In the matter under
The North American Free Trade Agreement (NAFTA)
and
Pursuant to a Request for Consolidation by the United Mexican States in:

FIRST MAJESTIC SILVER CORP.
v.
UNITED MEXICAN STATES

(ICSID CASE NO. ARB/21/14 & ICSID CASE NO. ARB/23/28)

ORDER OF THE CONSOLIDATION TRIBUNAL

Before the Arbitral Tribunal established under Article 1126 of the NAFTA in proceedings under the UNCITRAL Arbitration Rules of 1976 and comprised of:

Professor Albert Jan van den Berg, Presiding Arbitrator

Ms. Tina M. Cicchetti, Arbitrator

Mr. Christian Vidal-León, Arbitrator

Secretary of the Tribunal: Ms. Elisa Méndez Bräutigam, Legal Counsel, ICSID

Assistant to the Tribunal: Ms. Emily Hay

Washington, D.C., July 28, 2025

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I. INTRODUCTION

1. The Consolidation Tribunal is seized with a request by the Government of the United Mexican States ("**Mexico**" or "**Respondent**") to consolidate, pursuant to Article 1126(2) of the North American Free Trade Agreement ("**NAFTA**"), the claims submitted to two arbitrations under Article 1120 of the NAFTA, Annex 14-C of the United States-Mexico-Canada Agreement ("**USMCA**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"): *First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/21/14)* ("**FM1**"), and *First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/23/28)* ("**FM2**").

2. The Consolidation Tribunal rejects the request of Mexico for the reasons set forth below and in the manner set forth in Section V of this Order.

3. In accordance with paragraph 11.13 of Procedural Order No. 1, the Consolidation Tribunal initially issues this Order in English and will subsequently issue this Order in Spanish. Both language versions shall be equally authentic.

II. PROCEEDINGS IN THE PRESENT CONSOLIDATION PROCEDURE

4. The claims filed in arbitrations FM1 and FM2 against Mexico by First Majestic Silver Corp. ("**First Majestic**" or "**Claimant**"), a company organised under the laws of Canada, concern a series of measures implemented by Mexico against First Majestic's investment in Primero Empresa Minera S.A. de C.V. ("**PEM**"), a company that owns a silver mine located in the State of Durango, Mexico.

5. On 31 March 2021, the International Centre for the Settlement of Investment Disputes ("**ICSID**" or "**Centre**") registered a request for arbitration from Claimant against Respondent (collectively, the "**Parties**") under Chapter 11 of NAFTA and Annex 14-C of the USMCA with ICSID Case No. ARB/21/14.

6. On 21 July 2023, ICSID registered another request for arbitration from Claimant against Respondent under Chapter 11 of NAFTA and Annex 14-C of the USMCA with ICSID Case No. ARB/23/28.

7. On 12 February 2024, Mexico submitted to the Secretary-General of ICSID, pursuant to NAFTA Article 1126(3), a request for constitution of a tribunal to decide on the consolidation of claims in arbitrations FM1 and FM2 (the "**Consolidation Request**"). In its Consolidation Request, Respondent requests:

> That the Secretary-General establish an arbitral tribunal under NAFTA Article 1126(5) to decide on the consolidation of claims in ICSID cases No. ARB/21/14 and No. ARB/23/28, both initiated under NAFTA Chapter 11.
>
> That, pursuant to NAFTA Article 1126(9), it be ordered that ARB/21/14 and ARB/23/28 proceedings be suspended, pending the decision of the consolidation tribunal pursuant to Article 1126(2) of the NAFTA.[1]

8. In accordance with NAFTA Article 1126(1), a consolidation tribunal "shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section [B of NAFTA]." Pursuant to Article 1139 of NAFTA, the "UNCITRAL Arbitration Rules" is defined as "the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976" ("**UNCITRAL Rules 1976**").

9. On 8 May 2024, pursuant to NAFTA Article 1126(5), the Secretary-General of ICSID appointed Professor Albert Jan van den Berg, a national of the Kingdom of the Netherlands, as President of the Consolidation Tribunal, Ms. Tina M. Cicchetti, a national of Canada and the Italian Republic, as co-arbitrator, and Mr. Christian Vidal-León, a national of the United Mexican States and the Kingdom of Spain, as co-arbitrator. Accordingly, the Consolidation Tribunal was deemed to have been

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[1] Respondent's Consolidation Request, ¶ 60.

constituted on that date. Ms. Elisa Méndez Bräutigam, ICSID Legal Counsel, was designated to serve as Secretary of the Consolidation Tribunal.

10. On 13 May 2024, the Consolidation Tribunal requested the Parties to make an advance payment to cover the costs of the consolidation proceeding.

11. On 20 May 2024, following correspondence with the Parties, the Consolidation Tribunal confirmed that the First Procedural Meeting would take place on 5 June 2024. The Consolidation Tribunal further:

(i) circulated a draft Procedural Order No. 1 and draft Terms of Appointment ("**ToA**") to the Parties for their comments; and

(ii) took note of Respondent's request in its Consolidation Request that the Consolidation Tribunal stay arbitrations FM1 and FM2 pending the consolidation proceeding (the "**Suspension Request**") and invited Respondent to file any additional comments it may have on the Suspension Request by 23 May 2024 and Claimant to respond by 30 May 2024.

12. On 21 May 2024, Respondent filed its additional comments on the Suspension Request.

13. On 30 May 2024, Claimant provided its response to Respondent's comments of 23 May 2024.

14. On 31 May 2024, Respondent provided the Parties' joint comments on the draft Procedural Order No. 1 and the draft ToA. On 4 June 2024, Claimant confirmed its agreement with the documents submitted by Respondent.

15. On 3 June 2024, the Consolidation Tribunal informed the Parties that the First Procedural Meeting was postponed to give the Parties more time to pay the requested advance.

16. On 20 June 2024, Claimant informed the Consolidation Tribunal that it would file a request for leave to add ancillary claims to its Reply to the FM1 tribunal, and that it had requested Respondent's consent to the suspension of arbitration FM2. According to Claimant, "[i]n view of the filing of the request for leave to add ancillary claims by the Claimant in its Reply, which will likely result in the discontinuance of ICSID ARB/23/28 [i.e., arbitration FM2] proceeding if the Claimant is successful, there will axiomatically be no need for the Respondent's Consolidation Request to be advanced any further."

17. On 2 July 2024, the Parties respectively confirmed their availability for a First Procedural Meeting on 16 July 2024. In its communication, Claimant further indicated its intention to identify additional items for the agenda of the meeting, including "jurisdiction of the Consolidation Tribunal pursuant to NAFTA Article 1126, timing concerns and good faith application of the procedural rules."

18. On 9 July 2024, the Consolidation Tribunal confirmed that it would hold its First Procedural Meeting on 16 July 2024 and circulated a draft meeting agenda, inviting the Parties to indicate any items they wished to add by 12 July 2024. The Parties were also invited to confirm the appointment of Ms. Emily Hay as Assistant to the Consolidation Tribunal by 12 July 2024.

19. On 10 July 2024, Claimant requested the suspension of the consolidation proceeding on the basis that the Consolidation Tribunal had been established after the 60-day period provided for in NAFTA Article 1126(5) ("**Preliminary Objection on 60-day Period**").

20. On 11 July 2024, the Consolidation Tribunal invited Respondent to provide any comments it had on Claimant's letter by 15 July 2024.

21. On 12 July 2024, Respondent confirmed its agreement to appoint Ms. Emily Hay as Assistant to the Consolidation Tribunal and noted that it had no further items to add to the agenda of the First Procedural Meeting.

22. On 15 July 2024, Respondent provided its response to Claimant's Preliminary Objection on 60-day Period.

23. Also on 15 July 2024, Claimant requested the Consolidation Tribunal to adjourn the First Procedural Meeting scheduled for 16 July 2024 on the basis that the tribunal in arbitration FM1 had granted its "Request for Admission of Ancillary Claims". Claimant further requested the opportunity to make full submissions on whether the out-of-time constitution of the Consolidation Tribunal could be resolved when only Respondent is willing to waive the time limit, and whether the time limit could be waived. Respondent opposed Claimant's request to adjourn the First Procedural Meeting on the same date.

24. On 16 July 2024, the Consolidation Tribunal informed the Parties that the First Procedural Meeting would take place as scheduled, during which the Parties could address the recent correspondence.

25. During the First Procedural Meeting, the Consolidation Tribunal decided to address Claimant's Preliminary Objection on 60-day Period in an initial written phase and directed the Parties to file their respective written submissions within the timelines agreed upon during the procedural meeting. In addition, the Consolidation Tribunal decided to stay the proceedings in arbitrations FM1 and FM2 pursuant to NAFTA Article 1126(9).

26. On 22 July 2024, the Consolidation Tribunal circulated revised draft versions of Procedural Order No. 1 and the Consolidation Tribunal's ToA, together with a draft Procedural Timetable, reflecting the consultations with the Parties and directions issued during the First Procedural Meeting, and invited the Parties to review and

provide any comments on the revised drafts by 29 July 2024. The Consolidation Tribunal further invited the Parties to bring the decision on the request for the stay to the attention of the Secretary-General of ICSID with respect to arbitration FM2 and ordered the Parties to jointly inform the tribunal in arbitration FM1 about its decision on the request for the stay under NAFTA Article 1126(9). Finally, the Consolidation Tribunal invited Claimant to provide the Consolidation Tribunal with a courtesy copy of Claimant's "Request for Admission of Ancillary Claims" in arbitration FM1 dated 25 June 2024 and the FM1 tribunal's decision granting Claimant's "Request for Admission of Ancillary Claims" dated 15 July 2024.

27. On 29 July 2024, Respondent informed the Consolidation Tribunal that it had no further comments on the revised drafts circulated on 22 July 2024. On the same day, Claimant filed its comments on the revised drafts.

28. On 30 July 2024, the Consolidation Tribunal invited Respondent to file any comments it had on Claimant's communication of 29 July 2024 by 1 August 2024.

29. On 1 August 2024, Respondent filed its observations on Claimant's comments on the revised drafts circulated on 29 July 2024.

30. On 5 August 2024, the Consolidation Tribunal took note of the Parties' comments on the revised versions of the draft Procedural Order No. 1 and the draft ToA and issued Procedural Order No. 1 ("**PO1**"), incorporating the Procedural Timetable as Annex A and the ToA as Annex B thereto. In PO1, the Consolidation Tribunal, *inter alia*, (i) reiterated and confirmed the directions it had given during the First Procedural Meeting in respect of Claimant's Preliminary Objection on 60-day Period and, (ii) with respect to the stays ordered, clarified that either Party was at liberty to apply to the Consolidation Tribunal that the stays be lifted or that the proceedings of the Consolidation Tribunal be stayed.

31. On 8 August 2024, Claimant filed its Preliminary Objection to Jurisdiction dated 7 August 2024 ("**Claimant's 60-day Submission**"), together with factual exhibits C-0001 to C-0012 and legal authorities CL-001 to CL-017. Since Claimant's 60-day Submission was filed after the deadline specified in Annex A of PO1, Claimant also submitted a letter dated 8 August 2024, requesting an extension of one day due to technical difficulties in uploading the documents to ICSID's filesharing platform.

32. On 12 August 2024, the Consolidation Tribunal granted Claimant's request for a limited extension of time and proposed to extend the corresponding deadlines for Respondent's submission and the Consolidation Tribunal's decision by one day each, subject to Respondent's comments.

33. On 13 August 2024, Respondent informed the Consolidation Tribunal that it did not require an extension and would file its response to Claimant's 60-day Submission within the original deadline prescribed under Annex A of PO1.

34. On 19 August 2024, the Consolidation Tribunal took note of Respondent's communication of 13 August 2024 and confirmed that the Procedural Timetable in PO1 on the Preliminary Objection on 60-day Period applied.

35. On 22 August 2024, Respondent filed its response to Claimant's 60-day Submission, together with factual exhibits R-0001 to R-0025 and legal authorities RL-001 to RL-004.

36. On 29 August 2024, the Consolidation Tribunal issued Procedural Order No. 2 ("**PO2**"), rejecting Claimant's Preliminary Objection on 60-day Period, and confirming that it was duly constituted, had jurisdiction to decide whether to assume jurisdiction over all claims in ICSID Arbitration Nos. ARB/21/14 and ARB/23/28, and, subject to its decision on the Consolidation Request, to hear and determine them as appropriate. In PO2, the Consolidation Tribunal further reserved the issue of costs

and confirmed the next steps in the procedural timetable as set out in Annex A to PO1.

37. On 3 September 2024, the Centre informed the Parties of the default in the payment of Claimant's share of the advance requested and invited either Party to pay the outstanding amount by 18 September 2024.

38. On 16 September 2024, the Centre informed the Parties of Claimant's payment of its portion of the advance requested in the Centre's letter of 13 May 2024.

39. On 7 October 2024, Respondent filed its Memorial on Consolidation ("**R-Mem**"), together with factual exhibits RM-0026 to RM-0088 and legal authorities RML-005 to RML-024.

40. On 22 October 2024, the Consolidation Tribunal requested the Parties to make a second advance payment to cover the costs of the consolidation proceeding and subsequently received payment from both Parties.

41. On 31 October 2024, the Consolidation Tribunal invited the Parties to confirm by 7 November 2024 if, as discussed during the First Procedural Meeting, it was still in their interest to hold the hearing scheduled for 27-28 January 2025 (with 29 January 2025 in reserve) in person or if they preferred to hold the hearing virtually.

42. On 7 November 2024, Claimant confirmed its request to hold the hearing in person.

43. On the same date, Respondent requested that the hearing be held remotely.

44. On 9 November 2024, the Consolidation Tribunal invited Claimant's comments on Respondent's letter by 14 November 2024, including on the proposed duration of the hearing if it was to be held in person.

45. On 11 November 2024, Claimant requested from the Consolidation Tribunal an extension until 18 November 2024 for the submission of its comments on Respondent's letter of 7 November 2024.

46. On 12 November 2024, the Consolidation Tribunal granted Claimant's requested extension of time, subject to Respondent's opportunity to provide any comments by 13 November 2024.

47. On 13 November 2024, Respondent informed the Consolidation Tribunal that it took no position on the extension of time to be granted to Claimant to comment on Respondent's letter of 7 November 2024 and noted that any comments not concerning the hearing length and format should only be addressed in Claimant's Reply Memorial.

48. On 14 November 2024, the Consolidation Tribunal confirmed receipt of Respondent's communication of 13 November 2024 and further confirmed Claimant's extension until 18 November 2024 for those comments, highlighting that the invitation to comment was extended in relation to Respondent's letter of 7 November, which concerned the hearing format and the proposed duration of the hearing, if it was to be held in person.

49. On 18 November 2024, Claimant opposed Respondent's request and maintained its position that the hearing be held in person.

50. On 19 November 2024, having heard from the Parties, the Consolidation Tribunal informed them that the hearing would take place in person, but that it would address Respondent's valid concerns about cost efficiency by providing a virtual link for remote participation, and directing that, provided that all members of the Consolidation Tribunal and lead counsel were present in person, other members of the Parties' counsel team and/or their clients could join remotely, at the election of the Parties.

51. On 3 December 2024, the Consolidation Tribunal invited the Parties to confirm their availability to hold a pre-hearing organisational meeting on 8 January 2025 at 9 am Mexico City / 10 am DC / 4 pm Brussels by 6 December 2024.

52. On 6 December 2024, the Consolidation Tribunal circulated a draft Procedural Order No. 3 regarding hearing organisation, and invited the Parties to confer and submit a joint proposal advising the Consolidation Tribunal of any agreements they were able to reach on the matters addressed in the draft, or of their respective positions where they were unable to reach an agreement, as well as to inform the Consolidation Tribunal of any item they may wish to add to the agenda by 3 January 2025.

