Minera, S.A. de C.V. ("PEM"), on the basis of Article 1134 of the NAFTA, Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

3. In its PM Request, Claimant requested that the Tribunal recommend the following provisional measures:

> "*a) The suspension or stay of the proceedings pending before the Collegiate Court, in relation to the amparo relief requested by PEM from the Collegiate Court.*
>
> *b) Requiring the SAT and any other authority working in conjunction with the SAT, to refrain from:*
>
> *i. undertaking any additional enforcement measures, whether* [redacted]*, against the Claimant and its investment (and the assets of the investment);*

[1] Decision on the Claimant's Request for Provisional Measures, 26 May 2023 ("PM Decision"), para. 143.

ii. undertaking any further tax audits and issuing any additional tax reassessments based on any methodology other than provided for in the APA [redacted]; and

iii. initiating any proceedings, whether [redacted] and its investment, whether in Mexico or residing outside the country, and whether currently or previously employed, in relation to the measures currently under adjudication before this Tribunal and also any settlement offer made to the Respondent (whether or not in compliance with Mexican law formalities) offers made by [redacted]

c) Requiring the SAT to make all payments of VAT refunds owed to PEM after the filing of the Request for Arbitration and all future VAT refund payments into a newly opened bank account of [redacted] that will remain free from SAT's seizure or freezing order; and

d) maintaining strict confidentiality of the arbitration proceeding such that no written or other media statements are made by the President of Mexico and any other Mexican government official, concerning the arbitration proceedings or the legal dispute with First Majestic and its investment."[2]

4. In its PM Request, Claimant indicated that it was seeking those provisional measures on its own behalf and on behalf of its investment (PEM) in order to:

> *"a) fully protect the Tribunal's jurisdiction,*
>
> *b) ensure that the Tribunal's jurisdiction is made fully effective, and*
>
> *c) to preserve their rights as detailed herein.*"[3]

5. Claimant specified the purpose of its PM Request as follows:

> *"The provisional measures requested seek to avoid having the Government of Mexico, while this Tribunal is exercising its jurisdiction, from:*

[2] Claimant's Request for Provisional Measures, 4 January 2023 ("PM Request"), para. 153.
[3] PM Request, para. 12.

> *a) interfering with the Tribunal's exclusive jurisdiction pursuant to Article 26 of the ICSID Convention to adjudicate the dispute in a neutral manner and in an international forum (and to the exclusion of any domestic process in Mexico), in relation to the measures taken and not taken, that have been identified by the Claimant to be in violation of Chapter 11 of NAFTA;*
>
> *b) exacerbating the dispute including by causing irreparable harm to the Claimant and its investment; and*
>
> *c) impinging on any legal rights of the Claimant and its investment including the ability to carry on its business at the San Dimas Mine which is the source of livelihood for hundreds of its employees and their families in Mexico.*"[4]

6. On 10 February 2023, Respondent presented its Response (the "PM Response") to Claimant's PM Request, providing its reasoned opposition.

7. On 9 March 2023, the Tribunal issued Procedural Order No. 4 on the organization of a hearing with the purpose of discussing with the Parties the PM Request (the "Hearing on Provisional Measures").

8. On 13 March 2023, the Tribunal held the Hearing on Provisional Measures by video-conference where the Parties elaborated on their respective requests. Subsequently, by letter of 3 April 2023, Claimant informed the Tribunal that on Friday, 31 March 2023, it had served the Government of the United Mexican States with a NAFTA Notice of Intent ("NOI") seeking recovery of VAT refunds in the amount of [redacted], by submitting a separate new ICSID dispute.[5]

[4] PM Request, para. 18 (internal references omitted).

[5] *See* PM Decision, para. 19. The Tribunal notes here the following, which results from the record of the present case as of today: (a) the NOI has been subsequently submitted by Respondent as R-0201 and by Claimant as C-0048; (b) Claimant has made good on its NOI by filing a Request of Arbitration with ICSID on 30 June 2023 (the last day available for the submission of "legacy investment claims" under NAFTA in accordance with USMCA Annex 14-C, *see* Respondent's Revocation Request of Provisional Measures, 19 June 2023 ("Revocation Request"), para. 22). Its text has feen filed by Respondent as R-0202; (c) this Request has been registered by ICSID on 21 July 2023 under ICSID Case No. ARB/23/28.

