PARTIAL DISSENTING OPINION OF ARBITRATOR CHRISTIAN VIDAL-LEÓN

I. Introduction

1. I wish to begin this partial dissenting opinion by thanking my esteemed colleagues for their tireless efforts to try to bridge the differences in our views. After extensive and constructive discussions, we have come to agree on the large majority of the relevant legal and factual issues explained in the Non-Consolidation Order (the Order). However, I consider it necessary to write this partial dissenting opinion because our remaining diverging views lead to a different analysis of, and to a potentially different conclusion on, whether it is in the interests of fairness and efficiency to consolidate the claims at issue within the meaning of NAFTA Article 1126(2).

2. The chronology of events leading to these consolidation proceedings is set out in paragraphs 80 to 142 of the Order. To recall, on 1 March 2021, Claimant filed a request for arbitration with ICSID's Secretary-General challenging a large number of measures taken by the Mexican *Servicio de Administración Tributaria* (SAT) against *First Majestic*, a Canadian investor, and *Primero Empresa Minera S.A. de C.V.* (PEM), its investment in Mexico.[1] This arbitration is referred to as "FM1". More than two years later, on 29 June 2023, Claimant filed another request for arbitration with ICSID's Secretary-General challenging, specifically, "unlawful actions, impediments, and restrictions [taken by SAT] on PEM's legal rights and entitlement to access and use Value Added Tax (VAT) refunds totaling at the present time".[2] This arbitration is referred to as "FM2".

3. Against this background, these proceedings arose out of Respondent's request of 12 February 2024 for the consolidation of the FM1 and FM2 claims in accordance with NAFTA Article 1126(2). In particular, this provision – quoted at paragraph 172 of the Order – states that a tribunal constituted under that provision may consolidate claims: (1) that have been submitted to arbitration under NAFTA Article 1120; (2) that have a "question of law or fact in common"; (3) if that is "in the interests of fair and efficient resolution of the claims"; and (4) after hearing the views of the disputing parties. The parties agree on this cumulative legal standard.[3]

4. The parties do not contest that the first and fourth prongs of the legal standard under NAFTA Article 1126(2) are met. However, the parties disagree on the second and third prongs. With respect to the second prong – i.e. whether the claims in arbitrations FM1 and FM2 have a "question of law or fact in common" – I subscribe to the reasoning and the findings of the Order.

5. This individual opinion is limited to a discrete aspect of the application of the third prong of the legal standard under NAFTA Article 1126(2) – i.e. whether it is "in the interests of fair and efficient resolution of the claims" to consolidate the FM1 and FM2 claims. For the reasons explained below, my specific concerns relate to (1) the choice of the non-consolidation scenario used in the "efficiency" analysis and (2) the analysis of whether it would be "fair" to consolidate

[1] See, FM1 Request for Arbitration of 1 March 2021, (RM-0030-ENG), paras. 40-85.
[2] FM2 Request for Arbitration of 29 June 2023, (RM-0088-ENG), para. 5.
[3] See, Respondent's Consolidation Memorial, para. 63; and Claimant's Consolidation Counter-Memorial, para. 192.

the FM1 and FM2 claims. In my view, the relevant factual and legal issues in these proceedings show that "overall fairness and efficiency are in favour of consolidation in this case".[4]

II. The Choice of the Non-Consolidation Scenario Used in the "Efficiency" Analysis

6. The Order provides a legal interpretation of the "efficiency" standard in NAFTA Article 1126(2). Specifically, it correctly recalls that a "guiding test" relevant to assessing efficiency under NAFTA Article 1126(2) is to evaluate "the situation as it exists, and would continue to exist, if no consolidation were ordered".[5] It also finds that this hypothetical situation "must centre on the reasonable likelihood" that a certain scenario "could occur".[6] I refer to the hypothetical situation that would exist in the absence of consolidation as the "non-consolidation scenario".