53. On the same date, the Parties confirmed their availability to hold a Pre-Hearing Organisational Meeting on 8 January 2025 at 9 am Mexico City / 10 am DC / 4 pm Brussels.

54. On the same date, Claimant filed a Counter-Memorial on Consolidation ("**C-CM**"), together with factual exhibits CM-0001 to CM-0032 and legal authorities CML-001 to CML-008.

55. On 20 December 2024, the Government of Canada advised the Consolidation Tribunal that it would not file a NAFTA Article 1128 Submission.

56. On the same date, Claimant requested that certain portions of the Consolidation Request, the Memorial on Consolidation and the Counter-Memorial on Consolidation be redacted in accordance with the provisions on transparency contained in PO1 ("**Redactions Request**").

57. On 23 December 2024, the United States of America filed a NAFTA Article 1128 Submission.

58. On 27 December 2024, the Consolidation Tribunal invited Respondent's comments on Claimant's Redactions Request.

59. On 30 December 2024, Respondent filed its response to Claimant's Redactions Request objecting to the Request on the basis that unredacted versions of the Consolidation Request and the Memorial on Consolidation had already been published on ICSID's website in accordance with the provisions on transparency of PO1. Respondent agreed to Claimant's proposed redactions to the Counter-Memorial on Consolidation.

60. On 2 January 2025, the Consolidation Tribunal invited Claimant to provide additional information on its proposed redactions by 6 January 2025 in order to decide upon the disputed redactions.

61. On 6 January 2025, Claimant provided the additional information required by the Consolidation Tribunal on its proposed redactions.

62. On 7 January 2025, in accordance with the Procedural Timetable, Respondent filed its observations on the NAFTA Article 1128 Submission of the United States of America. Claimant did not file any observations.

63. On 8 January 2025, the Consolidation Tribunal invited Respondent to file any further comments it had on Claimant's 6 January 2025 submission by 10 January 2025. On the same date, the Consolidation Tribunal held a pre-hearing organisational meeting with the Parties by video conference during which the Consolidation Tribunal and the Parties discussed the draft procedural order no. 3 on hearing organisation that ICSID had shared with the Parties in advance, as well as the Parties' comments on the items contained in the draft order. The Consolidation Tribunal also informed the Parties that it would circulate a list of questions in advance of the hearing, which the Parties could decide to address in writing before the hearing or orally at the hearing.

64. On 10 January 2025, Respondent filed its further comments on Claimant's 6 January 2025 submission.

65. On 13 January 2025, the Consolidation Tribunal issued Procedural Order No. 3 regarding the organisation of the hearing.

66. On the same date, the Consolidation Tribunal sent a list of questions to the Parties and invited them to inform the Consolidation Tribunal by 15 January 2025 if they wished to provide written responses to the questions in advance of the hearing or if they preferred to address them orally at the hearing (the "**Tribunal Questions**"). The Tribunal Questions were the following:

> 1. When determining whether to assume jurisdiction over claims in two or more arbitrations, is a NAFTA Article 1126 consolidation tribunal to consider the status of the claims in proceedings at the time the request for consolidation is filed or at some later moment?
>
>   a. Assuming, without deciding, that the relevant moment is the date of filing of the request for consolidation, when interpreting and applying NAFTA Article 1126 are subsequent changed circumstances as argued by Claimant to be taken into account?
>
>   b. In this regard, is it relevant to consider whether the changed circumstances are attributable to the party invoking the changed circumstances?
>
> 2. Are the claims made in arbitration FM2 and the ancillary claims submitted in arbitration FM1 identical? If not, to what extent do they differ?
>
>   a. In that regard, assuming, without deciding, that the claims made by Claimant in arbitration FM2 and the ancillary claims submitted in arbitration FM1 are identical, is there a legal difference between a claim submitted in a request for arbitration and an ancillary claim?
>
> 3. How, if at all, is the requirement of NAFTA Article 1126(2) that there be "a question of law or fact in common" in the claims made in arbitrations FM1 and FM2 met in the present case?
>
>   a. Please answer with respect to both the date of filing of the Request for Consolidation and any other potentially relevant moment in time.

b. Does the expression "a question of law or fact in common" under NAFTA Article 1126 require that "claims" be the same?

c. If not, what is, as a legal matter, the minimum degree of commonality that facts and legal issues must share for them to fall within the scope of the expression "a question of law or fact in common"?

d. In answering question c, please consider the FM1 tribunal's statement that "the ancillary claim is intimately related to the broader dispute between the Claimant and the Respondent, which is the focus of the current arbitration [i.e., FM1]". (see ruling granting Claimant's Request for Admission of Ancillary Claims concerning the VAT refund of 15 July 2024 ("**Admission Decision**"), Exh. RM-0065.ENG, para. 2).

e. What is the relevance, if any, of the FM1 tribunal issuing the Recommendation in the Decision on Claimant's Request for Provisional Measures of 26 May 2023 ("**PM Decision**"), Exh. RM-0034.ENG, that "the Respondent not block payments of VAT refunds owed the 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" (*id.* para. 143(1), whilst acknowledging that "the denial by SAT of PEM's free access to future VAT refunds is not a measure challenged by the Claimant in its Request for Arbitration nor discussed in its Memorial" (*id.* para. 135)?

f. What is the relevance, if any, of the following statement by the FM1 tribunal in its letter of 24 March 2024 (Exh. RM-0047):

> The prohibition contained in NAFTA Article 1134 does not bar Respondent from complying with the Decision also in respect of amounts which have already been deposited in the blocked account. The Tribunal cannot issue a provisional measure ordering the unblocking of those funds in view of NAFTA Article 1134, since such unblocking has been requested by Claimant on the merits. Respondent is, however, at liberty to unblock those amounts and transfer them at its own initiative, even more so in compliance with a provisional measure that bindingly recommends Respondent to make those funds available to PEM.

4. The consolidation tribunal in the case of *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al v. United States of America* ("*Canfor*") found that a guiding test for efficiency involves "a comparison with the situation as it exists, and would continue to exist, if no consolidation were ordered" (Exh. RML-002, para. 126; see Respondent's Memorial on

Consolidation, para. 91; Claimant's Counter Memorial on Respondent's Request for Consolidation, paras. 216 and 218). To the extent that this Consolidation Tribunal should be guided by that test:

a. What is the relevant comparator situation that "exists, and would continue to exist, if no consolidation were ordered" in this case?

b. Specifically, assuming, without deciding, that the relevant comparator situation is one in which arbitration FM1 includes ancillary claims admitted on 15 July 2024, what efficiency considerations should be taken into account for the purposes of the comparison? In that regard, what is the relevance, if any, of the FM1 tribunal's statement that it "is already familiar with the subject matter of the ancillary claims" (Exh. RM-0065.ENG)?

c. Further, assuming, without deciding, that the relevant comparator situation is one in which arbitrations FM1 and FM2 are conducted separately, please specifically identify any alleged risk of conflicting findings in decisions of the FM1 and FM2 arbitrations (see Respondent's Memorial on Consolidation, para. 70).

5. Does the transcript of the hearing of 13 March 2023[2] show admissions by Respondent as alleged by Claimant (Counter-Memorial para. 189, Exh. CM-0003 pp. 56-57)? If so, what is the relevance of such admissions to the decision on consolidation?

6. With regard to the PM Decision of 26 May 2023: In the event that the Consolidation Tribunal assumes jurisdiction over the claims made in arbitrations FM1 and FM2, how should this Consolidation Tribunal deal with the PM Decision granted by the FM1 tribunal? In particular:

a. What is the current legal status of the PM Decision following: (i) suspension of the FM1 proceedings by the FM1 tribunal on 29 February 2024; and (ii) suspension of the FM1 proceedings by the Consolidation Tribunal on 16 July 2024?

b. What would be the legal status of the PM Decision in the consolidated proceedings?

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[2] The date on the transcript of 13 May 2023 (Exhibit CM-0003, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Transcripts on Hearing for Provisional Measures, 13 March 2023, p. 1) seems to be in error. *See* Exhibit RM-0034, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on the Claimant's Request for Provisional Measures, 26 May 2023, ¶ 16.

c. Would it be consistent with NAFTA Article 1134 if the PM Decision were to remain in place given that the claims made in arbitration FM2 would be part of the same proceedings?

d. What would be the implications, if any, of the answers to sub-questions a to c for the assessment of whether assuming jurisdiction over the claims made in arbitrations FM1 and FM2 would contribute to "efficiency" and "fairness" under NAFTA Article 1126(2)?

7. With respect to discontinuance:

a. ICSID Rule 56 (2022) refers to "discontinuance of the proceeding" at the request of a party. What is the difference, if any, between discontinuance of a proceeding and withdrawal of a claim?

b. As arbitration FM2 has, to date, legally not been discontinued, is Claimant's claim as set forth in its Second Amended Request for Arbitration dated 19 July 2023 (Exh. RM0-037) still pending in that arbitration? In other words, are these still "claims [that] have been submitted to arbitration under Article 1120"? If so, what is the relevance, if any, for the present Article 1126 proceedings?

8. Assuming that Respondent continues to oppose the discontinuance of arbitration FM2:

a. Further assuming, without deciding, that Claimant is correct that it no longer has a claim pending in arbitration FM2, is there still a claim regarding costs in that proceeding?

b. If so, and further assuming that the suspension of the FM2 proceeding is no longer in force, would the constitution of the arbitral tribunal be completed in FM2 for the purposes of deciding costs? (see Claimant's Counter Memorial on Respondent's Request for Consolidation, paras. 5(a), 10, 221). In these circumstances, would the FM2 tribunal have the jurisdiction to decide costs?

9. Assuming that the FM1 tribunal were to continue its proceedings, what are the likely procedural adjustments, if any, to be made by the FM1 tribunal in terms of: (i) the PM Decision; and/or (ii) the written and oral proceedings regarding the ancillary claims.

a. In particular, what would be the remaining steps in and likely timing of the proceedings?

b. How would this compare to the situation in which the Consolidation Tribunal determines that it should assume jurisdiction over all of the claims?

67. On 15 January 2025, the Consolidation Tribunal asked the Parties to provide additional information concerning the Redactions Request by 17 January 2025.

68. On the same date, Respondent expressed its preference to address the Tribunal Questions in writing in advance of the hearing. Claimant noted its preference to address the Tribunal Questions orally at the hearing.

69. On 17 January 2025, the Consolidation Tribunal informed the Parties that, given the short timeframe before the hearing and the absence of agreement, the Parties were to address the Tribunal Questions orally at the hearing.

70. On the same date, the Claimant provided the information on its Redactions Request requested by the Consolidation Tribunal on 15 January 2025.

71. On 20 January 2025, Claimant informed the Consolidation Tribunal that it had "taken the prudent step of filing a withdrawal notice for the VAT refunds claim with the ICSID Secretary General" ("**Withdrawal of Claim in FM2**").

72. On the same date, Respondent filed a response to Claimant's 20 January 2025 communication in which, among others, it sought guidance from the Consolidation Tribunal on the impact, if any, of the Withdrawal of Claim in FM2 on the hearing scheduled in this consolidation proceeding.

73. On 21 January 2025, the Consolidation Tribunal invited Claimant's comments on Respondent's 20 January 2025 letter by close of business on 22 January 2025 and informed the Parties that, subject to those comments, it intended to proceed with the hearing without prejudice to the arguments the Parties may present at the hearing concerning the Withdrawal of Claim in FM2 and Respondent's comments thereon.

74. On 22 January 2025, Claimant filed its comments on Respondent's 20 January 2025 letter. In its letter, Claimant concurred with the Consolidation Tribunal in holding the hearing as scheduled.

75. On 23 January 2025, the Consolidation Tribunal confirmed that the hearing would proceed as scheduled and that the Parties' respective positions on the issues raised in their correspondence on the Withdrawal of Claim in FM2 were noted and could be elaborated during the hearing.

76. A hearing on consolidation was held at the World Bank offices in Washington, D.C. on 27-28 January 2025. The following persons attended the hearing:

Consolidation Tribunal:	
Professor Albert Jan van den Berg	President
Ms. Tina M. Cicchetti	Arbitrator
Mr. Christian Vidal-León	Arbitrator
ICSID Secretariat:	
Ms. Elisa Méndez Bräutigam	Secretary of the Consolidation Tribunal
Assistant to the Consolidation Tribunal:	
Ms. Emily Hay (remote)	Assistant to the Consolidation Tribunal
For Claimant:	
Counsel:	
Mr. Samir Patel	First Majestic Silver Corp.
Ms. Andrea Elvira Elizondo Duran	First Majestic Silver Corp.
Mr. Riyaz Dattu	ArentFox Schiff
Mr. Lee M. Caplan	ArentFox Schiff
Ms. Maya S. Cohen	ArentFox Schiff
Ms. Jodi Tai	ArentFox Schiff
Mr. Denny Peixoto	ArentFox Schiff
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Mr. Alan Bonfiglio Ríos	Dirección General de Consultoría Jurídica de Comercio Internacional
Mr. Luis Fernando Muñoz Rodríguez	Dirección General de Consultoría Jurídica de Comercio Internacional
Mr. Alejandro Rebollo Ornelas	Dirección General de Consultoría Jurídica de Comercio Internacional
Ms. Laura Mejía Hernández	Dirección General de Consultoría

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Non-Disputing Parties:
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Ms. Rachel Lauder (remote)	Trade Law Bureau / Direction générale du droit commercial international (JLTB)

Court Reporter:
Ms. Laurie Carlisle
D-R Esteno

Interpreters:

Ms. Silvia Colla	English/Spanish
Mr. Luis Eduardo Arango	English/Spanish
Mr. Charlie Roberts	English/Spanish

77. On 31 January 2025, the Consolidation Tribunal issued its decision on the Redactions Request.

78. On 19 February 2025, Claimant filed a post-hearing brief ("**C-PHB**"), and Respondent filed a post-hearing brief accompanied by factual exhibits RM-0089 to RM-0091 ("**R-PHB**").

79. On 6 March 2025, each Party filed a statement of costs.

III. FACTS

80. The facts below concern the procedural developments in arbitrations FM1 and FM2 insofar as they may be relevant for the question of whether these arbitrations should

be consolidated pursuant to NAFTA Article 1126. To the extent possible, the factual overview is presented in a chronological sequence, albeit that some of the procedural development may overlap.

A. Proceedings in First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/21/14) ("FM1")

(a) Proceedings until Provisional Measures

81. On 13 May 2020, First Majestic filed a Notice of Intent to Submit a Claim to Arbitration on its own behalf and on behalf of its Mexican subsidiary, PEM, for alleged violations of NAFTA Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), 1109 (Transfers) and 1110 (Expropriation and Compensation) and applicable principles of international law ("**NoI-1**").[3]

82. Some ten months later, on 1 March 2021, Claimant filed a Request for Arbitration ("**RfA-1**") on its own behalf and on behalf of PEM. In its Request for Arbitration, Claimant alleged the same violations of the same NAFTA Articles as in the above NoI-1, in addition to invoking NAFTA Article 1104 (Standard of Treatment).[4]

83. Claimant appointed Prof. Stanimir A. Alexandrov and Respondent Prof. Yves Derains as co-arbitrators. The Parties subsequently appointed Prof. Giorgio Sacerdoti as President of the FM1 tribunal.[5]

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[3] Exhibit RM-0029-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Notice of Intent, 13 May 2020.

[4] Exhibit RM-0030-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for Arbitration, 1 March 2021.