B. The PM Decision granting a provisional measure and the Tribunal's grounds supporting it

9. By its PM Decision, the Tribunal granted only one of the provisional measures sought by Claimant, recommending that Respondent:

> "*not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM*."[6]

10. Preliminarily, the Tribunal recalled the legal basis of its authority to grant the provisional measures requested, to which Claimant had referred "cumulatively" in its PM Request, namely: Article 1134 of the NAFTA, Article 47 of the ICSID Convention, and Rule 39 of the ICSID Arbitration Rules, whose texts are reproduced below:

> *Article 47 of the ICSID Convention*
>
> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*
>
> *Rule 39 of the ICSID Arbitration Rules: Provisional Measures*[7]
>
> *(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*
>
> *(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).*
>
> *(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified*

[6] PM Decision, para. 143.
[7] Text of 2006 in force when this arbitration was initiated and applicable pursuant to Procedural Order No. 1, para.1.

in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Article 1134 of the NAFTA: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

11. The Tribunal noted that Claimant had referred specifically to Article 1134 of the NAFTA pointing out that, in its view, such provision:

> "*explicitly provides this Tribunal broad discretionary authority to award interim relief to* preserve the rights of a disputing party, protect the Tribunal's jurisdiction and to ensure that its jurisdiction is made fully effective*, provided the order does not constitute an '...attachment or enjoin the application of measures alleged to constitute a breach referred to in Article 1116 or 1117.*'"[8]

[8] PM Request, para. 23.

12. Claimant had added, in relation to the limitation found in the last sentence of Article 1134 of the NAFTA, that "[n]*one of the provisional measures requested seek to attach or enjoin the application of the measures that have been enumerated by the Claimant to constitute a breach of Mexico's NAFTA obligations*."[9]

13. As to Claimant's third request (c) that future VAT refunds payable to PEM be made fully accessible and remain free from SAT's seizure or freezing of bank accounts – which was granted by the Tribunal and is now the object of Respondent's Revocation Request –, the Tribunal first noted Claimant's statement that: "*PEM has not authorized such VAT refunds being deposited into one or more frozen bank accounts. The SAT has not denied that these VAT refunds are owed to PEM, and yet has continued depositing the VAT refunds into frozen bank accounts without any direction or authorization from PEM*."[10]

14. As to the reasons put forth by Claimant in respect of the VAT refunds, the Tribunal noted that:

> "*Claimant explains that PEM is entitled to VAT refunds in accordance with Mexican law which are periodically paid to it by SAT on its bank accounts. Currently the equivalent of about* [redacted] *of such refunds, in part as a result of deposits made after the filing of the Request of for Arbitration, are deposited on bank accounts of PEM which have been blocked or seized by SAT as a result of certain tax enforcement and collection measures against PEM. Claimant does not ask that the freezing of the account be lifted (since this would run counter to the prohibition contained in the last sentence of Article 1134 NAFTA) but rather that refunds not be deposited on such frozen account, SAT having 'continued depositing the VAT refunds into frozen bank accounts without any direction or authorization from PEM.*'"[11]

[9] PM Decision, para.43, referencing PM Request paras. 24, 80-81.
[10] PM Request, para. 81.
[11] PM Decision, para. 42; PM Request, paras. 80-81. These measures are described by Claimant at para. 97, especially at para. 97 (ii) and (v) of its PM Request and appear to be the result of SAT's tax reassessments for the years 2010-2013 in disregard of the APA (whose validity is the object of the *Lesividad* and subsequent amparo proceedings). Claimant indicates that, on average, these VAT refunds payable in the future amount to [redacted].