7. In addition, the Order appropriately states that "the assessment of fair and efficient resolution of the claims under Article 1126(2) must consider the situation existing at the time of deciding upon the Consolidation Request".[7] On this view, the Order found that, since the filing of Respondent's request for consolidation of 12 February 2024, "a number of procedural developments have taken place in arbitrations FM1 and FM2" that changed the non-consolidation scenario.[8] In particular, (1) Claimant sought admission of ancillary claims in FM1, which are the same as the FM2 claims; (2) the FM1 tribunal granted Claimant authorization to file those ancillary claims; (3) Claimant sought to discontinue arbitration FM2; (4) Respondent objected to the discontinuance of the FM2 proceedings; (5) ICSID's Secretary-General declined Claimant's discontinuance request in view of Respondent's objection; (6) Claimant then "made a formal withdrawal of its claim in arbitration FM2" and stated that the FM2 proceedings should be discontinued; (7) Respondent again objected to the discontinuance of the FM2 proceedings and to the withdrawal of claims; and (8) ICSID's Secretary-General declined Claimant's statement that the FM2 proceedings should be discontinued given Respondent's objection thereto.[9]

8. On the basis of these events, the Order defined the non-consolidation scenario as a situation in which: (1) Claimant would seek to pursue the ancillary claims – identical to the FM2 claims – before the FM1 tribunal, which would decide on any objection brought by Respondent with respect to the admissibility of those claims[10]; and (2) Claimant does not pursue its claims in FM2, which it has withdrawn "with prejudice".[11]

9. I agree with the Order on the first part of the non-consolidation scenario concerning the filing of the ancillary claims with the FM1 tribunal. As of today, those claims have not been filed with the FM1 tribunal.[12] But even assuming, for the sake of the argument, that Claimant had already

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[4] See, to the contrary, Non-Consolidation Order, para. 281.
[5] *Canfor Corporation v. The United States of America; Tembec et al v. United States of America; Terminal Forest Products Ltd. V. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, (RL-0003-ENG), para. 126
[6] Non-Consolidation Order, para. 237.
[7] *Ibid.*, para. 235.
[8] *Ibid.*, para. 245.
[9] See, *Id*.
[10] See, *Ibid.*, para. 246.
[11] See, *Ibid.*, paras. 256, 266, 267, and 281.
[12] See, *Ibid.*, para. 246.

filed those claims, this would not mean that they have been admitted.[13] Under Rule 40(1) of the 2006 ICSID Arbitration Rules – which govern the FM1 proceedings – the admissibility of ancillary claims is not automatic upon request. Rather, it requires an assessment by the requested tribunal of whether these claims fall "within the scope of the consent of the parties and is otherwise within [ICSID's] jurisdiction". Rule 40(3) further entitles the other party to make "observations" on "any ancillary claim". Thus, should Claimant file the FM2 claims as ancillary claims before the FM1 tribunal – which it has not done as of yet – Respondent could still have the right to file an objection to their admissibility. Under Rule 41(1), it would be ultimately for the FM1 tribunal to rule on this potential objection.[14]

10. I am, however, unable to share my colleagues' view on the second part of the non-consolidation scenario concerning the current status of the FM2 claims. I provide below the reasons supporting my view.

a. The FM2 claims have *not* been withdrawn "with prejudice"

11. My colleagues consider that Claimant has withdrawn its FM2 claims with prejudice.[15] In my view, it has *not*. I explain below that: (1) there is no legal basis for finding that Claimant has unilaterally withdrawn its FM2 claims with prejudice; (2) allowing Claimant unilaterally to withdraw its FM2 claims with prejudice undermines Respondent's procedural rights under the 2022 ICSID Arbitration Rules; and (3) Claimant's statements concerning the unilateral withdrawal of the FM2 claims with prejudice cannot be relied upon to determine the status of those claims in arbitration FM2.

- *There is no legal basis for finding that Claimant has unilaterally withdrawn its FM2 claims with prejudice*

12. The 2022 ICSID Arbitration Rules governing the FM2 proceedings do not envisage the unilateral "withdrawal of claims with prejudice". Rather, there are only two ways under ICSID rules through which a claimant may seek the removal of its case (or its claims) from arbitral resolution. Rule 8 of the ICSID Institution Rules provides that a claimant may withdraw a "request for arbitration" but only "before it has been registered". Thus, once a request for arbitration has been registered, a claimant may no longer withdraw its request for arbitration. Since the request for arbitration in the FM2 proceedings was registered on 21 July 2023, Claimant may no longer seek the unilateral withdrawal of the FM2 claims contained in its request for arbitration.[16]

13. If, subsequent to the registration of a request for arbitration, a claimant wishes to have its case terminated without definitive resolution, it should request the discontinuance of the proceedings under Rule 56(1) of the 2022 ICSID Arbitration Rules. However, for this request to be successful, the other party must not object to it. In other words, a respondent retains the right

[13] Claimant's view is that the ancillary claim "has been admitted in FM1" and that the FM1's admission decision is "final and binding on the parties". (Claimant's post-hearing brief, para 21, and sub-heading 2. a)). For the reasons explained in paragraph 9 of this opinion, I disagree with this statement.