[5] Exhibit RM-0031-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Procedural Order No. 1, 21 October 2021, ¶ 2.1.

84. On 25 April 2022, Claimant filed its Memorial on the Merits.[6] In the Memorial, Claimant summarises the legal dispute and the measures that have given rise to its NAFTA claim in arbitration FM1 as follows:

> 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 of amounts purportedly [*sic*] 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 Canada-Mexico Tax Treaty, the Barbados-Mexico Tax Treaty and the Luxembourg-Mexico Tax Treaty. [footnote omitted]
>
> 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 circumstances at the start of the COVID-19 pandemic).
>
> f) Unjustifiably encumbering, attaching, and freezing of PEM bank accounts and other assets.
>
> g) Seizing and encumbering of over
> .
>
> h) Using collateral powers of the Government of Mexico including provisions to interfere with the core business activities of PEM and to create conditions of coercion.

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[6] Exhibit RM-0032-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Memorial, 25 April 2022.

> 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 , for , 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 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. [footnote omitted]
>
> p) Various other additional egregious and unlawful measures and activities, and harsh enforcement and intimidation tactics.[7]

85. In the Memorial on the Merits, Claimant requested the FM1 tribunal to order Respondent to compensate Claimant for its losses "for an amount of at least "[8] For purposes of the Memorial on the Merits, Claimant "provisionally assessed PEM's losses" by reference to tax reassessments issued by

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[7] *Id.*, ¶ 5 (emphasis in the original).

[8] *Id.*, ¶ 512(2).

Respondent for the period 2010-2014 and the terms of the acquisition of PEM by Claimant in May 2018.[9]

86. Seven months later, on 25 November 2022, Respondent filed a Counter-Memorial, requesting the FM1 tribunal to resolve:

> (i) That the Complainant's claim is inadmissible because it is based on wrongdoing by its predecessor PM and PEM; and, if so, that the Complainant's claim is inadmissible because it is based on wrongdoing by its predecessor PM and PEM; and, if so, [*sic*]
>
> (ii) That it lacks jurisdiction over the Claimant's claims because, *inter alia*, they involve taxation measures, including measures relating to income and profits; that they are excluded from the NAFTA; or, as the case may be, that it has no jurisdiction over the Claimant's claims because, *inter alia*, they involve taxation measures, including measures relating to income and profits; that they are excluded from the NAFTA; or, if applicable, [*sic*]
>
> (iii) That Claimant's claim is without merit and, accordingly, Mexico is not liable for any alleged violation of the NAFTA; or, in the alternative,
>
> (iv) That the amount of damages equals the calculation submitted by the Respondent.[10]

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[9] *Id.*, ¶ 494.

[10] Exhibit RM-0033-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Counter-Memorial, 25 November 2022, ¶ 102.

(b) Provisional Measures – PM Decision with Recommendation (26 May 2023)

87. On 4 January 2023, Claimant filed a Request for Provisional Measures, submitting various requests mentioned below.[11] After Respondent had filed its response[12], a virtual hearing was held on 13 March 2023.[13]

88. On 26 May 2023, the FM1 tribunal issued a Decision on Claimant's Request for Provisional Measures ("**PM Decision**").[14] It rejected Claimant's request for a suspension of the *amparo* proceedings, a prohibition on making certain statements in the media, and a stay of enforcement, transfer pricing audits and civil and criminal proceedings. On the other hand, the FM1 tribunal granted Claimant's request to make future VAT refunds accessible in the following terms:

> RECOMMENDS as provisional measure pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and Article 1134 of the NAFTA that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM;[15]

89. On 19 June 2023, Respondent filed a Request for Revocation of the Recommendation for Provisional Measures, arguing that the PM Decision would

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11 Exhibit RM-0080-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for Provisional Measures, 4 January 2023.

12 Exhibit CM-0002-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Response to Claimant's Request for Provisional Measures, 10 February 2023.

13 Exhibit RM-0034-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Claimant's Request for Provisional Measures, 26 May 2023, ¶¶ 7, 12 and 16. *See also* Exhibit CM-0003-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Transcripts on Hearing for Provisional Measures, 13 March 2023.

14 Exhibit RM-0034-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Claimant's Request for Provisional Measures, 26 May 2023.

15 *Id.*, ¶ 143.1.

prejudice the imminent arbitration FM2, having regard to Claimant's Notice of Intent of 31 March 2023 (see next section).[16] Respondent's Revocation Request will be discussed further at paragraphs 99-103 below.

B. Proceedings in First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/23/28) ("FM2")

90. Whilst Claimant's Request for Provisional Measures was pending in arbitration FM1 (see preceding section), Claimant filed a second Notice of Intent on 31 March 2023 ("**NoI-2**"),[17] which led to arbitration FM2 as reviewed in this section. In the NoI-2, Claimant asserted PEM's inability to access VAT refunds deposited by SAT on its blocked bank account for an amount of in violation of NAFTA Articles 1102, 1103, 1105, 1109 and 1110.

91. Two months later and after the FM1 tribunal had issued the PM Decision, on 29 June 2023, Claimant filed a second Request for Arbitration,[18] followed by an amended Request for Arbitration ("**RfA-2**").[19] In the RfA-2, Claimant makes its claim for VAT refund amounts deposited between April 2020 and 4 January 2023:

> The present claim, therefore, concerns the VAT refund amounts deposited by the SAT into PEM's bank account as of April 2020 (when it imposed a restraint on withdrawals from PEM's blocked accounts) to the date of the making of the Request for Provisional Measures on January 4, 2023, made by First Majestic in the parallel proceedings [i.e., FM1 arbitration].[20]

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16 Exhibit RM-0036-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Request for Revocation of Recommendation for Provisional Measure, 19 June 2023.

17 Respondent's Consolidation Request, Annex 8.

18 Exhibit RM-0088-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Claimant's Request for Arbitration, 29 June 2023.

19 Exhibit RM-0037-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Claimant's Amended Request for Arbitration, 19 July 2023.

20 *Id.*, ¶ 57.

92. Claimant added to its claim refunds not released as of 4 January 2023:

> To the extent that any refunds payable to PEM as of January 4, 2023 are not released by the SAT to PEM, and all future VAT refunds continue to be withheld from PEM, the amount of damages and compensation claimed in this arbitration will exceed (i.e., so as to include the amounts of future VAT refunds).[21]

93. According to Claimant, "this claim relates to the Government of Mexico's steadfast refusal to allow PEM access to Value Added Tax (VAT) refunds which it has been entitled to since April 2020," alleging violations of NAFTA Articles 1102, 1103, 1104, 1105, 1109, and 1110, and seeking "on its own behalf and on behalf of its investments, monetary compensation estimated at this time at a minimum of plus interest owed to PEM by the SAT."[22]

94. By Claimant's account, it initiated arbitration FM2, among other reasons, because its NAFTA protections with respect to the claim in arbitration FM2 were expiring.[23]

95. The filing of RfA-2 prompted ICSID to inquire with Claimant how the requirements of NAFTA Articles 1116(2), 1117(2) and 2103 have been met in this case.[24] Claimant responded that the RfA-2 satisfies the three-year time limit for the filing of claims on its own behalf and on behalf of its investment contained in NAFTA Articles 1116(2) and 1117(2), arguing that it constitutes a continuous violation.[25] Claimant further responded regarding NAFTA Article 2103 that RfA-2 does not concern taxation measures as Respondent has not refuted PEM's entitlement to the VAT refunds.

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21 *Id.*, ¶ 60.

22 *Id.*, ¶¶ 23, 86-87.

23 C-PHB, ¶¶ 123-124.

24 Respondent's Consolidation Request, Annex 17.

25 *Id.*, Annex 18.

96. As mentioned, ICSID registered this case on 21 July 2023 under case number ARB/23/28 (herein referred to as FM2).[26]

97. In arbitration FM2, Prof. Horacio Grigera Naón was appointed as co-arbitrator by Claimant,[27] and Prof. Toby Landau KC was appointed as co-arbitrator by Respondent.[28] When the proceedings in arbitration FM2 were stayed in accordance with NAFTA 1126(9) by the present Consolidation Tribunal on 16 July 2024, no presiding arbitrator had been appointed.[29]

C. Further Developments in Arbitration FM1

98. Returning to arbitration FM1, various further developments occurred after Claimant had filed its RfA-2 in arbitration FM2 on 29 June 2023 (see preceding section). These developments in arbitration FM1 include notably the issuance by the FM1 tribunal of several decisions that have in common the initiation by Claimant of arbitration FM2: a Revocation Decision on 1 September 2023; a Jurisdiction Decision on 30 December 2023; a Suspension Decision on 29 February 2024; and an Authorisation Decision in relation to Claimant's ancillary claims on 15 July 2024. These and other developments are reviewed *seriatim* in the next sub-sections.

(a) Revocation Decision (1 September 2023)

99. As mentioned in paragraph 88 above, the FM1 tribunal had issued the PM Decision on 26 May 2023. As also mentioned in paragraph 89 above, Claimant's NoI-2 of 31 March 2023 prompted Respondent to file a Request for Revocation of the PM

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[26] *Id.*, Annex 19.

[27] Exhibit CM-0017-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Letter from ICSID to the Parties, 24 October 2023.

[28] Exhibit CM-0022-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Letter from ICSID to the Parties, 4 March 2024.

[29] Respondent's Consolidation Memorial, ¶ 43. Public details of the case may be found here: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/28

Decision on 19 June 2023. Claimant submitted a Reply to the Revocation Request on 21 July 2023.[30]

100. On 1 September 2023, the FM1 tribunal issued a Decision, rejecting Respondent's request ("**Revocation Decision**").[31] The FM1 tribunal identified the issue before it as whether there had been a change of circumstances:

> The issue is therefore whether the introduction by Claimant of a new arbitration request against Respondent on 30 June 2023[32] (following the NOI of 31 March 2023 [i.e., NoI-2]), 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.[33]

101. The FM1 tribunal rejected the argument that the claim made in arbitration FM2 is also before it in arbitration FM1:

> In the new ICSID case [i.e., FM2], 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. [footnote omitted] Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.
>
> The introduction of the new ICSID Case No. ARB/23/28 [i.e., FM2] 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 [i.e., FM1] nor of

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30 Exhibit CM-0005-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Reply to Respondent's Request for Revocation, 21 July 2023.

31 Exhibit RM-0038-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Respondent's Request for Revocation of Provisional Measures, 1 September 2023.

32 Exhibit RM-0088-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Claimant's Request for Arbitration, 29 June 2023.

33 Exhibit RM-0038-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Respondent's Request for Revocation of Provisional Measures, 1 September 2023, ¶ 40.

> the prejudice to the *status quo* represented by the unavailability of the VAT refunds for PEM.[34]

102. The FM1 tribunal further opined with respect to a possible impact of the provisional measure on arbitration FM2:

> The Tribunal recognizes that the fact that the provisional measure is in place may (*de facto*) have an impact on the new case [i.e., FM2]. 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 [i.e., FM2] in part moot. [footnote omitted]
>
> 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.[35]

103. The FM1 tribunal opined finally regarding its jurisdiction:

> 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 [i.e., FM2] 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 [i.e., FM2]. 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 [i.e., FM2], based on the information that the Parties have supplied to this Tribunal.[36]

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34 *Id.*, ¶¶ 45-46.

35 *Id.*, ¶¶ 47-48.

36 *Id.*, ¶ 50.

(b) Jurisdiction Decision (30 December 2023)

104. Shortly after having filed the Revocation Request on 19 June 2023, discussed in the preceding sub-section, on 28 July 2023, Respondent filed a Preliminary Objection on Jurisdiction, arguing that, by initiating a second arbitration based on the same measures (i.e., arbitration FM2), Claimant had breached the waivers filed in arbitrations FM1 and FM2.[37] During the period September-November 2023, Claimant filed a response, Respondent a reply, and Claimant a rejoinder.[38]

105. On 30 December 2023, the FM1 tribunal issued a Decision on Respondent's Preliminary Objection to Jurisdiction, dismissing the objection ("**Jurisdiction Decision**").[39] In its reasoning, the FM1 tribunal considered the issue of whether arbitration FM2 is a proceeding with respect to the same measure(s) which Claimant alleged to be in breach of Respondent's obligation towards Claimant in arbitration FM1.[40] It identified the measures which, according to Respondent, have been submitted by Claimant to both arbitrations as:

> (a) The freezing of certain bank accounts of PEM; and
>
> (b) Depositing VAT refunds in those frozen bank accounts thereby impeding recovery of the same by PEM.[41]

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[37] Exhibit RM-0081-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Objection to Jurisdiction, 28 July 2023.

[38] Exhibits RM-0039-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶¶ 23-24; CM-0013-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Rebuttal for Respondent's Preliminary Objection to Jurisdiction, 9 September 2023; and CM-0018-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Rejoinder on Preliminary Objection to Jurisdiction, 6 November 2023.

[39] Exhibit RM-0039-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Respondent's Preliminary Objection to Jurisdiction, 20 December 2023.

[40] *Id.*, ¶ 63.

[41] *Id.*, ¶ 67.

106. Noting that Respondent focused on (b) in its Preliminary Objection, the FM1 tribunal observed that "Claimant has repeatedly insisted [...] that it has submitted no claim in this arbitration [i.e., FM1] concerning the inaccessibility of the deposits of VAT refunds to PEM made by SAT."[42] The FM1 tribunal recalled its earlier finding in the PM Decision of 23 May 2023 regarding NAFTA Article 1134:[43]

> [T]he Tribunal considers that the above recommendation is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117."[44] This is because the denial by SAT of PEM's free access to future VAT refunds is not a measure challenged by the Claimant in its Request for Arbitration [i.e., FM1] nor discussed in its Memorial.[45]

107. The FM1 tribunal confirmed its conclusion made in the PM Decision "that the payment of VAT refunds to PEM into blocked accounts, making them thus inaccessible to PEM, is not a measure which First Majestic is challenging in the present arbitration. The Tribunal concludes consequently that the Respondent's Preliminary Objection is in this respect unfounded."[46]

108. The FM1 tribunal opined with respect to its jurisdiction:

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42 *Id.*, ¶ 72.

43 Exhibit RML-0005-ENG, North American Free Trade Agreement, 1992, Article 1134 ("Interim Measures of Protection") provides: "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."

44 A breach referred in NAFTA Articles 1116 and 1117 mainly relates to the substantive protections for investors and investments set forth in Section A of Chapter 11.

45 Exhibit RM-0039-ENG*, First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14, Decision on Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶ 78, quoting Exhibit RM-0034-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Claimant's Request for Provisional Measures, 26 May 2023, ¶ 135.

46 *Id.*, ¶ 80.

> Since the measure relating to SAT's refusal to allow PEM to access the VAT refunds is not before this Tribunal, it is immaterial for the jurisdiction of this Tribunal that this measure is the subject matter of the Second Arbitration (including with respect to the determination of the relevant periods of time and the request for compensation of the ensuing damages).[footnote omitted] By submitting a claim concerning the inaccessibility of the VAT refunds to PEM in the Second Arbitration, the Claimant could not and has not breached Article 1121 NAFTA nor its waiver since it has not challenged this measure as being in breach of NAFTA nor has it submitted any claim in that respect in the present arbitration.[47]

109. As regards the measure mentioned at paragraph 105(a) above (i.e., freezing of certain bank accounts of PEM), the FM1 tribunal noted that the Parties did not disagree that it is a measure challenged by Claimant in arbitration FM1 and that it is not challenged by Claimant in arbitration FM2.[48]

110. With respect to the request for bifurcation, the FM1 tribunal declared "the Parties' requests concerning bifurcation moot in view of the decision [to dismiss the objection to the jurisdiction]."[49]

(c) Extensions of Time for Reply and Rejoinder

111. A few days prior to the issuance of the Jurisdiction Decision, on 26 December 2023, the FM1 tribunal extended the deadlines for Claimant's Reply from 15 January 2024 to 15 February 2024 and for Respondent's Rejoinder from 25 April 2024 to 1 July 2024, stating that the hearing dates (21-25 October 2024) remained unchanged.[50]

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47 *Id.*, ¶ 81.