15. According to Claimant, this request, – i.e., that Respondent not impede the rights and entitlement of Claimant to VAT refunds ("*which is not in dispute*") –, seeks to ensure that the *status quo* is preserved so as not to exacerbate the dispute.[12]

16. The Tribunal further noted in its PM Decision that Respondent objected to the presentation of the matter by Claimant.[13] According to Respondent, SAT had fully refunded, without any reduction upon verification, all VAT refunds that PEM had filed, "[p]*ara que PEM pueda recibir tales recursos, únicamente debe indicar en la solicitud de devolución, la cuenta bancaria a la cual se tiene que realizar el depósito correspondiente. Claramente, esta no es una situación que requiera la intervención del Tribunal*."[14]

17. The Tribunal also took due note that Respondent was challenging the admissibility of Claimant's PM Request under Article 1134 of the NAFTA which "*establece que '[u]n tribunal no podrá ordenar el embargo, ni la suspensión de la aplicación de la medida presuntamente violatoria a la que se refiere el Artículo 1116 o 1117*.'"[15] According to Respondent:

> "[a]*l pretender suspender el Amparo 12/2021, prohibir declaraciones públicas y ordenar devoluciones de IVA, la Solicitud de la Demandante intenta orillar al Tribunal a prejuzgar si tiene jurisdicción y resolver aspectos relacionados con las medidas reclamadas en este arbitraje, lo cual está prohibido en virtud del Artículo 1134 del TLCAN.*"[16]

18. After having reviewed the Parties' arguments, the PM Decision recapitulated the principles on the granting of provisional measures stemming from the above-quoted ICSID and NAFTA provisions on the matter.

19. The Tribunal recalled that:

> "*[a]ccording to Article 47 ICSID and ICSID Rule 39 'provisional measures' in the form of 'recommendations' may be granted by a*

[12] PM Decision, para. 43, referencing PM Request, paras. 79, 83.
[13] PM Decision, para. 62, referencing Respondent's Response to the Request for Provisional Measures, 10 February 2023 ("PM Response") paras. 37-38.
[14] PM Response, para. 38.
[15] PM Response, para. 89.
[16] PM Decision, para. 73, with reference to PM Response, paras.89-91.

tribunal, at the request of a party, in order to 'preserve the respective rights of either party.' According to Article 1134 of the NAFTA, interim measures of protection may be ordered or recommended by a tribunal to 'preserve the right of a disputing party' or 'to ensure that the Tribunal's jurisdiction be made fully effective', or 'to protect the Tribunal's jurisdiction.'"[17]

20. The Tribunal noted that:

> "*The Parties do not significantly differ on the substantive requirements, conditions or elements that are necessary to grant provisional measures under those provisions, but differ as to their contour, exact content, their respective importance and, of course, as to their presence or absence in respect of the Claimant's Request. While the Claimant has referred to them throughout the presentation of its various requests, the Respondent has listed them as five requirements or elements that must be present for provisional measures to be granted.89 The Tribunal rephrases them hereunder as appropriate to deal with the matter before it.*"[18]

> "*Those requirements are (a) that the Tribunal has* prima facie *jurisdiction; (b) that the provisional measures are aimed at protecting, while the dispute is pending, either a substantive right of the requesting party, (c) or a procedural right, notably as to the integrity of the arbitral process, the exclusivity of the ICSID arbitration, and/or are aimed at avoiding the aggravation of the dispute (maintaining the* status quo *while the dispute is pending); (d) from actions by the other party that are likely to cause an actual or imminent serious (irreparable) harm to the above rights, so that the requested measures appear to be necessary (proportionate) and urgent. Moreover, the measures are by their nature provisional, i.e., temporary, and must not prejudge the final decision of the dispute.*"[19]

> "*In this arbitration under NAFTA, an additional condition for granting interim measures under Article 1134 NAFTA is that such*

[17] PM Decision, para. 91 (Original footnote 88): "*The distinction between recommendations and orders does not appear to be relevant because it is generally admitted that 'tribunals have developed a doctrine under which provisional measures have binding effects on the parties*,'" Schreuer et al., 3rd ed., Commentary to Article 47, para. 21, CL-0085.