[14] I, therefore, share the Order's view that the FM1 tribunal would still have to decide on whether to accept the ancillary claims "should these ancillary claims be filed". (See, Non-Consolidation Order, para. 246).

[15] See, *Ibid*., paras. 256, 266, 267, and 281.

[16] See, FM2 Notice of Registration, 21 July 2023, (RM-0059-ENG).

to object to the discontinuance of the proceedings.[17] In the circumstances of arbitration FM2, Claimant has already sought to discontinue the FM2 proceeding, but these attempts have met with Respondent's objections.[18] As a result, ICSID has declined these discontinuance requests by noting that the FM2 "proceeding shall continue".[19] ICSID's responses to Claimant's request for the discontinuance of the FM2 proceeding are consistent with Rule 56(1) of the 2022 ICSID Arbitration Rules. The "proceeding" referred to in ICSID's responses evidently refers to both the arbitral procedure as such and the underlying claims pending in arbitration FM2.

14. Accordingly, ICSID rules envisage two legal avenues through which a claimant could remove its claims from arbitral resolution – i.e. withdrawal of the request for arbitration and discontinuance of proceedings. My colleagues and I agree that none of these options has crystallized in the FM2 proceedings.[20] However, in their opinion, there is a third avenue through which a claimant could have its FM2 claims removed – i.e. "withdrawal of a claim with prejudice to reinstatement".[21] This option would "entail[] that a party retracts its claim for relief that was previously made" when there is "a clear indication by the claimant that it will not pursue its claim".[22] The effect of the withdrawal of a claim with prejudice would be "that the claim is no longer pursued and is not pending to be decided as a positive claim".[23] To put it differently, a claimant may unilaterally decide to withdraw its claims with prejudice regardless of whether the respondent agrees to that action.[24]

15. I do not see the legal basis under ICSID rules for the "withdrawal of a claim with prejudice to reinstatement". Nor does the Order identify any legal basis for this type of action, whether in the ICSID Arbitration Rules or, otherwise, in any other sources of international law. This reinforces my view that the applicable ICSID rules do not envisage the right unilaterally to "withdraw a claim with prejudice to reinstatement". Rather, it bears repeating that there are *only* two ways to put an end to an ICSID dispute without final resolution of the underlying claims – i.e. withdrawal of a request for arbitration before registration and discontinuance of proceedings.

    - *Allowing Claimant unilaterally to withdraw its FM2 claims with prejudice undermines Respondent's procedural rights under the 2022 ICSID Arbitration Rules*

16. In my view, the unilateral withdrawal of claims with prejudice is inconsistent with the proper functioning of the 2022 ICSID Arbitration Rules. As explained earlier, under Rule 56(1), a respondent may object to a claimant's request for the discontinuance of a proceeding. In that case, "the proceeding shall continue".

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[17] At the same time, a respondent may not keep an idle proceeding indefinitely. Rules 57(a) and (b) of the 2022 ICSID Arbitration Rules establish that, if the parties have not taken any "steps in the proceeding" for more than 180 consecutive days, "they shall be deemed to have discontinued the proceeding". This applies also when the tribunal has not yet been constituted. (See, Rule 57(4)).

[18] See, Non-Consolidation Order, para. 245(i), (iii), (iv), and (vii).

[19] *Ibid.*, para. 245(v) and (vii).

[20] See, *Ibid.*, paras. 255 and 256.

[21] *Ibid.*, paras. 253-256.

[22] *Ibid.*, para. 256.

[23] *Id*. See, also, *Ibid*., para. 256.

[24] See, *Id.*, where the Order appears to take the view that Claimant "has withdrawn its entire case and there is no longer a case to be decided".