48 *Id.*, ¶ 82.

49 *Id*., ¶ 84(b).

50 Exhibit RM-0041-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 26 December 2023.

112. On 2 January 2024, Claimant requested an extension of time for its Reply until 1 April 2024 and a rescheduling of the hearing to January 2025.[51]

113. By email of 24 January 2024, the FM1 tribunal granted the extensions: Claimant was to file the Reply Memorial on 1 April 2024 and Respondent was to file the Rejoinder Memorial on 1 October 2024. The FM1 tribunal further determined that the hearing dates would be discussed after having received the Parties' proposal for the "deadlines for the following procedural steps."[52]

(d) Suspension of the Proceedings – FM1 PO6 (29 February 2024)

114. As mentioned at paragraph 7 above, on 12 February 2024, Mexico submitted to the Secretary-General of ICSID the Consolidation Request pursuant to NAFTA Article 1126(3).

115. Three days later, on 15 February 2024, the FM1 tribunal invited the Parties to submit their comments on whether the tribunal should stay the proceedings in arbitration FM1 pending the decision on the Consolidation Request.[53]

116. By communications of 22 February 2024, both Parties agreed that the FM1 proceedings be suspended.[54] Claimant added the following conditions:

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[51] Exhibit RM-0042-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant to ICSID, 2 January 2024.

[52] Exhibit RM-0043-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 24 January 2024.

[53] Exhibit CM-0019-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 15 February 2024.

[54] Exhibits CM-0020-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Letter from Claimant to ICSID, 22 February 2024; and CM-0021-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Letter from Respondent to ICSID, 22 February 2024.

> The Claimant agrees to an immediate stay, subject to the following conditions:
>
> 1. The stay will be *temporary* and for the period until a decision is issued by a consolidation tribunal pursuant to the Consolidation Request. In the interim, this Tribunal's jurisdiction, its interim decisions, and its record of the proceeding will remain unaffected.
>
> 2. The temporary stay will not affect any of the Claimant's rights in this arbitration beyond suspending the deadlines established by the Tribunal for the filing of pleadings. In particular, and without limiting the generality of the foregoing:
>
> a. The Tribunal's Provisional Remedy Order ("Order") dated May 26, 2023 for VAT refunds accruing as of January 4, 2023 will remain in effect and the Respondent shall continue to be bound by its obligation to comply with this Order and make VAT refunds to the Claimant's subsidiary, Primero Empresa Minera, S.A. de C.V. ("PEM").
>
> b. The Claimant will continue to be entitled to seek interim measures of protection pursuant to Article 1134 of NAFTA.
>
> c. The Claimant reserves its right to seek an order for costs against the Respondent for the interlocutory proceedings in which the Claimant has fully prevailed.[55]

117. Claimant also requested the FM1 tribunal to give a direction to Respondent:

> Additionally, the Claimant respectfully requests that the [FM1] Tribunal issue a direction requiring the Respondent to explain within one week why it has not complied with the [FM1] Tribunal's Order, and whether it intends to do so and by which date. At this time, the amount owed by the Respondent to the Claimant pursuant to the [FM1] Tribunal's Order exceeds . This direction to the Respondent should be issued before the Tribunal's decision to temporarily stay this arbitration proceeding.[56]

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[55] Exhibit CM-0020-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Letter from Claimant to ICSID, 22 February 2024, pp. 1-2.

[56] *Id.,* p. 2.

118. Considering the Consolidation Request and noting that both Parties agreed to a suspension of arbitration FM1, the FM1 tribunal issued Procedural Order No. 6 on 29 February 2024 ("**FM1 PO6**").[57] The FM1 tribunal ordered as follows:

> a) The present proceeding is hereby suspended until the Consolidation Tribunal established under NAFTA Article 1126 assumes or declines jurisdiction over the present case in accordance with NAFTA Article 1126(2), or orders that the present proceedings be stayed in accordance with NAFTA Article 1126(9).
>
> b) The procedural calendar, including the deadlines of 1 April 2024 for the Claimant's Reply and of 1 October 2024 for the Respondent's Rejoinder, is accordingly suspended.
>
> c) The Tribunal invites the Respondent to inform the Tribunal and the Claimant by 7 March 2024 whether it has complied with the Tribunal's provisional measure granted by the Tribunal in its Decision on the Claimant's Request for Provisional Measures of 26 May 2023, para. 143.1, supplying evidence thereof, or, if not yet, how and by which date it intends to comply.
>
> d) The suspension granted under (a) shall be effective from the date of the Respondent's reply to the Tribunal under (c) above.

(e) Compliance by Respondent with FM1 PO6

119. With reference to arbitration FM1 PO6, on 11 March 2024, Respondent submitted a report on compliance with the Recommendation set forth in the PM Decision (quoted at paragraph 88 above), stating that it had complied with the Recommendation and that Claimant's actions had prevented it from accessing the VAT returns.[58]

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[57] Exhibit RM-0044-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Procedural Order No. 6, 29 February 2024.

[58] Exhibit RM-0045-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Respondent Regarding Compliance with the Provisional Measure, 11 March 2024.

120. On 14 March 2024, the FM1 tribunal invited Claimant to provide comments "[i]n view of the complexity of the factual allegations in the Respondent's response of 11 March 2024, and the difficulty for the Tribunal to assess its impact in light of the Tribunal's decision in Procedural Order No. 6, points (c) and (d)."[59]

121. Claimant provided the comments on 25 March 2024.[60] It contended that "Respondent has sought to obfuscate and mislead the [FM1] Tribunal, through its allegations, and has thereby created confusion concerning its compliance," and that "[i]n reality, the Respondent has deliberately chosen not to comply with the [FM1] Tribunal's Order issued on May 26, 2023[footnote omitted] and has also confirmed that it will continue not to comply with the Order in the future."[61] At the end of the letter, Claimant requested relief from the FM1 tribunal regarding the VAT refund.[62]

122. By letter of 29 March 2024, the FM1 tribunal provided the Parties with its understanding of Respondent's compliance with the Recommendation in the PM Decision.[63] With respect to NAFTA Article 1134, the FM1 tribunal observed in the letter:

> The prohibition contained in NAFTA Article 1134[64] does not bar Respondent from complying with the Decision also in respect of amounts which have already been deposited in the blocked

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59 FM1 tribunal's invitation to Claimant, as quoted in Exhibit RM-0046, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant Regarding Compliance with the Provisional Measure, 25 March 2024, p. 2.

60 Exhibit RM-0046-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant Regarding Compliance with the Provisional Measure, 25 March 2024.

61 *Id.*, p. 2.

62 *Id.*, pp. 17-18.

63 Exhibit RM-0047-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 29 March 2024.

64 *See* footnotes 43-44 above.

> account.[65] The Tribunal cannot issue a provisional measure ordering the unblocking of those funds in view of NAFTA Article 1134, since such unblocking has been requested by Claimant on the merits. Respondent is, however, at liberty to unblock those amounts and transfer them at its own initiative, even more so in compliance with a provisional measure that bindingly recommends Respondent to make those funds available to PEM.[66]

123. The FM1 tribunal concluded that:

> . . . in order to fully comply with the Decision, Respondent must make the amounts of VAT refunds paid to PEM from 4 January 2023 to July 2023 on its blocked account at freely available to PEM, by depositing those amounts on PEM's freely accessible account at or otherwise.

124. The FM1 tribunal added that "[i]n the light of these clarifications, Claimant is invited to indicate whether it maintains its requests of relief at pages 17-18 of its letter of 25 March 2024 by 10 April 2024."[67]

125. Claimant responded by letter of 10 April 2024 that Respondent had not fully complied with the PM Decision and requested an extension for answering the FM1 tribunal's invitation to confirm whether it maintains its requests for relief until 1 May 2024.[68] Subsequently, on 1 May 2024, Claimant requested another extension until 31 May 2024.[69]

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[65] It is the understanding of the Consolidation Tribunal that the amounts on PEM's accounts with were frozen, whilst the amounts on PEM's account with were not at that time. *See* Transcript (English), 27 January 2025, 25:23-26:9 (Claimant Response to Tribunal Question). *See also* footnote 73 below.

[66] Exhibit RM-0047-ENG*, First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 29 March 2024*,* p. 4, ¶ 5.

[67] Exhibit RM-0047-ENG*, First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 29 March 2024*,* p. 4.

[68] Exhibit RM-0048-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant to ICSID, 10 April 2024.

[69] Exhibit RM-0049-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant Requesting Relief, 1 May 2024.

126. On 6 May 2024, the FM1 tribunal sent a communication to the Parties, urging Respondent to complete the necessary steps "to have these amounts unblocked in favor of PEM [...] with all required speed" and invited the Parties to keep the FM1 tribunal informed of the completion of the process.[70]

127. On 21 May 2024, Respondent requested the FM1 tribunal to confirm its understanding that arbitration FM1 was stayed as of 11 March 2024, the day on which it reported to the FM1 tribunal about its compliance with the PM Decision (see section (e) above), in light of the information Respondent had to provide to the Consolidation Tribunal by 23 May 2024.[71]

128. By letter of 29 May 2024 to the FM1 tribunal, Claimant provided its comments on Respondent's letter of 21 May 2024 and requested the FM1 tribunal "that this Tribunal confirm that it continues to have jurisdiction over the claim in ICSID Case No. ARB/21/14 (FM 1) and that the suspension reflected in PO 6 was limited to the calendar and the pleadings that would have been filed pursuant to the calendar."[72]

129. On 4 June 2024, the FM1 tribunal wrote to the Parties:

> Reference is made to the Respondent's clarification request of 21 May 2024, as well as the Claimant's comments of 29 May 2024.
>
> The Tribunal observes that it does not appear that the Respondent has fully complied with the Tribunal's Decision of 26 May 2023, although it has repeatedly stated that it intends to do so. This matter is therefore still pending notwithstanding the suspension of the proceedings.
>
> The Tribunal therefore urges again the Respondent, confirming its message to the Parties of 6 May 2024, to complete the steps needed to

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[70] Exhibit RM-0050-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 6 May 2024.

[71] Exhibit RM-0051-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Respondent to the Tribunal, 21 May 2024. *See* ¶ 12 above.

[72] Exhibit RM-0054-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant to ICSID, 29 May 2024.

> release to PEM the amounts of the VAT refunds pertaining to the months from January to July 2023 in full compliance of the Decision and report promptly to the Tribunal.[73]

(f) Claimant's Ancillary Claims and Authorisation Decision (15 July 2024)

130. Some three weeks later, on 24 June 2024, Claimant filed with the FM1 tribunal a "Request for Admission of Ancillary Claims", requesting:

> [...] leave to include in its Reply ancillary claims (Request) for amounts refunded to Primero Empresa Minera, S.A. de C.V. (PEM) by the SAT for value-added tax (VAT) that have remained inaccessible to PEM since April 3, 2020.[74]

131. The ancillary claims are, according to Claimant and not denied by Respondent,[75] identical to the claims Claimant submitted in arbitration FM2, which it filed almost one year earlier, on 29 June 2023.[76]

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[73] Exhibit RM-0055-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from ICSID to the Parties, 4 June 2024. Claimant asserts that on or about 29 August 2024, SAT imposed a freeze on PEM's bank account at and that SAT takes the position that the freeze is justified by the ongoing proceedings before the Consolidation Tribunal and the suspension of arbitrations FM1 and FM2. *See* Claimant's Consolidation Counter-Memorial, ¶ 4(a)(iv) and Exhibit CM-0011-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Letter from Claimant to Respondent, 3 September 2024. *See also* Exhibit CM-0032-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Letter from Claimant to ICSID, 7 October 2024; Transcript (English), 27 January 2025, 25:23-26:9 (Claimant Response to Tribunal Question). *See also* footnote 65 above.

[74] Exhibit RM-0056-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for Admission of Ancillary Claims, 24 June 2024, ¶ 1; *see also Id*., ¶¶ 87-89. Claimant also requested to order "if necessary, the temporary suspension of the proceedings under P.O. No. 6 to be lifted for the purpose of granting leave for this Request and admitting Claimant's ancillary claims with the Reply [Memorial]." *Id.*, ¶ 91(3).

[75] C-PHB, Annex, Question 2; R-PHB, Appendix, ¶ 17.

[76] *See* ¶ 91 above.

132. On 11 July 2024, Respondent submitted its "Response to Request for Admission of Subordinate Claims", requesting that Claimant's Request be dismissed.[77] Respondent argued that (i) the stay of arbitration FM1 should remain in effect as long as the consolidation proceeding is ongoing;[78] (ii) the Request does not comply with the requirements of Article 46 of the ICSID Convention and Rule 40(1) of the 2006 ICSID Arbitration Rules;[79] and (iii) maintaining the provisional measures would be in contravention of NAFTA Article 1134.[80]

133. On 12 July 2024, with reference to the First Procedural Meeting of the Consolidation Tribunal scheduled for 16 July 2024, Claimant made an urgent request to the FM1 tribunal to issue on an expedited basis its decision on Claimant's "Request for Admission of Ancillary Claims".[81]

134. By a ruling issued on 15 July 2024, the FM1 tribunal granted Claimant authorisation to file the ancillary claims as outlined in its 24 June 2024 "Request for Admission of Ancillary Claims" ("**Authorisation Decision**").[82] The text of the ruling is as follows:

> The [FM1] Tribunal has reviewed the Claimant's request dated June 24, 2024, seeking permission to submit ancillary claims in the current proceedings. These claims pertain to refunds issued by the SAT to PEM for VAT payments that PEM has been unable to access due to the funds being held in PEM's blocked accounts (the "Request"). The Tribunal

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77 Exhibit RM-0063-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Response to Request for Admission of Subordinate Claims, 11 July 2024.

78 *Id.,* ¶¶ 3-4.

79 *Id.,* ¶¶ 5-12.

80 *Id.,* ¶¶ 13-15. For NAFTA Article 1134, *see* footnotes 43-44 above.

81 Exhibit RM-0064-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for an Expedited Ruling on its Ancillary Claims Request, 12 July 2024.

82 Exhibit RM-0065-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Tribunal's Expedited Ruling on Ancillary Claims Request, 15 July 2024.

has also taken into account the Respondent's reply dated July 11, 2024, which urges the Tribunal to dismiss the Claimant's request. Furthermore, the Tribunal has considered the Claimant's letter dated July 12, 2024, which outlines the urgency of the Request. The Claimant indicates that if the Tribunal grants authorization, it will withdraw the identical claim currently pending in ICSID Case ARB/23/28, thereby rendering the upcoming decision of the Consolidation Tribunal, scheduled for July 16, 2024, unnecessary.

The Tribunal hereby GRANTS the Claimant authorization to file the additional claims as outlined in its Request of June 24, 2024, for the following reasons:

1. The ongoing suspension of proceedings, as per Procedural Order No. 6 ("PO6"), does not preclude the Tribunal from considering the merits of the Claimant's Request and granting authorization, having deemed it admissible. Procedural orders like PO6 are subject to revocation or amendment for valid reasons or in light of new circumstances, such as a request to submit ancillary claims that meet the requirements of the ICSID Convention and Arbitration Rules. Moreover, authorizing the additional claims does not necessitate lifting the suspension of proceedings.