[18] PM Decision, para. 92

[19] PM Decision, para. 93.

> *measures do not 'enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.'*"[20]

21. In light of these criteria and based on the arguments of the Parties, the Tribunal decided to only grant the provisional measure requested by Claimant concerning the VAT refunds, reasoning as follows in the final paragraphs of the PM Decision:

> "*Claimant complains that tax refunds owed to PEM have been deposited, without PEM's authorization, on accounts of PEM that have been blocked by SAT pursuant to pending tax enforcement proceedings. The Claimant seeks an order restraining SAT from continuing to deposit VAT refunds on accounts that PEM cannot use so to ensure that the status quo is preserved and so not to exacerbate the dispute.*"[21]

> "*After having examined Claimant's Request and Respondent's Response, the exact factual situation has remained unclear to the Tribunal. Claimant has specified that it 'is not seeking to have the freezing of PEM's bank accounts undone including the funds that were on deposit at the time of the seizure, which could be viewed as directed at a measure being challenged in this arbitration,' contrary to the prohibition of Article 1134 of the NAFTA. The Respondent, on the other hand, has stated that VAT refunds are paid into accounts that the taxpayer indicates to the tax authorities in charge to make such payment. It is up to PEM therefore to indicate to these authorities (apparently SAT) on which accounts on which it seeks to obtain payments, which* per se *are available to PEM.*"[22]

> "*In this context, the Tribunal observes that the Claimant's request concerns future deposits and not the amounts already deposited in the past.*"[23] "*On the other hand, the unblocking of these previously deposited amounts would not be a proper object of a provisional*

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[20] PM Decision, para. 94.

[21] Original footnote 117 at PM Decision, para. 127: PM Request, paras 79, 83. "*The Claimant refers in support of its request* Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, dated 29 June 2009, para. 59, CL-0093, whereby that tribunal granted a provisional measure against the seizure of the oil production by Ecuador for the purpose of 'preservation of the status quo and non-aggravation of the dispute."*"

[22] Original footnote 118 at PM Decision, para. 128: PM Request, para.80; Original footnote 119 at PM Decision, para. 128: PM Response, paras. 34-39. "*Specifically 'la demandada tiene conocimiento que no se le ha negado ninguna de las solicitudes de devolución que PEM ha presentado mensualmente*," at para. 36."

[23] Original footnote 120 at PM Decision, para. 129: PM Request, para. 80. "*The Claimant's request concerns however 'payments of VAT refunds owed to PEM as to the filing of the Request for Arbitration' as well as 'all future payments' (at para. 78). The Tribunal considers however that a provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, in order not to aggravate the dispute and to maintain the* status quo*, cannot cover actions by the Respondent that predate the relevant request (4 January 2023)*."

measure because it would be a sort of anticipation of a decision on the merits on this issue."[24]

"*In light of the principles, recalled above*"[25] "*governing the issuance of provisional measures intended to avoid the aggravation of the dispute and maintain the* status quo *while the arbitration is pending, the Tribunal grants the following provisional measure (…).*"[26]

"*Finally, the Tribunal considers that the above recommendation is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would 'enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.' This is because the denial by SAT of PEM's free access to future VAT refunds is not a measure challenged by Claimant in its Request for Arbitration nor discussed in its Memorial.*"[27]

II. RESPONDENT'S REQUEST OF 19 JUNE 2023 FOR THE REVOCATION OF THE PROVISIONAL MEASURE GRANTED BY THE TRIBUNAL IN ITS PM DECISION OF 26 MAY 2023

A. Respondent's Arguments

22. Respondent, first of all, recalls that the Tribunal has the power to reconsider and revoke its provisional measures in accordance with Rule 39(3) of the ICSID Arbitration Rules.[28] On the merits, Respondent refers to the NOI served by Claimant to Respondent on 31 March 2023 by which Claimant notified to Respondent of its intention to initiate an ICSID proceeding, with the following object:

"*Las acciones del SAT consistentes en negar firmemente que PEM tenga acceso a los fondos respecto de los cuales legalmente tiene derecho a acceder es ilegal conforme a las leyes mexicanas y*