17. The issue of whether respondents may object to a request for discontinuance is not merely an abstract legal discussion. In the circumstances of arbitration FM2, I recall that Respondent has already objected at least twice to the discontinuance of the FM2 proceedings.[25] Moreover, Respondent has indicated that it would continue to object to any future attempts at discontinuing those proceedings. In view of Respondent's objections to discontinuance, my colleagues are of the opinion that "both FM1 and FM2 continue to exist as separate proceedings".[26] However, in their view, the unilateral withdrawal of claims with prejudice "mean[s] that the claim is no longer being pursued and therefore is not pending to be decided as a positive claim".[27]

18. I do not see how, as a result of Respondent's objections to discontinuance, the FM2 proceedings would "continue to exist as separate proceedings" but without any FM2 claims "pending" in those proceedings. As stated earlier, I read the term "proceeding" in Rule 56(1) of the 2022 ICSID Arbitration Rules as referring not only to the procedure as such but also to the underlying claims in that dispute. Thus, allowing Claimant unilaterally to withdraw its claims with prejudice would remove the key object of an arbitral proceeding – i.e. the claims – thereby undermining the operation of the discontinuance proviso in Rule 56(1) of the 2022 ICSID Arbitration Rules.

19. Moreover, the unilateral withdrawal of claims with prejudice affects a respondent's right to seek an Award under the "default" provision in Rule 49 of the 2022 ICSID Arbitration Rules. It bears recalling that, according to the Order, the trigger for the "withdrawal of a claim with prejudice to reinstatement" is the existence of "a clear indication by the claimant that it **will not pursue its claim**".[28] Interestingly, this is exactly the definition of "default" under Rule 49(1) of the 2022 ICSID Arbitration Rules. To recall, this provision states:

> A party is in default if it fails to appear or present its case or **indicates that it will not appear or present its case**. (Boldface added).

20. Thus, Claimant's statement that it "will not pursue a claim" – or "will not … present its case" – does not mean that this claim is withdrawn. Rather, it means that Claimant has expressed its intention to be in default. In this connection, Rule 49(2) of the 2022 ICSID Arbitration Rules describes the consequence of default in the following terms:

> If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

21. The neutral references to "party" in Rules 49(1) and (2) suggest that both the claimant and the respondent are capable of being in default. Similarly, both the claimant and the respondent could potentially be "the other party" entitled to request an Award on the questions submitted to a tribunal. I understand the expression "the questions submitted to it" in Rule 49(2) to include the claims contained in the request for arbitration. Accordingly, in the context of arbitration FM2, if Claimant indicates that it "will not pursue its claim" – or "will not … present its case" –

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[25] See, *Ibid.*, para. 245(iv) and (vii). See, also, Respondent's response of 5 August 2024 to Claimant's letter of 31 July 2024 (CM-0025-SPA) and Respondent's letter of 7 October 2024 (RM-0086-SPA).

[26] Non-Consolidation Order, para. 256.

[27] *Id*.

[28] *Id*. (Boldface added).

Respondent may request that an FM2 tribunal render an Award addressing the claims that have been submitted in that arbitration.

22. As explained earlier, Respondent indicated in these consolidation proceedings that, in addition to objecting to the discontinuance of arbitration FM2, it would seek from an FM2 tribunal an Award on the merits.[29] Respondent's position could arguably be viewed as unusual in international investment arbitration. In addition, as the Order observes, Respondent has not explained why it would be in its own interest to object to the discontinuance of the FM2 proceedings and to seek an Award on the merits from an FM2 tribunal.[30]

23. Regardless of whether it is in own interest to do so, Respondent has the right, under Rule 49(2), to seek an Award on the merits from an FM2 tribunal. However, the unilateral withdrawal of claims with prejudice would entail that the claims have been "remove[d]"[31] and, therefore, would no longer be "pending" in arbitration FM2. In that case, I do not see how respondent could meaningfully request an FM2 tribunal to "address the questions submitted to it and render an Award" within the meaning of Rule 49(2).