2. The [FM1] Tribunal is familiar with the subject matter of the ancillary claims, which were previously discussed when the Claimant sought provisional measures. This is particularly relevant to the measure granted by the Tribunal's decision on May 26, 2023, which recognized that NAFTA Article 1134 did not prevent the Tribunal from advising the Respondent against blocking VAT refunds due to PEM. The Tribunal had determined that the blocking of these payments was not a contested measure in this arbitration. The discussions revealed that the ancillary claim is intimately related to the broader dispute between the Claimant and the Respondent, which is the focus of the current arbitration. Consequently, the Tribunal finds the ancillary claims proposed by the Claimant to be admissible, as they appear to arise directly from the dispute's subject matter and fall within the scope of the parties' consent, in accordance with Article 46 of the ICSID Convention and ICSID Arbitration Rule 40.

3. Regarding the Respondent's contention that NAFTA Article 1134[83] precludes the submission of additional claims, as they would become part of the ongoing proceedings, the Tribunal disagrees. Article 1134 prohibits the issuance of provisional measures concerning a pending claim; it does not prevent a claimant from subsequently adding such a

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83 *See* footnotes 43-44 above.

> claim to the proceedings, provided the conditions of Article 46 of the ICSID Convention are met.
>
> For these reasons, the [FM1] Tribunal grants the Claimant the requested authorization.

135. As mentioned in paragraph 25 above, at the First Procedural Meeting held on 16 July 2024, the Consolidation Tribunal decided to stay the proceedings in arbitrations FM1 and FM2 pursuant to NAFTA Article 1126(9).

D. Arbitration FM2 as of 15 July 2024

136. In its communication of 15 July 2024 to ICSID requesting to convey urgently to the Consolidation Tribunal the FM1 tribunal Authorisation Decision of even date, Claimant advised that it will "now be taking the necessary steps to immediately discontinue" arbitration FM2, adding that "[s]uch discontinuance would, needless to say, render the issue of consolidation moot, and naturally leading to discontinuance of the Consolidation proceeding [...]."[84]

137. By letter of 31 July 2024, with reference to Rule 56 of the 2022 ICSID Arbitration Rules,[85] Claimant advised Respondent that it intended to request from the ICSID Secretary-General the discontinuance of arbitration FM2.[86] In the letter, Claimant

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[84] Exhibit RM-0074-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28 - Consolidation Request, Communication from Claimant to ICSID, 15 July 2024.

[85] Rule 56 ("Discontinuance at Request of a Party") of the ICSID Arbitration Rules (2022) provides:

"(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal."

[86] Exhibit RM-0078-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Communication from Claimant to Respondent, 31 July 2024.

sought Respondent's consent to the discontinuance, offering Respondent reimbursement of its reasonable costs. By email of 5 August 2024, Respondent declined to give consent, without stating reasons.[87]

138. By letter of 26 August 2024, Claimant repeated its inquiry to Respondent regarding consent to discontinuance of arbitration FM2.[88] By email of 28 August 2024, Respondent reaffirmed that it did not consent to the discontinuance of arbitration FM2.[89]

139. By letter of 1 October 2024, Claimant requested ICSID for "an immediate discontinuance of the proceeding in [FM2], pursuant to Rule 56 of the ICSID Arbitration Rules (2022)."[90] With reference to Rule 56(2), Claimant requested the ICSID Secretary-General to fix a time limit of 7 days for Respondent to object to the discontinuance. Respondent advised on 7 October 2024 that it objected to the discontinuance of arbitration FM2.[91] On the same date, ICSID's Secretary-General informed the Parties that the proceedings in arbitration FM2 shall continue:

> I write on behalf of the Secretary-General of ICSID in reference to the Claimant's letter of October 1, 2024, requesting the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 56. In accordance with Rule 56, the Respondent was ordered to state whether or not it opposes the discontinuance by October 11, 2024. Today, ICSID

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87 Exhibit CM-0025-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28 - Consolidation Request, Correspondence from Respondent to Claimant, 5 August 2024.

88 Exhibit RM-0079-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Communication from Claimant to Respondent, 26 August 2024.

89 Exhibit CM-0026-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28 - Consolidation Request, Correspondence from Respondent to Claimant, 28 August 2024.

90 Exhibit RM-0084-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Communication from Claimant to ICSID with the Request for Discontinuation of FM 2, 1 October 2024.

91 Exhibit RM-0086-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Communication from Respondent to ICSID, 7 October 2024.

> received a letter from the Respondent objecting to the discontinuance. Therefore, the proceeding shall continue.[92]

140. On 14 October 2024, Claimant made to Respondent another, detailed proposal for discontinuance of arbitration FM2.[93] Respondent replied by email of 17 October 2024 that the matter was now before the Consolidation Tribunal.[94]

141. On 17 January 2025, Claimant addressed correspondence to ICSID in which it "reaffirms its withdrawal of its claim" in arbitration FM2 and submitted a "Withdrawal of Claim" dated 17 January 2025 stating as follows:

> 1. On June 29, 2023, the Claimant filed its Request for Arbitration in the above-captioned proceeding. The Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") registered the Request on July 21, 2023. As set forth in the Request for Arbitration, the only claim submitted by the Claimant in the present proceeding "relates to the Government of Mexico's steadfast refusal to allow PEM access to Value Added Tax (VAT) refunds which it has been entitled to since April 2020." [footnote omitted]
>
> 2. Following the admission of an identical claim into the record of *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 as an ancillary claim on July 15, 2024, the Claimant hereby withdraws its claim concerning its VAT refunds in the present proceeding in its entirety.
>
> 3. Accordingly, the present proceeding should be discontinued as promptly as possible in the most efficient manner, as there does not exist any "claim" within the meaning of NAFTA Articles 1120 and 1121 to be resolved.[95]

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92 Exhibit RM-0087-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Communication from ICSID to the Parties, 7 October 2024.

93 Exhibit CM-0027-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Letter from Claimant to Respondent, 14 October 2024.

94 Exhibit CM-0028-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28 - Consolidation Request, Correspondence from Respondent to Claimant, 17 October 2024.

95 Exhibit RM-0089-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Correspondence from Claimant to Consolidation Tribunal, 17 January 2025.

142. On 29 January 2025, ICSID replied to Claimant's letter seeking withdrawal of its claim in arbitration FM2 by stating that Respondent "object[ed] to the discontinuance of this proceeding" and that, "[a]ccordingly, pursuant to ICSID Arbitration Rule 56(1), the proceeding shall not be discontinued".[96]

IV. SUMMARY OF THE PARTIES' POSITIONS

A. Position of Mexico

143. According to Respondent, there are four conditions for consolidation under NAFTA Article 1126 ("**Conditions**") which are met in this case. [97]

144. Respondent submits that Condition 1 that the claims have been submitted to arbitration under NAFTA Article 1120 is met by Claimant in both arbitrations FM1 and FM2,[98] and that Claimant cannot now withdraw from arbitration FM2. [99]

145. Respondent also submits that Condition 2 that the claims have "a question of law or fact in common" is met because Claimant's claims in each of the two arbitrations arise from the same factual circumstances, as it is acknowledged by Claimant.[100]

146. Respondent further submits that Condition 3 that the consolidation order is "in the interest of a fair and efficient resolution of the claims" is also met.[101] For the

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96 Exhibit RM-0091-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Correspondence from ICSID to the Parties, 29 January 2025.

97 Respondent's Consolidation Memorial, ¶ 63.

98 *Id.*, ¶ 65.

99 *Id.*, ¶¶ 66-68, 94 and footnote 97.

100 *Id.*, ¶¶ 70-74. *See also* R-PHB, ¶¶ 6-10, 27-34.

101 Respondent's Consolidation Memorial, ¶¶ 75-135.

meaning of "fair and efficient," Respondent relies on the interpretation given by the *Canfor* Consolidation Tribunal.[102]

147. Respondent lists a number of points of guidance for Condition 3 of "in the interest of a fair and efficient resolution": (i) comparison of consolidation with the existing situation; (ii) focus on the effective administration of justice in light of the position of State parties in particular; (iii) an objective, fact-based standard for the term "efficient"; (iv) a balancing of interests of all parties involved as required by the term "fair"; and (v) the relevance of whether a party is guilty of an abuse of process.[103]

148. Respondent disagrees with Claimant's position that consolidation should be compared to Claimant's proposed expanded arbitration FM1. Rather, Respondent argues the Consolidation Tribunal must compare the consolidation of arbitrations FM1 and FM2 with the continuation of those arbitrations.[104]

149. In this regard, Respondent asserts that it is justified in pursuing consolidation rather than consenting to the discontinuance of arbitration FM2.[105]

150. Respondent submits, in the alternative, that if the Consolidation Tribunal decides that the comparison should be made with Claimant's proposed expanded arbitration FM1 rather than with arbitrations FM1 and FM2, consolidation would still be in the interests of a fair and efficient resolution of the claims.[106]

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102 *Id.*, ¶¶ 78-89, *citing* Exhibit RL-0003-ENG, *Canfor Corporation v. United States of America; Tembec et al v. United States of America; Terminal Forest Products Ltd. v. United States of America*, NAFTA/UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005 ("***Canfor* Order**").

103 Respondent's Consolidation Memorial, ¶ 89.

104 *Id.*, ¶¶ 91-93.

105 *Id.*, ¶ 94; *see* for rationale footnote 97.

106 *Id.*, ¶ 95.

151. In particular, Respondent contends that, through its actions, Claimant has expanded the scope of what must be decided to resolve its claims in such a manner that only the Consolidation Tribunal can resolve those claims in a fair and efficient manner.[107] In support of this contention, Respondent lists seven alleged actions of Claimant:

(a) Claimant's initial decision not to include the FM2 claims in arbitration FM1.[108]

(b) Claimant's Request for Provisional Measures in arbitration FM1, including the denial of Respondent's opportunity to fully present its defense regarding the VAT refunds.[109]

(c) Claimant's initiation of arbitration FM2.[110] In particular, according to Respondent, by tactically leaving FM2's claims out of arbitration FM1, Claimant was able to seek provisional measures in arbitration FM1 regarding some of the arbitration FM2 claims, circumventing a violation of NAFTA Article 1134.[111]

(d) Claimant's request for admission of ancillary claims.[112] Respondent contends that, taken together, the provisional measures, arbitration FM2 and the request for admission of an ancillary claim demonstrate a fundamental unfairness to Respondent and an abuse of process.

(e) Claimant's conduct in the consolidation proceeding. According to Respondent, this conduct includes Claimant's request to the FM1 tribunal to

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107 *Id.*, ¶¶ 96-133.

108 *Id.*, ¶¶ 97-101.

109 *Id.*, ¶¶ 102-109.

110 *Id.*, ¶¶ 110-117.

111 For NAFTA Article 1134, *see* footnotes 43-44 above.

112 Respondent's Consolidation Memorial, ¶¶ 118-121.

expedite the Authorisation Decision and its non-payment of its advance on costs which delayed the holding of the First Procedural Meeting.[113]

(f) The unnecessary costs caused by Claimant's above-mentioned actions.[114]

(g) The consolidation proceeding would be the quickest way to resolve the claims.[115]

152. Finally, Respondent rejects Claimant's argument that Respondent's actions in arbitrations FM1 and FM2 as well as in the consolidation proceeding constitute procedural misconduct.[116]

153. Respondent seeks the following relief:

> In view of the foregoing, pursuant to NAFTA Article 1126(2), Mexico respectfully requests that the Consolidation Tribunal assume jurisdiction, hear and determine jointly all claims brought by Claimant in the FM1 and FM2 arbitrations.[117]

B. Position of First Majestic Silver Corp.

154. Claimant submits that the factual situation warrants the rejection of Respondent's Consolidation Request based on either of these two grounds:

(1) the Consolidation Tribunal lacks authority to consolidate because the condition of multiple "claims" before more than a single tribunal no longer exists due to the discontinuance of arbitration FM2; and

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113 *Id.*, ¶¶ 123-125.

114 *Id.*, ¶¶ 126-128.

115 *Id.*, ¶¶ 129-133.

116 *Id.*, ¶¶ 136-138.

117 *Id.*, ¶ 139.

(2) in the alternative, even if it were to be assumed that the VAT refund claim has not been admitted by the FM1 tribunal (which is not the case), Respondent has failed to present a persuasive case for consolidation under NAFTA Article 1126(2), *i.e.*, that there are "questions of fact or law in common" and consolidation is necessary for the "fair and efficient resolution of the claims."[118]

155. With respect to its primary submission (1) above, Claimant contends that the Consolidation Tribunal no longer possesses the authority to consolidate due to the existence of different circumstances from the time of the filing of the Consolidation Request on 12 February 2024. In this regard, Claimant is no longer proceeding with multiple claims in two separate proceedings, *i.e.*, in arbitrations FM1 and FM2:[119]

-- The FM1 tribunal admitted Claimant's VAT refund claim as an ancillary claim in the Authorisation Decision.

-- Claimant has taken since then the necessary steps to discontinue the proceedings in arbitration FM2.

-- Respondent has refused to give consent to the discontinuance of arbitration FM2, notwithstanding Claimant's repeated requests and offer to pay Respondent's reasonable costs.

-- There are no longer two separate claims in different proceedings.

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[118] Claimant's Consolidation Counter-Memorial, ¶ 157.

[119] *Id.*, ¶¶ 158-171.

156. With respect to the alternative submission (2) above, Claimant contends that Respondent has failed to prove that consolidation is appropriate under the circumstances.[120]

157. Claimant asserts that, assuming *arguendo* that the VAT refund claim has not been admitted to arbitration FM1 and remains in arbitration FM2, the claim related to the attempted revocation of the Advanced Purchase Agreement ("**APA**") in arbitration FM1 and the claim related to the VAT refunds in arbitration FM2 do not have questions of law or fact that are in common.[121]

158. Claimant submits further that the Respondent is not being put in a position of having to defend itself against a multiple number of claimants; and that there does not exist any potential risk of contradictory decisions emerging, as the adjudication does not concern the same factual and legal questions.[122]

159. Claimant also argues that the *Canfor* test is not met, in particular because the claims do not raise a question of law or fact in common,[123] and consolidation is not in the interests of fair and efficient resolution of the claims.[124]

160. Claimant submits that, even if the Consolidation Tribunal determines that the elements of the *Canfor* test are met, consolidation should nonetheless be rejected as (i) Respondent is seeking to avoid its obligation to comply with the FM1 tribunal's Order on Provisional Measures (i.e., PM Decision); (ii) Respondent has engaged in

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120 *Id.*, ¶¶ 172-229.

121 *Id.*, ¶ 177.

122 *Id.*, ¶ 183.

123 *Id.*, ¶¶ 197-207. For the *Canfor* Order, *see* footnote 102 above.

124 *Id.*, ¶¶ 208-230.

an "abuse of process"; and (iii) Respondent's asserted objection to the discontinuation of arbitration FM2 based on costs is disingenuous.[125]

161. Claimant further contends that Respondent's abuse of process argument must be rejected.[126]

162. Finally, Claimant submits that if arbitrations FM1 and FM2 are consolidated, the proceedings should resume where arbitration FM1 was suspended.[127]

163. Claimant seeks the following relief:

> [R]equests that the Consolidation Tribunal to issue an Order:
>
> a. Dismissing the Consolidation Request as the circumstances before the Consolidation Tribunal have changed substantially from what is reflected in the Request, thereby depriving the Consolidation Tribunal of its authority to consolidate.
>
> b. Alternatively, dismissing the Respondent's Consolidation Request for failing to meet the requirements of NAFTA Article 1126.
>
> c. Order costs to be payable to the Claimant in the Consolidation Proceeding to be payable immediately by the Respondent.[128]

C. Non- Disputing Party Submission of the United States of America

164. As mentioned, the United States of America filed a NAFTA Article 1128 Submission on 23 December 2024 ("**NDP-Submission**").[129] In the NDP-Submission, the United States makes submissions on questions of interpretation of

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125 *Id.*, ¶¶ 231-251.