[24] PM Decision, para. 129.
[25] Original footnote 124 at PM Decision, para. 134: "*See above Section IV A.*"
[26] Original footnote 125 at PM Decision, para. 134: "*The Tribunal considers appropriate to remind here that although provisional measures under Article 47 of the ICSID Convention are labelled 'recommendations', ICSID tribunals have consistently held that such provisional measures have a binding effect on the parties, see Schreuer et al., 3rd ed., Commentary to Article 47, para. 21 with reference to relevant case law at paras 21-32, concluding at para.32 that 'there is now almost universal acceptance that provisional measures have binding force.' The Tribunal shares this view, based also on Article 1134 of the NAFTA on 'Interim Measures of Protection,' which authorizes tribunals to issue orders and not only recommendations to this effect*."
[27] PM Decision, para. 135.
[28] Revocation Request, para. 2.

> *contraviene las disposiciones del Capítulo 11 del TLCAN y, en consecuencia, constituye una disputa en términos del TLCAN*."[29]

23. More specifically, Respondent points out Claimant's allegation in the NOI that: "[l]*as restricciones impuestas por el Gobierno de México a las devoluciones de IVA supuestamente son violatorias de los Artículos 1102 (Trato Nacional), 1103 (Trato de Nación Más Favorecida), 1105 (Nivel Mínimo de Trato), 1109 (Transferencias) y 1110 (Expropiación y compensación) del TLCAN*."[30]

24. Respondent explains that, in its view,

> "*la medida provisional dictada en este procedimiento afectaría el desarrollo de la nueva reclamación referida en la NOI 2023 de dos maneras.* Primero*, interfiere con el proceso de consultas derivado de la NOI 2023, pues la medida provisional* de facto *suspende la medida que se reclama en este potencial nuevo procedimiento.* Segundo*, siguiendo el mismo razonamiento del párrafo 129 de la Decisión sobre Medidas Provisionales, el efecto de la medida provisional dictada sobre devoluciones del IVA futuras podría ser una especie de anticipación de una decisión sobre el fondo de la nueva reclamación, lo cual afectaría el debido proceso.*"[31]

25. In subsequent paragraphs of its Revocation Request, Respondent expands on its argument that the provisional measure granted in the current case would prejudice the new case between the Parties (now pending as ICSID Case No. ARB/23/28). This is because, in its view, the provisional measure relates to the same facts (the payment by SAT of VAT refunds on PEM's block accounts) that Claimant challenges in the new case as being in breach of NAFTA.

26. Respondent argues as follows:

> "*30.* [E]*l Tribunal determinó que la medida relacionada con las devoluciones de los saldos a favor por concepto de devolución IVA no contravenía lo dispuesto en el Artículo 1134 del TLCAN porque dichas devoluciones futuras no constituían una medida reclamada en el arbitraje ARB/21/14. El Tribunal señaló además que la medida*

[29] Revocation Request, para. 4 with reference to NOI, para. 6, R-0201.
[30] Revocation Request, para. 20.
[31] Revocation Request, para.7.

> *recomendada se emitió con el fin de evitar agravar la disputa y mantener el* status quo *del arbitraje ARB/21/14 mientras éste se encuentre pendiente de resolver.*
>
> *31. No obstante, la Demandada considera que esta recomendación no tomó en consideración el efecto que tendría sobre la nueva controversia notificada en la NOI 2023, el potencial arbitraje que podría suscitarse en poco tiempo y la baja probabilidad de que las negociaciones resuelvan la controversia dada la posición de la Demandante. De hecho, recientemente la Demandada recibió una comunicación de First Majestic en donde se señala que la reclamación se someterá a arbitraje antes del 1 de julio de este año si el Gobierno de México no accede a sus peticiones.*
>
> *32. La Demandada desea hacer notar al Tribunal que su recomendación afectará directamente la materia del nuevo arbitraje que se instaure a partir de la NOI 2023, que seguramente incluiría la presunta interferencia con el derecho legal de PEM a recibir y utilizar las devoluciones, pasadas y futuras, de saldos a favor por concepto de IVA. Esto es así porque la medida provisional otorgada por el Tribunal interferirá con una medida que es objeto de controversia en un procedimiento independiente al Caso ARB/21/14.*"[32]