24. For the reasons set out above, I see the discontinuance and the default provisions in the 2022 ICSID Arbitration Rules as complementary. Rule 56(1) recognizes a respondent's right to object to a claimant's request for the discontinuance of proceedings. There are several reasons as to why a respondent might wish to have the proceedings "continue". My colleagues have identified one – i.e. to protect an outstanding costs claim.[32] But another legitimate reason for objecting to the discontinuance of proceedings is so that a respondent can avail itself of the right, under Rule 49(2), to seek an Award on the merits from a tribunal even if the claimant is in default. Against this backdrop, it is clear to me that allowing Claimant unilaterally to withdraw the FM2 claims with prejudice would effectively prejudice Respondent's rights: (1) to object to the discontinuance of the FM2 proceedings (Rule 56(1)); and (2) to pursue an Award on the merits from an FM2 tribunal even if Claimant does not pursue its claims (Rule 49(2)).

    - *Claimant's statement concerning the unilateral withdrawal of the FM2 claims with prejudice cannot be relied upon to determine the status of that claim in FM2 proceedings*

25. The finding that Claimant has already withdrawn its FM2 claims with prejudice is premised on Claimant's statement – both at the Hearing and in its post-hearing brief – that the FM2 claims have "been withdrawn effectively with prejudice".[33] It bears noting that these statements were made during, and for the purpose of, these consolidation proceedings.[34]

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[29] See, *Ibid.*, para. 241. See, also, Respondent's post-hearing brief, answer to question 8(a), para. 82.
[30] See, Non-Consolidation Order, para. 273.
[31] *Ibid.*, paras. 267 and 278.
[32] See, *Ibid.*, para. 255.
[33] *Ibid.*, para. 254, quoting Hearing Transcript (English) 28 January 2025, 289:13-18. A similar statement was made in Claimant's post-hearing brief, para. 62.
[34] Claimant states that it has withdrawn the FM2 claims "with prejudice" on the assumption that "the FM1 Tribunal has admitted the Claimant's FM2 claim as an ancillary claim". (Claimant's post-hearing brief, para. 62). Thus, it seems that, for Claimant, the ancillary/FM2 claims are now safely harboured in arbitration FM1 and, therefore, there is no risk of losing them if they are withdrawn from arbitration FM2 even "with prejudice". However, as explained in the Order, the ancillary claims have not been filed, let alone admitted, in arbitration FM1. If requested by the parties, the FM1 tribunal would still have to address whether the withdrawal of the FM2 claims "with prejudice" has any effect on the admission of the ancillary claims in arbitration FM1. (See, Non-Consolidation Order, paras. 246 and 256).

26. Leaving aside the issue of whether there is some legal basis for this type of unilateral withdrawal of claims, it is not clear to me how that statement can produce legal effects on the status of the FM2 claims in the separate FM2 proceedings. At a minimum, this statement should be submitted to an FM2 tribunal or, if still not constituted, to ICSID's Secretary-General. This tribunal – or ICSID's Secretary-General – should ultimately accept, or at least take note of, the withdrawal of claims. In other words, before the Consolidation Tribunal can consider that the FM2 claims have been withdrawn with prejudice, there should be a prior decision or action to that effect in the context of arbitration FM2.

27. In sum, I am unable to agree that Claimant has withdrawn its FM2 claims with prejudice as a result of a statement made during the separate consolidation proceedings. Rather, as explained, there are *only* two legal ways under the relevant ICSID rules to remove claims from arbitral resolution – withdrawal of a request for arbitration under Rule 8 of the ICSID Institution Rules and discontinuance of proceedings under Rule 56(1) of the 2022 ICSID Arbitration Rules. Claimant has not been able successfully to avail itself of either of these two options. In contrast, unilateral withdrawal of claims with prejudice after a request for arbitration has been registered has no legal basis and, therefore, is not available to Claimant. It follows, therefore, that the FM2 claims are still pending before the FM2 proceedings. Assuming otherwise would undermine Respondent's right to object to the discontinuance of the FM2 proceedings (Rule 56(1)) and to seek an Award on these claims (Rule 49(2)). At any rate, I do not consider Claimant's statement – *made in these consolidation proceedings* – that it has withdrawn its FM2 claims with prejudice to have any legal effect on the status of those claims in the separate FM2 proceedings.

b. The finding that the FM2 claims have already been withdrawn has serious implications for the "efficiency" analysis under NAFTA Article 1126(2)