126 *Id.*, ¶¶ 252-255.

127 *Id.*, ¶¶ 256-259.

128 *Id.*, ¶ 260.

129 As also mentioned, the Government of Canada advised the Consolidation Tribunal by letter of 20 December 2024 that it would not be filing a non-disputing Party submission.

the NAFTA, whilst emphasizing that it does not take a position on how the interpretation offered applies to the facts of this case.[130]

165. The United States addresses first the policy objectives underlying Article 1126, which include avoiding a multiplicity of parallel claims and promoting their expeditious and cost-effective resolution.[131] The United States agrees with the tribunal in *Canfor*, "which acknowledged that: the 'intended purpose and object' of Article 1126 'are procedural economy in light of the position of State Parties in particular. That objective includes considerations of saving costs and time for a State Party, while simultaneously taking into account and balancing the interests of the disputing investors.'"[132]

166. The United States further addresses the matter of common questions of law or fact and observes: "once a tribunal determines that one or more common questions of fact or law exist, it should then consider the relative importance of those questions to determine whether consolidation is in the interests of a fair and efficient resolution of the claims."[133]

167. Finally, the United States addresses the matter of fair and efficient resolution of claims: "Under the plain terms of Article 1126, a consolidation tribunal's role is to determine, at the time the request is made, whether consolidation would be fair and efficient for the resolution of the claims." It notes that: "The main elements of fairness and efficiency under Article 1126 are: (i) time; (ii) costs; and (iii) the avoidance of conflicting determinations of law or fact regarding the same measure."[134] The United States submits that: "The disputing investor's preference

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130 NDP-Submission, ¶ 1.

131 *Id.*, ¶¶ 3-5.

132 *Id.*, ¶ 4, referring to *Canfor* Order, ¶ 75 (footnote 102 above).

133 *Id.*, ¶ 6, referring to *Canfor* Order, ¶ 114 (footnote 102 above).

134 *Id.*, ¶¶ 7-8, referring to *Canfor* Order, ¶ 208 (footnote 102 above).

regarding consolidation is not relevant when evaluating a consolidation request under Article 1126, unless that preference is based on the interests of fair and efficient resolution of the claims as referred to in paragraph 2 of that provision."[135]

168. Respondent agrees with the United States, *inter alia*, that: (i) the objective of consolidation is to ensure procedural efficiency and avoid duplication of proceedings;[136] (ii) NAFTA Article 1126 is not limited to cases involving multiple claimants;[137] (iii) common issues that are dispositive of the case as a whole will weigh in favour of consolidation;[138] (iv) time, costs, and the avoidance of conflicting rulings are elements of fairness and efficiency;[139] and (v) the disputing investor's preference regarding consolidation is not relevant, since by consenting to arbitrate claims under NAFTA Chapter 11, it agreed to submit to the rules and procedures under the treaty, including possible consolidation.[140]

169. Claimant did not file any observations on the NDP-Submission.

V. CONSIDERATIONS OF THE CONSOLIDATION TRIBUNAL

170. As required by NAFTA Article 1131(1), the Consolidation Tribunal shall apply "this Agreement [the NAFTA] and the applicable rules of international law." Accordingly, the Consolidation Tribunal will also apply the rules of treaty interpretation as set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 ("**VCLT**"). While the VCLT is not in force among the three

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135 *Id.*, ¶ 9, referring to *Canfor* Order, ¶ 135 (footnote 102 above).

136 Respondent Comments on NDP-Submission, ¶ 2.

137 *Id.*, ¶ 3.

138 *Id.*, ¶ 5.

139 *Id.*, ¶ 9.

140 *Id.*, ¶ 11.

NAFTA State Parties (the United States has never ratified it), Articles 31 and 32 are regarded as reflective of established customary international law.[141]

171. In the analysis below, the Consolidation Tribunal has not only considered the positions of the Parties as summarised in the preceding Section but also their numerous detailed arguments in support of those positions as well as the arguments made at the Hearing. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the analysis.

A. NAFTA Article 1126

172. Where claims to separate Article 1120 arbitrations have "a question of law or fact in common," the Consolidation Tribunal may, "in the interests of fair and efficient resolution of the claims," issue an order pursuant to NAFTA Article 1126(2), which provides as follows:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order
>
> (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
>
> (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

173. Claimant and Respondent (and the United States in its NDP-Submission) base their arguments on the interpretation of NAFTA Article 1126 largely on the *Canfor* Order.[142] The Consolidation Tribunal also agrees with the interpretation of NAFTA

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141 *See* Exhibit RL-0003-ENG, *Canfor* Order, ¶ 59.

142 *See* footnote 102 above. The *Canfor* Order is more detailed than the decisions in the other two reported cases deciding on consolidation under NAFTA 1126: Exhibit CML-0006-ENG, *Corn*

(footnote cont'd)

Article 1126 developed in the *Canfor* Order as it is consistent with Articles 31 and 32 VCLT. Accordingly, this interpretation is adopted to the extent that it is relevant to the present case. With that said, the Consolidation Tribunal notes that the present case raises certain issues that were not considered by the consolidation tribunal in *Canfor*.

174. Pursuant to the VCLT, the Consolidation Tribunal interprets NAFTA Article 1126 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.

175. The Consolidation Tribunal addresses at the outset several questions of general import relevant to the operation of NAFTA Article 1126 that arose in the course of these proceedings.

(a) The rationale for NAFTA Article 1126

176. As reflected in national court procedures, consolidation is a well-known procedural device for achieving procedural economy where there are multiple proceedings.[143] The object and purpose of consolidation under NAFTA Article 1126 is likewise procedural economy, which is served by consolidating claims in the circumstances set out in Article 1126(2). The Consolidation Tribunal concurs with the consolidation tribunal in *Canfor* that the term "procedural economy" is used in the sense of an effective administration of justice.[144] As was also noted by the *Canfor* consolidation tribunal following an analysis of the legislative history of NAFTA,

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Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1 and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Order of the Consolidation Tribunal, 20 May 2005; Exhibit CML-0007-ENG, *The Canadian Cattlemen for Fair Trade v. United States of America – Consolidation Request*, NAFTA/UNCITRAL, Procedural Order No. 1, 20 October 2006.

143 *See* Exhibit RL-0003-ENG, *Canfor* Order, ¶ 77.

144 *Id.*, ¶¶ 73-77 (footnote 102 above).

avoidance of procedural harassment of a State Party to the NAFTA appears to be the main rationale of the provisions set forth in Article 1126.[145]

(b) Consensual nature

177. By consenting to arbitration within the confines of NAFTA Article 1121, the Parties consent to Article 1126, with the potential consequence that the claims will be adjudicated by a tribunal that is composed of persons different from those who formed part of the original Article 1120 tribunal.[146]

(c) Multiple claimants

178. Claimant submits that "the Canfor decision also accepts that [Article 1126] is really aimed at a situation where there are two or three claimants, or potentially more, as against one sovereign [S]tate."[147] Respondent disputes this, arguing that Article 1126 does not impose any requirement on the identity of the claimant parties, and the mere fact that it is a new situation does not mean it is impermissible.[148]

179. The text of NAFTA Article 1126(2) refers to "claims" that "have been submitted to arbitration under Article 1120." Aside from specifying that they must have been filed under NAFTA Article 1120, Article 1126 does not otherwise limit the type of claim that may be consolidated or the party or parties that have filed such claims. The Consolidation Tribunal therefore finds no basis in the text of Article 1126 to limit a request for consolidation to situations in which a State is faced with claims

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145 *Id.*, ¶¶ 63-73.

146 *Id.*, ¶¶ 78-80, 135 ("party autonomy (to which [c]laimants also refer as the consensual nature of the process or as the parties' wishes) is not relevant for considering a consolidation request under Article 1126").

147 Transcript (English), 28 January 2025, 372:14-18. *See also* Claimant's Consolidation Counter-Memorial, ¶ 180.

148 R-PHB, ¶ 19.

from separate claimants, as opposed to multiple claims from one single claimant, as is the present case.

(d) Power to consolidate

180. The text of NAFTA Article 1126(2) uses the expression "may [...] order." An Article 1126 consolidation tribunal, therefore, has the power to make an order under Article 1126(2), subject to the requirements set forth below.

181. The power to make an order under Article 1126(2) is circumscribed by the express conditions (i) that "claims have been submitted to arbitration under Article 1120," (ii) that these claims have "a question of law or fact in common," (iii) that the order is "in the interests of fair and efficient resolution of the claims," and (iv) that the disputing parties have been heard. This power is further circumscribed by what an Article 1126 consolidation tribunal may order pursuant to sub-paragraphs (a) and (b) of NAFTA Article 1126(2).[149]

182. As to the requirement in condition (iv) mentioned in ¶ 181 above to decide upon the Request for Consolidation only "after hearing the disputing parties," Claimant and Respondent have provided their views on the Request for Consolidation in written submissions before and after the hearing on consolidation, and oral submissions at the hearing on consolidation. This requirement is therefore fulfilled and does not require further consideration.

(e) Structure of the analysis

183. The legal standard under NAFTA Article 1126(2) calls for a three-step analysis. The first step in the Consolidation Tribunal's analysis is to determine that "claims have been submitted to arbitration under Article 1120." The second step is for the

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[149] Exhibit RL-0003-ENG, *Canfor* Order, ¶¶ 88-91.

Consolidation Tribunal to satisfy itself that those claims "have a question of law or fact in common."

184. Subject to a finding that claims have been submitted to arbitration that have a question of law or fact in common, Article 1126(2) states that consolidation may be ordered "in the interests of fair and efficient resolution of the claims." The third step of the Consolidation Tribunal's analysis is therefore to determine whether consolidation is in the interests of fair and efficient resolution of the claims.

(f) The term "a question of law or fact in common"

185. The notion of "question" in the term "a question of law or fact in common" as appearing in Article 1126(2) means a factual or legal issue that requires a finding to dispose of a claim. An issue to which the invocation of a provision of Section A of Chapter 11 of the NAFTA gives rise should be in common in the Article 1120 arbitrations. Furthermore, a fact may be in common in the Article 1120 arbitrations, but there should also be an issue concerning that fact that is in common. However, the distinction is not as black or white as the previous sentences may suggest since there is often an interaction between legal and factual issues.[150]

186. As regards the question whether one or several questions of law or fact are necessary to justify an order under Article 1126(2), within the perspective of procedural economy, the presence of one common question of either law or fact in two or more Article 1120 arbitrations will serve that object and purpose under given circumstances.[151]

187. The question need not be purely a quantitative one, but a qualitative one as well. The determination that one question of law or fact is in common requires a further

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150 *Id.*, ¶¶ 109-110.

151 *Id.*, ¶ 113.

determination that resolution of that question is in the interests of fair and efficient resolution of the claims. Thus, at least one question of law or fact in common may present itself, but resolution of that question by an Article 1126 consolidation tribunal may not serve the fair and efficient resolution of the claims advanced before the Article 1120 tribunals. Whether that is so depends entirely on the circumstances of the cases and cannot be answered in the abstract.[152]

(g) The term "in the interests of fair and efficient resolution of the claims"

188. The text of Article 1126(2) neither expresses nor implies that a comparison must be made between the Article 1120 arbitrations and an Article 1126 arbitration when applying the term "in the interests of fair and efficient resolution of the claims." Efficiency in the sense of procedural economy is the operative goal of consolidation under Article 1126. That is basically an objective, fact-driven standard which an Article 1126 consolidation tribunal can apply as it deems appropriate under the circumstances. Determining what is efficient under Article 1126(2) is not an accounting exercise of drawing up a matrix of comparative advantages and disadvantages and applying relative weighing factors. It suffices that the Article 1126 consolidation tribunal is convinced that efficiency in the resolution of the claims will, under the circumstances before it, be served by a consolidation.[153]

189. In making that determination, an Article 1126 consolidation tribunal is also to consider what is "fair." That requirement indicates that the interests of all parties involved should be balanced in determining what is the procedural economy in the

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152 *Id.*, ¶ 114.

153 *Id.*, ¶ 124.

given situation. The necessary balancing includes the consideration that all parties shall continue to receive the fundamental right of due process.[154]

190. Respondent argues that fairness and efficiency should be analysed jointly, because "there cannot be an efficient procedure or proceeding if it is unfair."[155] Claimant submits that fairness and efficiency are to be considered separately, with primacy to procedural economy as the more prominent consideration.[156]

191. There is no priority in the language of NAFTA Article 1126 between considerations of fairness and those of efficiency. The plural reference to the "interests" of fairness and efficiency confirms that they are distinct considerations. Further, the use of the conjunction "and" suggests that consolidation should only occur if both the interests of fairness and efficiency will be served. However, the specific circumstances of the case may have dual relevance to considerations of fairness and those of efficiency that weigh either in favour of or against consolidation. It is for the Consolidation Tribunal to weigh those factors in making its assessment of whether consolidation is in the interests of fair and efficient resolution of the claims.

192. While the standard of efficiency is an objective one, a guiding test is a comparison with the situation as it exists, and would continue to exist, if no consolidation were ordered. Factors to take into account in making such a comparison are: (i) time; (ii) costs; and (iii) avoidance of conflicting decisions. With respect to factor (i), a request under Article 1126(2) is not subject to a specific time limit.[157]

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154 *Id.*, ¶ 125.

155 Transcript (English), 28 January 2025, 279:3-4. *See also* Transcript (English), 28 January 2025, 278:8-17 (Respondent Answer to Tribunal Question).

156 C-PHB, ¶ 86.

157 Exhibit RL-0003-ENG, *Canfor* Order, ¶¶ 126, 128.

(h) Timing of assessment

193. In relation to the relevant moment in time at which the Consolidation Tribunal is to make its assessment of whether to consolidate, Tribunal Question 1 asked the Parties whether the Consolidation Tribunal is to consider the status of the claims in proceedings "at the time the request for consolidation is filed or at some later moment," and whether and how to take into account changes in circumstances after the date of filing the request for consolidation (see ¶ 66 above).

194. This question did not arise in the circumstances of the *Canfor* case where the situation at the time of the request for consolidation and the hearing on consolidation were the same. In this case, as discussed above, there have been procedural developments since the moment that the Consolidation Request was filed.

195. According to Respondent, in light of the requirement for a party seeking consolidation to specify "the grounds on which the order is sought" under NAFTA Article 1126(3), a request for consolidation should be evaluated based on the circumstances that existed at the time that the request for consolidation was filed.[158]

196. In Respondent's view, a later event should only be taken into account if it has a "material change in the state of the claims" at the time of the decision of the Consolidation Tribunal, in exceptional circumstances.[159] This should consider, Respondent contends, the genuine reasons for the alleged change in circumstance and whether the parties acted in good faith.[160]

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[158] Transcript (English), 27 January 2025, 34:24-35:3 (Respondent's Opening Statement); R-PHB, Appendix, ¶ 1. *See also* Transcript (English), 27 January 2025, 99:20-100:3 (Respondent's Opening Statement), 110:6-112:3 (Respondent Response to Tribunal Questions).

[159] Transcript (English), 27 January 2025, 112:4-113:8 (Respondent Response to Tribunal Questions).

[160] R-PHB, Appendix, ¶¶ 5, 13. *See also* R-PHB, Appendix, ¶¶ 2, 9-10.