27. Respondent also submits the following:

> "*33. La Demandada también encuentra preocupante que, al emitir una recomendación sobre una medida que es el objeto de otro procedimiento, se estén prejuzgando los méritos de ese nuevo caso, incluso antes de haber iniciado el arbitraje. Esto, desde luego, afectaría el desarrollo del nuevo procedimiento arbitral que inicie a partir de la NOI 2023.*
>
> *34. Como se dijo anteriormente, el Artículo 1134 del TLCAN prohíbe a un Tribunal ordenar la suspensión de una medida presuntamente violatoria. Es evidente que, si este Tribunal no puede ordenar la suspensión de medidas que son objeto del presente arbitraje ARB/21/14, mucho menos puede recomendar o suspender medidas que serán objeto de un procedimiento independiente cuya resolución corresponderá a otro tribunal.*"[33]

[32] Revocation Request, paras. 30-32.
[33] Revocation Request, paras. 33-34.

28. Respondent submits that the NOI (and, by implication, the subsequent initiation of the new ICSID case – which has in the meantime occurred –) represents a change of the relevant circumstances existing when the provisional measure was granted that allows and justifies its revocation in conformity with Rule 39(3) of the ICSID Arbitration Rules:

> "*27. Las circunstancias que existían al momento en que fue otorgada la medida provisional han cambiado a la luz de la presentación de la NOI 2023 y la inminente solicitud de arbitraje que seguramente se presentará antes del 1 de julio de 2023. Por esta razón, la Demandada considera indispensable que se revoque la medida provisional relacionada con los depósitos futuros por concepto de devolución de IVA con base en las Reglas 39.3 y 39.4 de las Reglas de Arbitraje a las que hace referencia el ¶1.1 de la Resolución Procesal 1 (RP 1).*"[34]

B. Claimant's Arguments

29. Claimant opposes Respondent's Revocation Request and asks the Tribunal to reject it, based on the following reasons. First, Claimants reiterates that PEM is entitled to the VAT refunds at issue. It also complains that Respondent has made misleading statements as to the reasons why the VAT refunds have not been paid into accounts that PEM could freely dispose of and alleges that there were no valid reasons for SAT to block those accounts in the first place.[35]

30. Claimant further explains that that it has filed the new case because of the continuing prejudice it is suffering by PEM being deprived of the amount of the VAT refunds to which it is entitled.[36] Claimant denies that the filing of the new case is a new fact that warrants the revocation of the provisional measure, arguing as follows:

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

[34] Revocation Request, para. 27.
[35] Claimant's Reply to Respondent's Request for Revocation of Recommendation of Provisional Measures, 21 July 2023 ("Reply to Revocation Request"), paras. 18-61.
[36] Reply to Revocation Request, paras. 64-65.

> *70. In the present case, there are no new material facts or considerations that the Tribunal has not previously addressed. In fact, as discussed, Claimant notified the Tribunal of its NOI with regard to the VAT refunds claim prior to the Tribunal issuing its Decision. As a result, Respondent is merely repeating its arguments from prior submissions and hoping now for a different result.*"[37]

31. Claimant recalls "*the extremely high threshold for justifying a reversal of the Tribunal's discretionary Decision.*"[38] In this case, the factors that pursuant to ICSID's longstanding practice may justify a tribunal to modify or revoke provisional measures are not present. Such factors are: (1) whether the circumstances underlying its original decision have changed; (2) whether it failed to consider a material fact in the prior record; (3) whether the provisional measures continue to be necessary; and (4) whether a revocation of provisional measures would cause a party irreparable harm.[39]

32. According to Claimant, the existence of changed circumstances is the critical factor for a tribunal's reconsideration of its order of provisional measures.[40] But, according to Claimant, "*Respondent's argument that the NOI is a 'changed circumstance' is entirely misplaced*."[41]

33. Claimant submits its views on the relation between the provisional measure and the claim made (or to be made) in the new arbitration concerning VAT refunds:

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

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[37] Reply to Revocation Request, paras. 63, 70.