28. The finding that the FM2 claims have been withdrawn with prejudice led to an efficiency analysis in which my colleagues compared the non-consolidation scenario – consisting of: (1) the FM1 tribunal deciding on whether to accept the ancillary claims; and (2) the FM2 claims being withdrawn with prejudice – with a scenario in which consolidation under NAFTA Article 1126(2) would be ordered. It is logical that, under this comparison, my colleagues' analysis concluded that it would not be in the interests of efficiency to consolidate the FM1 and the FM2 claims. Simply put, since the FM2 claims are no longer "pending" in arbitration FM2[35], there is nothing to consolidate anymore. As the Order expresses it, "the fundamental basis for a consolidation, which would be to resolve claims submitted to multiple arbitrations that have a question of law or fact in common" is "remove[d]".[36]

29. On that understanding, the Order conducted its "efficiency" analysis under NAFTA Article 1126(2) by comparing the implications of the consolidation and non-consolidation scenarios for

[35] Non-Consolidation Order, para. 256. See, also, *Ibid.*, para. 257. Under this non-consolidation scenario, the Order logically concluded the following: "In the circumstances of this case, the effect of consolidation would not be to avoid a multiplicity of proceedings in which Respondent must defend claims with factual or legal issues in common, but instead would result in substituting the competence of one tribunal already at an advanced stage of its proceedings with that of another". (*Ibid.*, para. 281).

[36] *Ibid.*, para. 267. See, also, *Ibid.*, para. 278.

(1) litigation time and costs, and (2) the risk of conflicting decisions. To avoid unnecessary repetition, I refer to paragraphs 258 to 268 where the Order carefully undertakes that analysis.

30. I have expressed earlier my misgivings about the legal soundness of the unilateral withdrawal of claims with prejudice. Rather, in my opinion, a non-consolidation scenario should have considered that: (1) the FM1 tribunal would receive and decide on a request for admission of ancillary claims; and (2) the FM2 proceedings "shall continue", which means that the FM2 claims are not withdrawn. This non-consolidation scenario would be in accordance with the legal standard under NAFTA Article 1126(2) as laid out in the Order – i.e. a non-consolidation scenario based on "the situation existing at the time of deciding upon the Consolidation Request".[37]

31. Accordingly, the more complex and uncertain (but appropriate) non-consolidation scenario could lead – depending on the outcome of the parties' requests and objections in both FM1 and FM2 proceedings – to at least three potential permutations:

    i. The FM1 tribunal would assume jurisdiction over all of the claims – including the ancillary claims – and the FM2 proceedings would be terminated. This would occur if the FM1 tribunal admits the ancillary claims and an FM2 tribunal or ICSID's Secretary-General discontinues or otherwise terminates the FM2 proceedings.

    ii. The FM1 would assume jurisdiction over all of the claims – including the ancillary claims – but the FM2 proceedings would continue its work, thereby leading to duplication of claims in both tribunals. This situation could take place if the FM1 tribunal admits the ancillary claims, and the FM2 proceedings are not discontinued and Respondent seeks an Award on the merits.

    iii. Each tribunal would address the claims originally submitted to each of them. This could occur if: (1) the FM1 tribunal rejects the admission of the ancillary claims; and (2) the FM2 proceedings are not discontinued and Respondent seeks an Award on the merits. This could also occur if Claimant ultimately decides not to file a request for admission of ancillary claims and does not seek withdrawal/discontinuance of FM2 claims/proceedings.[38]

32. To recall, the Consolidation Tribunal conducted its efficiency assessment of whether consolidation was in the interests of efficiency under NAFTA Article 1126(2) based on litigation time/costs, and the risk of conflicting decisions. In my view, this efficiency assessment should have taken account of the different permutations of the non-consolidation scenario. For instance, the Consolidation Tribunal should have considered the potential time/costs associated with the parallel conduct of the FM1 and FM2 proceedings under the second and third permutations of the list above. These time/cost implications should then be compared to the time/costs implications of a consolidated proceeding under NAFTA Article 1126(2).

33. Similarly, in the case of the risk of conflicting decisions, the relevant comparison should be between the different permutations of the non-consolidation scenario and a consolidation

[37] *Ibid.*, para. 235.