197. Claimant argues that the Consolidation Tribunal must confirm its jurisdiction on an ongoing basis before deciding whether to consolidate.[161] It takes the position that changed circumstances must therefore be taken into account in the determination of whether there are issues of fact and law in common.[162]

198. Claimant relies, in this regard, on the wording of NAFTA Article 1126 which states that a consolidation tribunal may issue an order to consolidate "after hearing the disputing parties," and where it "is satisfied that claims have been submitted to arbitration under Article 1120 […]."[163] In its view, this underscores that the Consolidation Tribunal must evaluate all the facts and arguments as they exist and are presented at the hearing.[164] Claimant submits that to ignore material factual developments would be unreasonable and inconsistent with the Consolidation Tribunal's mandate for advancing procedural economy.[165]

199. Article 1126 does not specify the moment in time at which the Consolidation Tribunal is to satisfy itself under Article 1126(2) whether "claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common" and whether consolidation is "in the interests of fair and efficient resolution of the claims."

200. However, it is the submission of claims to arbitration and the creation of more than one proceeding that trigger a party's right to request consolidation. Said differently, Article 1126 instructs that the claims to be analysed by the Consolidation Tribunal in determining whether there are issues of fact or law in common are those that

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161 Transcript (English), 27 January 2025, 182:10-13 (Claimant's Opening Statement). *See also* C-PHB, ¶ 1.

162 Transcript (English), 27 January 2025, 182:17-19 (Claimant's Opening Statement).

163 C-PHB, ¶ 9; *citing* Exhibit CL-001, NAFTA, Art. 1126(2).

164 *Id.*, ¶ 10.

165 *Id.*, ¶¶ 12-13.

"have been submitted to arbitration." These words are in the past tense, indicating that the claims to be analysed are those that were submitted prior to the request for consolidation. According to the ordinary meaning of NAFTA Article 1126(2), the relevant moment in time for the assessment of whether claims exist that have a question of law or fact in common is therefore the time at which the Consolidation Request is filed.

201. This is confirmed by the wording of NAFTA Article 1126(3)(c), which requires a request for consolidation to specify the "grounds on which the order [for consolidation] is sought." The grounds to be reviewed by a consolidation tribunal are those set out in the request for consolidation, which reflect the moment in time when that request was filed.

202. Consistent with and giving effect to Article 1126(2) and (3), the Consolidation Tribunal considers that the relevant moment in time for making the assessment of whether the claims have a question of law or fact in common under NAFTA Article 1126(2) is therefore at the time of filing of the Consolidation Request.

203. With respect to the assessment of whether consolidation is to be ordered "in the interests of fair and efficient resolution of the claims," there is likewise no express indication in Article 1126(2) of the moment in time at which the assessment is to be carried out. The language about "claims" "submitted to arbitration" being in the past tense does not carry significance for the timing of the assessment of fair and efficient resolution.

204. A determination of fairness and efficiency that is frozen in time at the moment of filing a request for consolidation would not allow a consolidation tribunal to accurately compare a potentially consolidated proceeding with the situation as it exists, and would continue to exist, if no consolidation were ordered. Such an assessment necessarily takes into account the situation at the time of deciding upon the request for consolidation, including any change in circumstances that has

occurred since the request was filed. If it were otherwise, the decision on the Consolidation Request would not reflect reality. Indeed, both Parties acknowledge that a change in circumstances must be taken into account in the Consolidation Tribunal's assessment, at least insofar as such change is a "material" one (see ¶¶ 196, 198 above).

205. In making its assessment of fairness and efficiency, the Consolidation Tribunal is mindful of the need to maintain the integrity of the consolidation proceeding and procedural fairness. It follows that it is appropriate to consider whether any relevant circumstances are attributable to the Party invoking the changed circumstances, and whether there has been any abuse of process by either Party.

206. For the above reasons, the assessment of fair and efficient resolution of the claims under Article 1126(2) will be carried out at the time of deciding upon the Consolidation Request.

(i) Burden of proof

207. The rules concerning burden of proof in international law have a limited relevance in the context of an application for an order under Article 1126(2). Article 1126(3) does not impose a specific burden of proof on the party seeking an order under Article 1126(2) other than furnishing elements for setting into motion the proceedings for a possible consolidation under Article 1126(2). It suffices to note that in accordance with Article 24 of the UNCITRAL Rules 1976, "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence."

B. Whether Multiple Claims Have Been Submitted to Arbitration under Article 1120

208. As noted at ¶ 200 above, it is the submission of claims to arbitration and the creation of more than one proceeding that triggers a party's right to request consolidation. Tribunal Question 7(b) asked whether Claimant's claim in arbitration FM2 was still

pending, i.e., whether there are still "claims [that] have been submitted to arbitration under Article 1120" (see ¶ 66 above).

209. According to Respondent, there is no doubt that the claims in arbitrations FM1 and FM2 have been submitted to arbitration.[166] It is not required, in Respondent's view, to determine that the claims have not been withdrawn.[167] Respondent further argues that Claimant has recognized that there is still, at least, a claim for costs in arbitration FM2.[168]

210. Claimant contests the existence of two separate claims under Article 1120 on the basis that it has withdrawn (with prejudice) its Article 1120 claim in arbitration FM2 and all claims are now with the FM1 tribunal.[169] As the condition that there be multiple Article 1120 "claims" in multiple proceedings is not fulfilled, Claimant argues that the fundamental condition for the Consolidation Tribunal's jurisdiction is absent.[170]

211. The existence of two claims submitted to arbitration under Article 1120 is to be assessed as at the moment of filing the Request for Consolidation (see ¶ 200 above). The Consolidation Tribunal is satisfied that at the time of filing the Request for Consolidation, there were two claims that had been submitted to arbitration under Article 1120.

212. In this respect, as at 12 February 2024 when Respondent filed its Request for Consolidation:

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166 R-PHB, ¶ 21; R-PHB, Appendix, ¶ 80.

167 R-PHB, Appendix, ¶ 80.

168 R-PHB, ¶ 22; *citing* Transcript (English), 27 January 2025, 255:1-10.

169 C-PHB, ¶¶ 4, 7, 15, 23, 62; C-PHB Annex, Tribunal Question 7(b). *See, e.g.*, C-PHB, ¶ 62: "… the FM1 Tribunal has admitted the Claimant's FM2 claim as an ancillary claim, and the Claimant has withdrawn (with prejudice) its Article 1120 claim in FM2."

170 C-PHB, ¶ 7.

(i) Arbitration FM1 had been commenced by Claimant's RfA-1 (see ¶ 82 above);[171] and

(ii) Arbitration FM2 had been commenced by Claimant's RfA-2 (see ¶ 91 above).[172]

213. Developments subsequent to the filing of the Request for Consolidation may not alter this assessment of whether two claims existed at the relevant moment. In particular, a Party cannot, by its unilateral acts, deprive the Consolidation Tribunal of its jurisdiction or authority granted pursuant to the NAFTA to decide upon the Consolidation Request.

214. The Consolidation Tribunal will consider whether, and in what way, the procedural developments in relation to arbitrations FM1 and FM2 are relevant to its assessment of the fair and efficient resolution of the claims (see ¶ 233 *et seq* below).

C. Commonality

215. The question of whether the two claims submitted to arbitration "have a question of law or fact in common," in the sense of a factual or legal issue that requires a finding to dispose of a claim, is to be assessed at the time of filing the Request for Consolidation (see ¶ 201 above). Both Parties argue that their respective positions are the same whether analysed as at the date of the Request for Consolidation or any other date.[173]

216. Respondent argues that having a "question of law or fact in common" does not require the claims to be the same, as the question may be a common question of law

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171 Exhibit RM-0030-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for Arbitration, 1 March 2021.

172 Exhibit RM-0088-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Claimant's Request for Arbitration, 29 June 2023.

173 R-PHB, Appendix, ¶ 29; C-PHB, Annex, Question 3(a).

"or" fact.[174] In Claimant's view, on the other hand, the phrase "a question of law or fact in common" requires that the claims in the two arbitrations are based on the same measure and support the same argument that the measures breach an investment protection standard in Section A of the NAFTA.[175]

217. The Consolidation Tribunal does not consider that the claims to be consolidated must be based on the same measure or must otherwise be the same. According to the ordinary meaning of "a question of law or fact in common" in NAFTA Article 1126(a), the commonality between the two claims may be either a question of law, or a question of fact, provided that the issue requires a finding to dispose of a claim. As set out at ¶¶ 186 and 187 above, and as found by the consolidation tribunal in *Canfor,* the presence of one common question of either law or fact in two or more Article 1120 arbitrations will suffice under given circumstances.[176] The analysis is qualitative as well as quantitative. Whether consolidation will serve the fair and efficient resolution of the claims depends entirely on the circumstances of the cases.[177]

218. Respondent submits that arbitrations FM1 and FM2 have common questions of law and fact, *inter alia*, because: (i) the claims arise from the same set of factual circumstances, as the measures claimed in arbitration FM2 arise directly from the actions of Claimant in relation to the measures claimed in arbitration FM1;[178] (ii) the two arbitrations challenge the same series of measures, including the assessment of tax liabilities, the blocking of PEM's bank accounts and depositing VAT refunds in

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174 R-PHB, Appendix, ¶ 31.

175 C-PHB, Annex, Question 3(b)-(c).

176 Exhibit RL-0003-ENG, *Canfor* Order, ¶ 113.

177 *Id.*, ¶ 114.

178 Respondent's Consolidation Memorial, ¶ 70. *See also* R-PHB, ¶¶ 27-30.

the blocked account, and Claimant's resulting inability to access the VAT refunds.[179]

219. In Respondent's view, the common questions of law and fact include the following:

(i) Whether the revocation, through a *juicio de lesividad*, of the Transfer Pricing Resolution granted to PEM was contrary to Respondent's obligations and, if so, whether the APA (referred to by Respondent as the "RMPT" or "Transfer Pricing Resolution") could still have legal effect with respect to the tax years 2010 to 2014. This is on the basis that the inability to access the VAT refunds arises from the blocking of PEM's bank accounts in order to secure the tax liability, the legality of which has been challenged by Claimant in arbitration FM1;

(ii) Whether the tax liabilities determined by SAT were issued illegally or improperly, noting that the challenge of the tax liabilities triggered the requirement to guarantee the full amount outstanding and led to the account blocking that prevented access to the VAT refunds;

(iii) Whether SAT unlawfully or improperly refused to accept a guarantee from PEM for amounts claimed by Respondent, leading to the account blocking that prevented access to the VAT refunds;

(iv) Whether it was illegal or improper for SAT to deposit the VAT refunds in the blocked bank accounts, preventing PEM from recovering the funds, noting that the Parties disagree on whether PEM authorised or instructed the deposits into the accounts;

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[179] Respondent's Consolidation Memorial, ¶ 70. *See also* R-PHB, ¶¶ 31-34.

(v) Whether SAT intended to collect amounts for outstanding taxes, penalties and interest without a legal basis, as Claimant alleges.[180]

(vi) The quantum of damages arising from Respondent's measures, noting that the damages claimed in arbitration FM1 include, according to Claimant's Damages Expert Report, the VAT refund amounts claimed in arbitration FM2.[181]

220. Respondent further argues that its objection to jurisdiction based on NAFTA Article 2103 is common to arbitrations FM1 and FM2.[182]

221. According to Claimant, there is not a single common question of law or fact between arbitrations FM1 and FM2.[183] Claimant contends that resolution of the VAT refunds claim will not dispose of the claim before the FM1 tribunal on the attempted revocation of the APA, the denial of remedies, and the alleged illegal enforcement measures.[184]

222. Claimant distinguishes the facts of arbitration FM1 from arbitration FM2 on the basis that the arbitration FM1 facts are complex and date back to 2012, while the arbitration FM2 facts are straightforward and relate to access to the VAT refunds and Respondent's continued unwillingness to accept guarantees offered under Mexican law.[185] Likewise, Claimant submits that the legal issues are different.

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180 Respondent's Consolidation Memorial, ¶ 70. *See also* R-PHB, Appendix, ¶¶ 22, 23.

181 R-PHB, ¶ 33; *citing* Exhibit RM-0081-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Objection to Jurisdiction, 28 July 2023, Table 5 of Claimant's Damages Expert as extracted in Respondent's Preliminary Jurisdiction Objection in FM1, ¶¶ 64 and 65.

182 R-PHB, Appendix, ¶ 24.

183 C-PHB, ¶ 36.

184 Claimant's Consolidation Counter-Memorial, ¶ 198.

185 C-PHB, ¶ 37; *citing, inter alia,* Claimant's Consolidation Counter-Memorial, ¶ 31; Exhibit CM-0013-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14,

(footnote cont'd)

Arbitration FM1 concerns primarily the legality of the repudiation of the APA, denial of access to remedies available under Mexican law and illegal enforcement, while arbitration FM2 concerns the quantum of the guarantee.[186]

223. Claimant relies on a number of statements by the FM1 tribunal in various decisions that the access to the VAT refunds is not a claim made by Claimant in arbitration FM1. In its view, these findings are a conclusion that arbitrations FM1 and FM2 have very different factual and legal grounds.[187]

224. The Consolidation Tribunal finds that there are common questions of fact and law in arbitrations FM1 and FM2 as assessed at the time of the Request for Consolidation, for the reasons elaborated below.

225. The Parties agree that arbitration FM2 arose out of arbitration FM1.[188] In this regard, Claimant argues in arbitration FM2 that Respondent has admitted PEM's entitlement to the VAT refunds in the course of arbitration FM1.[189]

Respondent's Rebuttal for Respondent's Preliminary Objection to Jurisdiction, 9 September 2023, Appendix A. *See also* C-PHB, Annex, Question 3(a).

186 C-PHB, ¶ 38; *citing* Transcript (English), 28 January 2025, 166:7-12, 192:21-25; 193:1-9.

187 Claimant's Consolidation Counter-Memorial, ¶ 200(a)-(f); *citing* Exhibit RM-0034-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on the Claimant's Request for Provisional Measures, 26 May 2023, ¶ 135; Exhibit RM-0038-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on Respondent's Request for Revocation of Provisional Measures, 1 September 2023, ¶¶ 43, 45, 82; Exhibit RM-0039-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on the Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶¶ 80-81; C-PHB, ¶ 40.

188 R-PHB, ¶ 30; Transcript (English), 28 January 2025, 369:5-7.

189 *See* C-PHB, ¶ 41.

226. According to Respondent, its defence of the claims in arbitration FM2 will be that the restrictions imposed on PEM's access to VAT refunds are legal measures justified by the chain of measures that Claimant challenges in arbitration FM1.[190]

227. Claimant's view is that "the VAT refund issue [in arbitration FM2] comes down to making accessible the VAT refunds which belong to us, and the question is what is the appropriate level of guarantee"[191] and argues that there is therefore "no connection between the two cases."[192] However, resolution of Claimant's claim in arbitration FM2 necessarily requires consideration of factual and legal issues that are also to be decided upon in arbitration FM1, such as (i) whether Respondent's authorities have a legal basis for restricting PEM's access to VAT refunds; (ii) whether Respondent's authorities have a legal basis to reject the guarantees offered by PEM; and (iii) the calculation of a guarantee by reference to alleged tax liabilities, and therefore the basis for determining those liabilities.

228. To demonstrate this by reference to Claimant's pleadings, in arbitration FM1, Claimant challenges the blocking of PEM's accounts by the SAT since April 2020 as an illegal enforcement measure, as set out in its Memorial in arbitration FM1:

> The issues arising in this arbitration proceeding in connection with Mexico's Measures include:
>
> ….
>
> 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 […] otherwise) under its administrative processes for taxation matters, can nevertheless engage in harsh and illegal collection tactics, notwithstanding a court injunction, by […] freezing bank accounts which are

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190 R-PHB, Annex, ¶ 22.