[38] Reply to Revocation Request, paras. 66-69, quoting *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 8 Concerning Respondent's Request for Reconsideration of Procedural Order No. 7, 18 April 2017, para. 31, CL-0098: "*The very nature of the provisional measures analysis involves assessments of the necessity, urgency and proportionality of particular measures at particular points in time, and if the underlying facts have changed that alter the prior calculus, parties should be free to bring these changes to a tribunal's attention. This is different, however, from simply asking a tribunal to 'reconsider' its prior decision based on the exact same evidentiary and legal record as previously presented.*"

[39] Reply to Revocation Request, para. 71.

[40] Reply to Revocation Request, paras. 74-75, with reference to *Ioan Micula, Viorel Micula and others v. Romania* (I), ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 111, CL-0097 *"[The tribunal] further considered that the circumstances … had not changed to such an extent as to warrant revocation, suspension, or modification of the provisional measures in question*."

[41] Reply to Revocation Request, para. 79.

> *82. In fact, the contrary is the case. The Tribunal's interim measures of protection and the ability of PEM to access VAT refunds as of January 4, 2023 will make unnecessary for the Claimant to seek relief in the newly filed arbitration claim under the NAFTA with respect to VAT refunds paid to PEM as of January 4, 2023.*
>
> *83. Equally, it is entirely incorrect to claim, as has been done by the Respondent, that by 'issuing a recommendation on a measure that is the subject of another proceeding, the merits of that new case are being prejudged, even before having initiated arbitration."*"[42]

34. Claimant goes on explaining why, in its view, the new case and its object do not represent new circumstances that would warrant the re-examination of the provisional measure and its revocation as follows:

> "*84. The current Decision has been made based on the applicable laws including the principles related to the making of provisional relief decisions. As such, its provisional relief measures are made pending the making of the final award.*
>
> *85. The Respondent in asserting, that by this Tribunal making its interim decisions or when rendering its final award, it is somehow prejudging the merits of the new case, is simply absurd.*
>
> *86. It is axiomatic that an arbitral tribunal's mandate is limited to the resolution of the claims presented to it. The claims in the new arbitration are not before the Tribunal in this proceeding. Importantly, the Tribunal has no authority to decide a matter in the new arbitration. The arbitration tribunal in the newly filed NAFTA claim will make its decision based on the facts presented to it and the applicable law. It will not be bound by the decisions made by this Tribunal, although it may consider the impact of this Tribunal's decision in deliberating on issues such as double-recovery and indemnification for losses suffered.*"[43]

[42] Reply to Revocation Request, paras. 81-83.
[43] Reply to Revocation Request, paras. 84-86.

35. On this basis, and in view of the fact that no other circumstances have changed since the issuance of the PM Decision, Claimant concludes requesting the Tribunal to dismiss the Revocation Request.[44]

III. THE TRIBUNAL'S DECISION

A. Reasoning

36. From the above presentation of the Parties' arguments, it appears that they agree that a modification, or even more a revocation, of a provisional measure, which is within the powers of a tribunal as explicitly provided in Rule 39(3) of the ICSID Arbitration Rules, requires a material change in the circumstances that justified the granting of the measure in the first place.

37. The Tribunal recalls that in the present case the provisional measure at issue is a recommendation:

> "*that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.*"[45]

38. In order to determine whether there has been a material change in the circumstances that the Tribunal considered as justifying the granting of the provisional measure, it is necessary to look at the reasoning of the Tribunal in the PM Decision, which has been referred to above, namely:

> "*(a) that the Tribunal has* prima facie *jurisdiction; (b) that the provisional measures are aimed at protecting, while the dispute is pending, either a substantive right of the requesting party, (c) or a procedural right, notably as to the integrity of the arbitral process, the exclusivity of the ICSID arbitration, and/or are aimed at*

[44] *See* Reply to Revocation Request, para. 78: "*The growing amount of funds that remain inaccessible to Claimant only further demonstrates the need for the continuation of the Tribunal's recommendation based on the need to avoid exacerbation of the dispute and to maintain the* status quo*."*
[45] PM Decision, para. 143.