[38] In my view, this is still a legally possible scenario since, as explained earlier, neither an FM2 tribunal nor ICSID's Secretary-General has decided on or taken note of the withdrawal of claims with prejudice.

scenario in which that risk would not arise. For instance, under the second permutation listed above, it seems clear that a risk of conflicting decisions could arise as the claims heard by the FM2 tribunal would also be heard as ancillary claims by the FM1 tribunal. I see this as highly relevant for the analysis of whether consolidation would be in the interests of efficiency within the meaning of NAFTA Article 1126(2). In addition, there is a potential for conflicting intermediate factual findings under the third permutation listed above as both tribunals would have to assess similar factual issues as part of their analysis.[39] Therefore, there would be a risk of conflicting decisions to the extent that, as indicated in these consolidation proceedings, Respondent continues to object to the discontinuance of the FM2 proceedings and pursues an Award in arbitration FM2.

34. It is unnecessary to provide in this partial dissenting opinion a detailed "efficiency" analysis premised on what I consider to be the appropriate non-consolidation scenario. It suffices to observe that the "efficiency" analysis under NAFTA Article 1126(2) and, most likely, the ultimate finding of whether it is in the interests of efficiency to consolidate the FM1 and FM2 claims would have been significantly different. For this reason, I feel compelled to submit this partial dissenting opinion.

III. Consolidation of Proceedings under NAFTA Article 1126(2) is the Fairer Way to Resolve the Claims at Issue

35. In addition to efficiency, NAFTA Article 1126(2) requires an assessment of whether consolidation of proceedings would be "in the interests of fair … resolution of the claims". I refer to this as the "fairness standard".

36. The tribunal in *Canfor* aptly held that the fairness standard in NAFTA Article 1126(2) "indicates that the **interests of all parties** involved should be balanced in determining what is the procedural economy in the given situation".[40] In this connection, the complexities permeating this case arise from past and projected actions of both parties as laid out in paragraph 7 above.[41] All of these actions are, in principle, grounded in legitimate rights to which both parties are arguably entitled under the relevant arbitral rules.

37. At the same time, as the Order indicates, both parties have expressed their agreement that it would be fairer that the FM1 and the FM2 claims be heard by only one tribunal.[42] The disagreement between the parties therefore lies in which tribunal should take on this task. For Respondent, it should be the Consolidation Tribunal under NAFTA Article 1126; for Claimant, it

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[39] To avoid those conflicting decisions, the FM1 and FM2 tribunals could coordinate their work – e.g. along the lines of the proviso in Rule 46(3) of the 2022 ICSID Arbitration Rules. While this would mitigate or eliminate the risk of conflicting decisions, this option would add more time for the resolution of the disputes as one tribunal would potentially have to delay its work until the other tribunal renders a decision. This additional time – which would not be required if the FM1 and FM2 claims were consolidated – would then be assessed against the familiarity advantage of the FM1 tribunal, that is, the criterion that was pivotal in the Order's analysis of the litigation time/costs.

[40] *Canfor Corporation v. The United States of America; Tembec et al v. United States of America; Terminal Forest Products Ltd. V. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, (RL-0003-ENG), para. 125. (Boldface added).

[41] See, also, Non-Consolidation Order, para. 245.

[42] See, for instance, Claimant's post-hearing brief, para. 34; and Respondent's post-hearing brief, para. 74. The Order also recognized that, like Respondent, Claimant "concede[s] that it would be fair and efficient to resolve its claims in one single arbitration proceeding". (Non-Consolidation Order, para. 249).

should be the FM1 tribunal upon admitting the ancillary claims. This begs the question of which of these approaches is fairer.

38. On the one hand, Respondent grounds its right to seek consolidation in NAFTA Article 1126(2). This provision explicitly states that claims submitted to separate NAFTA Article 1120 tribunals may be consolidated if the conditions set forth therein are met, even if the other party opposes.[43]