> *avoiding the aggravation of the dispute (maintaining the* status quo *while the dispute is pending); (d) from actions by the other party that are likely to cause an actual or imminent serious (irreparable) harm to the above rights, so that the requested measures appear to be necessary (proportionate) and urgent to that end. Moreover, the measures are by their nature provisional, i.e., temporary, and must not prejudge the final decision of the dispute.*"[46]

39. At paragraph 134 of the PM Decision, the Tribunal stated that it was granting the provisional measure "[i]*n light of the principles recalled above governing the issuance of provisional measures intended to avoid the aggravation of the dispute and maintain the* status quo *while the arbitration is pending.*"

40. The issue is therefore whether the introduction by Claimant of a new arbitration request against Respondent on 30 June 2023 (following the NOI of 31 March 2023), having as its object the recovery, as damages, of a sum equal to the amount of the VAT refund that PEM has been unable to access, based on the premise that the denial of such access represents a breach by Respondent of certain NAFTA obligations towards Claimant, represents a relevant change of the circumstances that justified the issuance of provisional measure.

41. The Tribunal believes that the answer cannot but be in the negative for the following reasons.

42. The initiation of the new ICSID Case No. ARB/23/28 does not change the fact that the VAT refunds to which PEM is entitled have been deposited (and continue to be deposited as long as Respondent does not comply with the provisional measure)[47] on accounts that are not freely accessible to PEM, thus aggravating the dispute and prejudicing the *status quo, pendente lite.*

43. In reaching this conclusion, the Tribunal also noted in the PM Decision that, based on statements made by Claimant itself,[48] the effective payment of those VAT refunds was not a claim that Claimant was making in this arbitration, so that a provisional order of payment

[46] PM Decision, para. 93.
[47] *See* Reply to Revocation Request, para. 52, referring to a letter of Claimant's counsel of 15 June 2023, seeking compliance with the PM Decision, C-0060.
[48] *See* PM Decision, para. 43, referencing PM Request, paras. 24, 80-81.

would not be contravening the provision in Article 1134 of the NAFTA that: "[a] *Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117*."[49]

44. Accordingly, the provisional measure was limited to VAT refunds to be paid after the date of the Claimant's PM Request (4 January 2023). Additionally, this Tribunal stressed that the order was provisional, to be in force as long as the present dispute was not decided, as required by Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

45. In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. [50] Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.

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

47. The Tribunal recognizes that the fact that the provisional measure is in place may (*de facto*) have an impact on the new case. Thus, as mentioned by Claimant itself, compliance by Respondent with the provisional measure (that is, making the VAT refunds accrued from 4 January 2023 freely available to PEM) might make the claim submitted by Claimant in ICSID Case No. ARB/23/28 in part moot.[51]

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[49] *See* PM Decision, paras. 42 and 135, referencing PM Request, paras. 80-81.

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

[51] Reply to Revocation Request, paras. 82-86.

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

49. For the same reason, the Tribunal cannot agree with Respondent where it submits that "[e]*s evidente que, si este Tribunal no puede ordenar la suspensión de medidas que son objeto del presente arbitraje ARB/21/14, mucho menos puede recomendar o suspender medidas que serán objeto de un procedimiento independiente cuya resolución corresponderá a otro tribunal*."[52]

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

[52] Revocation Request, para. 34.

B. Decision

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

1. Respondent's Request of 19 June 2023 that the Tribunal revoke its Decision of 26 May 2023 granting the provisional measure set forth therein is hereby rejected.

Prof. Stanimir A. Alexandrov
Arbitrator

Prof. Yves Derains
Arbitrator

Prof. Giorgio Sacerdoti
President

Dated: 1 September 2023