39. On the other hand, Claimant effectively seeks consolidation of FM1 and FM2 claims through an expanded FM1 tribunal by way of admission of the "ancillary claims" under Rule 40 of the 2006 ICSID Arbitration Rules and the withdrawal of the FM2 claims. However, neither the 2006 nor the 2022 ICSID Arbitration Rules allow for a *unilateral* decision by one party to have claims in separate proceedings consolidated. Specifically, the 2006 ICSID Arbitration Rules (applicable in the FM1 proceedings) do not contain any rules on consolidation. Guided by the principle of party autonomy, a few tribunals governed by these Rules have proceeded to consolidation of claims, but only with the consent of the parties. This practice was codified in Rules 46(1) and (2) of the 2022 ICSID Arbitration Rules (applicable in the FM2 proceedings), which provide for the possibility to consolidate two or more pending arbitrations but, again, subject to the agreement of the parties. Thus, the approach adopted by Claimant seeking the admission of ancillary claims and the discontinuance of the FM2 proceedings effectively circumvents the requirement, under the relevant ICSID rules, to have an *agreement* as a condition precedent for the consolidation of claims submitted in two different ICSID arbitrations.

40. In my view, this confirms that Respondent holds a better right to have the FM1 and FM2 claims be heard by the Consolidation Tribunal under NAFTA Article 1126(2). Given that both parties have expressed their preference to have the totality of the FM1 and FM2 claims adjudicated by a single tribunal, it is *fairer* that this be done by a tribunal explicitly entrusted in the relevant treaty to do so. As explained above, Claimant's approach seeks to dispense with the agreement of the parties, which is a condition *sine qua non* for consolidation of claims under ICSID rules. This, in my view, is a less fair alternative.

41. For these reasons, I am bound to depart from my colleagues' view that it is not "established that potentially facing all of Claimant's claims in arbitration FM1 would result in unfairness to Respondent".[44] Rather, as I see it, considerations of fairness tilt the balance in favour of consolidation under NAFTA Article 1126(2).

IV. Conclusion

42. The complexity of the Consolidation Tribunal's decision results from actions taken by both parties in the context of the FM1, FM2, and the consolidation proceedings. The parties have

[43] As the Order correctly states, both parties have consented to the possibility that claims in different NAFTA proceedings be consolidated if the conditions in NAFTA Article 1126(2) are fulfilled. (See, *Ibid.*, para. 177).

[44] *Ibid.*, para. 272.

faulted each other for engaging in bad faith practices[45], abuse of process[46], and/or abuse of rights.[47] Like my colleagues, I resist to think that the parties have actually acted inappropriately. Rather, it seems to me that the parties have availed themselves of the procedural options available to them to pursue their interests and have not crossed the line of inappropriate procedural behaviour. Their actions, however, have led to a state of uncertainty about the current status and potential resolution of these related disputes, especially with respect to the FM2/ancillary claims. As a general consideration, I fail to see how leaving the parties in a state of uncertainty as to the current and future situation of the FM1 and FM2 proceedings would serve the interests of justice better – and, therefore, be more "fair and efficient" – than the certainty inherent in a decision in favour of consolidation under NAFTA Article 1126(2).

43. In closing, I recall that, under NAFTA Article 1126, "[i]t suffices that the [Consolidation] Tribunal is **convinced** that efficiency in the resolution of the claims will, under the circumstances before it, be served by a consolidation".[48] However, "conviction" must still be based on a proper and objective assessment of all of the relevant facts and legal issues. My colleagues and I have taken different views about the legal status of the FM2 claims. They are convinced about their approach as much as I am about mine. Because of this disagreement, I am bound to submit this partial dissenting opinion. In doing so, I would like to express my gratitude to them for the professional and constructive discussions and to the ICSID Secretariat for its support throughout these consolidation proceedings. I hope that the parties find a smooth way to resolve the entirety of these claims.

[Signed]

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Christian Vidal-León

July 28, 2025

[45] See, Claimant's Consolidation Counter-Memorial, paras. 165, 232-236, and 245. See, also, Respondent's Post-Hearing Brief, paras. 51 and 69.

[46] See, Claimant's Consolidation Counter-Memorial, para. 169 and Claimant's Post-Hearing Brief, sub-heading II.D.1. See, also, Respondent's Post-Hearing Brief, paras. 50 and 64; and Respondent's Memorial of Consolidation, paras. 86 and 87.

[47] See, Claimant's Consolidation Counter-Memorial, paras. 54, 238, 242, and 253.

[48] *Canfor Corporation v. The United States of America; Tembec et al v. United States of America; Terminal Forest Products Ltd. V. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, (RL-0003-ENG), para. 124. (Boldface added).