191 Transcript (English), 28 January 2025, 369:7-10.

192 *Id.*, 369:19-20.

> 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 […] because it views its Reassessments as final and non-appealable.[193]

229. The blocking of PEM's banks accounts is also at issue in arbitration FM2, as per RfA-2:

> By illegally blocking PEM's bank accounts and restricting PEM's access to approximately in VAT refunds, the Government of Mexico has engaged in egregious and shocking conduct.[194]

230. The connected subject matter between the claims made in arbitrations FM1 and FM2 was subsequently put forward by Claimant itself as a basis for its "Request for Admission of Ancillary Claims" before the FM1 tribunal, noting that the ancillary claims as referred to by Claimant are identical to those put forward in arbitration FM2:[195]

> The ancillary claims [i.e., the same claims made in arbitration FM2][196] and the claim related to the freezing of the bank account [i.e., the claim made in arbitration FM1], have a common subject in dispute *albeit* in relation to different measures of the Respondent (the challenge to the freezing measure of the SAT in April 2020, and the continuing inaccessibility of the VAT refunded amounts which continue to this day), and thus clearly arise directly out of the subject-matter of the dispute as a result of the Respondent's breaches of Article 1109 and Article 1110.[197]

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193 Exhibit RM-0032-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Memorial, 25 April 2022, ¶ 6, footnote 11.

194 Exhibit RM-0037-ENG, First Majestic Silver Corp. v. United Mexican States, ICSID Case No. ARB/23/28, Claimant's Amended Request for Arbitration, 19 July 2023, ¶ 67.

195 C-PHB, Annex, Question 2; R-PHB, Appendix, ¶ 17.

196 *See* C-PHB, Annex, Question 2.

197 Exhibit RM-0056, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Request for Admission of Ancillary Claims, 24 June 2024, ¶ 71.

231. Claimant's position requires drawing an artificial and ultimately untenable distinction between (i) "the blocking of the bank accounts and seizure of other assets" at stake in arbitration FM1; and (ii) the measures or claims related to VAT recovery, i.e., the inability of PEM to access its VAT refunds submitted in arbitration FM2.[198] While arbitration FM1 is broader in scope than arbitration FM2, the claims have questions of law and fact in common that require a finding to dispose of a claim, as set out in ¶ 227 above. Further, the Consolidation Tribunal notes that the damages claimed by Claimant in arbitrations FM1 and FM2 appear to have questions of fact in common, even if the damages relate to different time periods.[199]

232. In reaching the above conclusion, while noting the Parties' respective positions,[200] the Consolidation Tribunal does not consider it necessary to place reliance on statements made by the FM1 tribunal with respect to the scope of provisional measures granted in arbitration FM1 (see Tribunal Questions 3(e) and (f) at ¶ 66 above). The Consolidation Tribunal further confirms that it does not purport to act as an appellate tribunal over the FM1 tribunal, which both Parties agree is not the purpose of the present consolidation proceeding.[201]

233. For the above reasons, the Consolidation Tribunal is satisfied that pursuant to NAFTA Article 1126(2) claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common. This being the case, the

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198 *See* C-PHB, Annex, Question 3(e).

199 Exhibit RM-0081-SPA, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Objection to Jurisdiction, 28 July 2023, Table 5 of Claimant's Damages Expert as extracted in Respondent's Preliminary Jurisdiction Objection in FM1, ¶¶ 64 and 65; Exhibit RM-0037-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28, Claimant's Amended Request for Arbitration, 19 July 2023, ¶ 57.

200 *See, inter alia,* C-PHB, Annex, Questions 3(e), 3(f); R-PHB, Appendix, ¶ 41.

201 *See* R-PHB, ¶ 17; C-PHB, ¶ 42.

Consolidation Tribunal will proceed to decide whether consolidation of the two claims would be in the interests of fair and efficient resolution of the claims.

D. Fair and Efficient Resolution of the Claims

234. The third prong of the legal test under NAFTA Article 1126(2) concerns the assessment of whether it would be "in the interests of fair and efficient resolution of the claims" to consolidate claims submitted under Article 1120 presenting a common legal or factual question. The Consolidation Tribunal refers to this as the "fair and efficient resolution standard."

235. As set out at ¶ 206 above, 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.

236. The tribunal in *Canfor* provided a detailed interpretation of the fair and efficient resolution standard. Fairness requires balancing the interests of all parties involved in determining what is the procedural economy in the given situation (see ¶ 189 above).

237. In relation to efficiency, the *Canfor* tribunal stated that "a guiding test is a comparison with the situation as it exists, and would continue to exist, if no consolidation were ordered" (see ¶ 192 above). Thus, the comparison requires envisaging two scenarios that could take place in the future. For that reason, this analysis must centre on the reasonable likelihood, and not on the certainty, that these scenarios could occur. With this in mind, Tribunal Question 4(a) sought the Parties' views on the relevant comparator situation that "exists, and would continue to exist" in the absence of consolidation (see ¶ 66 above).

238. As mentioned at ¶ 188 above, determining what is efficient is not an accounting exercise of comparative advantages and disadvantages. It suffices to consider

whether the Consolidation Tribunal is convinced that efficiency in the resolution of the claims will be served by consolidation, in the circumstances before it.

239. According to Respondent, the relevant comparator situation in the present case is a situation in which arbitrations FM1 and FM2 continue as separate proceedings on different tracks. An expanded arbitration FM1 that includes the arbitration FM2 claims as ancillary claims does not exist at this time, and in its view is not a reasonable possibility in the future.[202]

240. In Respondent's view, no ancillary claim has yet been filed in arbitration FM1 and by granting Claimant permission to file the ancillary claim, the FM1 tribunal simply recognised a right that Claimant already had.[203] Respondent further questions the legal validity of the FM1 tribunal's Authorisation Decision on the basis that arbitration FM1 was suspended at the relevant time.[204]

241. In addition, Respondent argues that the admission of the ancillary claim in arbitration FM1 does not *ipso facto* terminate the proceedings in arbitration FM2.[205] Due to its objection to discontinuance, Respondent contends that arbitration FM2 will continue, as unilateral discontinuation is not possible under ICSID Arbitration Rule 56(1) after the request for arbitration is registered.[206] In the event that there is no consolidation, Respondent has advised that it intends to seek a final and binding determination of the dispute in arbitration FM2 from a to be constituted FM2 tribunal.[207]

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202 R-PHB, Appendix, ¶¶ 43-44.

203 *Id.*, ¶¶ 38-40.

204 *Id.*, ¶¶ 42-44.

205 *Id.*, ¶ 49.

206 *Id.*, ¶¶ 45, 48; *citing* Exhibit RM-0091, Communication from ICSID to the Parties in ICSID Case No. ARB/23/28, 29 January 2025.

207 *Id.*, ¶ 50.

242. For Respondent, Claimant's efforts to "unilaterally reorganize" its claims are abusive procedural actions which seek to undermine the exclusive jurisdiction of the Consolidation Tribunal.[208] It argues that if the changed circumstances are accepted as a valid comparator, then Claimant will have prevailed in those improper actions.[209]

243. For Claimant, the relevant comparator to a consolidated case is a situation in which the FM1 tribunal has admitted the ancillary claim regarding the VAT refunds and Claimant has withdrawn the same claim from arbitration FM2. As such, Claimant argues that, at present, claims in multiple proceedings do not exist.[210] In its view, the FM1 tribunal's decision to admit the ancillary claim is final and binding on the Parties.[211] Claimant further relies on its right, acknowledged by Respondent, to add the ancillary claim up to the time it files its Reply in arbitration FM1, which has not yet occurred.[212]

244. Claimant submits that it initially commenced a second arbitration because its protection under the NAFTA was about to expire and because it believed a separate claim would be procedurally cleaner in light of NAFTA Article 1134 and the provisional measures granted in arbitration FM1.[213] It subsequently asked the FM1 tribunal to grant authorisation to file those claims as ancillary claims after which it would discontinue arbitration FM2, effectively consolidating its claims into one proceeding. According to Claimant, it has withdrawn its claim in arbitration FM2 with prejudice, such that "it can no longer proceed with its claim (because there is

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208 *Id.*, Appendix, ¶ 46.

209 *Id.*, Appendix, ¶ 48.

210 C-PHB, Annex, Question 4(a).

211 *Id.*, ¶¶ 19-20.

212 *Id.*, ¶ 22; *citing* Transcript (English), 27 January 2025, 43:6.

213 *Id.*, ¶¶ 123-124; Transcript (English), 27 January 2025, 219:14-16, 219:25-220:2.

none) in FM2."[214] Claimant asserts that Respondent's opposition to the discontinuance of arbitration FM2 is not *bona fide* but is because it wants to "keep the fiction of an FM2 claim alive."[215]

245. Since the filing of the Request for Consolidation, a number of procedural developments have taken place in arbitrations FM1 and FM2 as detailed above, including:

(i) Claimant sought the admission of ancillary claims in arbitration FM1 which were the same as the claims that had been submitted in arbitration FM2 (see ¶ 130 above);[216]

(ii) The FM1 tribunal issued the Authorisation Decision granting Claimant "authorization to file" the ancillary claims in arbitration FM1 (see ¶ 134 above);

(iii) Claimant sought to discontinue arbitration FM2 (see ¶ 139 above);

(iv) Respondent opposed and continues to oppose the discontinuance of arbitration FM2 (see ¶ 139 above);

(v) ICSID referred to the letter from Respondent objecting to the discontinuance and stated that "[t]herefore, the proceeding shall continue" (see ¶ 139 above);

(vi) Claimant filed a letter with ICSID seeking the formal withdrawal of its claim in arbitration FM2, which it later stated at the Hearing and in its Post-Hearing

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214 C-PHB, ¶ 23.

215 Transcript (English), 27 January 2025, 216:15-217:3.

216 C-PHB, Annex, Question 2; R-PHB, Appendix, ¶ 17.

Submission was undertaken on a "with prejudice" basis (see ¶ 141 above)[217]; and

(vii) ICSID replied to Claimant's letter seeking withdrawal of its claim in arbitration FM2 by stating that Respondent "object[ed] to the discontinuance of this proceeding" and that, "[a]ccordingly, pursuant to ICSID Arbitration Rule 56(1), the proceeding shall not be discontinued."[218]

246. While Respondent argues that the ancillary claims have not been filed in arbitration FM1, it acknowledges that Claimant has the right to submit such ancillary claims with its Reply submission in arbitration FM1.[219] Claimant has stated that it will do so. Therefore, should these ancillary claims be filed, they would fall for consideration by the FM1 tribunal; Respondent has indicated its intention to challenge the FM1 tribunal's jurisdiction to decide the ancillary claims on the ground that those claims have already been submitted in arbitration FM2.[220] The Consolidation Tribunal does not presuppose the FM1 tribunal's decision on any challenge that may be brought by Respondent. The FM1 tribunal will effectively assume jurisdiction over whether the ancillary claims will be heard in arbitration FM1, but this does not equate to assuming jurisdiction over the claims.

247. In light of the foregoing, the Consolidation Tribunal finds that the relevant situation "as it exists, and would continue to exist, if no consolidation were ordered" is one in which (i) Claimant does not pursue its claim in arbitration FM2; (ii) Respondent opposes discontinuance of arbitration FM2; (iii) Claimant seeks to pursue its

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217 *See, inter alia*, C-PHB, ¶ 23; Transcript (English), 28 January 2025, 289:8-18.

218 Exhibit RM-0091-ENG, *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Correspondence from ICSID to the Parties, 29 January 2025.

219 R-PHB, ¶¶ 38-40.

220 *Id.*, Appendix, ¶ 101.

ancillary claims in arbitration FM1, which are identical to its claims in FM2; and (iv) Respondent opposes the admission of the ancillary claims in arbitration FM1.

248. The Consolidation Tribunal accepts that Claimant is responsible for taking the actions described in items (i) and (iii) set out in ¶ 247 above, while Respondent is responsible for the actions set out at items (ii) and (iv) in ¶ 247 above.

249. By seeking to pursue the ancillary claims in arbitration FM1 and requesting the discontinuance of arbitration FM2, the Consolidation Tribunal understands Claimant to concede that it would be fair and efficient to resolve its claims in one single arbitration proceeding, although it argues that such resolution should be by the FM1 tribunal and not the Consolidation Tribunal.

250. While noting that valid questions may be raised in relation to the efficiency of Claimant's conduct in first commencing arbitration FM2 and then seeking to withdraw its claim, as well as Claimant's approach to NAFTA Article 1134, the Consolidation Tribunal does not consider Claimant to have engaged in an abuse of process or find that Claimant's conduct has compromised the integrity of the consolidation proceeding.[221] Nor does the Consolidation Tribunal find that Respondent has abused the procedure by refusing to consent to the discontinuance of arbitration FM2 pending resolution of the consolidation proceeding. Each of the Parties has pursued its respective litigation strategy and has exercised its respective rights.

251. The Consolidation Tribunal further observes that in assessing fairness and efficiency, it is not the role of the Consolidation Tribunal to review or decide upon the correctness or validity of actions taken by Claimant, Respondent or the FM1

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[221] The Consolidation Tribunal notes that the *Canfor* tribunal used the term "abuse of right under international law" (Exhibit RL-0003-ENG, *Canfor* Order, ¶ 137). The Consolidation Tribunal understands that it used the term "abuse of right" in the sense of "abuse of process," and considers the term "abuse of process" more appropriate.

tribunal in relation to arbitrations FM1 and FM2. The Consolidation Tribunal is not an appellate tribunal. Its task is to objectively assess, as a matter of fact, the reasonably likely scenario to compare with consolidation and assess the interests of fair and efficient resolution of the claims in all the circumstances.

252. As such, the Consolidation Tribunal does not consider it necessary to determine (i) the effect, if any, of the FM1 tribunal's directions issued on 15 July 2024 (see ¶ 134 above); (ii) whether the FM1 arbitration proceedings were suspended at that time, and the implications of any such suspension; (iii) the legal effect of Claimant's position that it has withdrawn with prejudice its claim in arbitration FM2; or (iv) the scope of the FM1 tribunal's decision on its jurisdiction or the admissibility of the ancillary claims in arbitration FM1, which remains to be determined by that tribunal.

253. However, for the purposes of determining the reasonably likely scenario in the non-consolidation scenario, and without prejudging any determination by the tribunal in arbitration FM1 or FM2, if any, the Consolidation Tribunal notes that there is a legal distinction to be drawn between (i) withdrawal of a request for arbitration before the request is registered by ICSID, pursuant to Rule 8 of the ICSID Institution Rules;[222] (ii) discontinuance of a proceeding under ICSID Arbitration Rule 56;[223] and (iii) withdrawal of a claim with prejudice to reinstatement.

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222 ICSID Institution Rule 8 is entitled "Withdrawal of the Request" and states:

> At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 5(b).

223 ICSID Arbitration Rule 56 is entitled "Discontinuance at Request of a Party" and provides:

> (1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the

(footnote cont'd)

254. In this respect, Claimant stated at the Hearing, in response to the Consolidation Tribunal's question whether its withdrawal was "with prejudice" or "without prejudice":[224]

> … it's been withdrawn effectively with prejudice because the NAFTA limitation has expired, but we didn't expressly use that language. But our intention is complete, that we are not pursuing a claim in FM2 at all, and can't.

255. There is no dispute between the Parties that ICSID Arbitration Rule 56 means that a disputing party cannot discontinue a proceeding of its own motion over the objection of the other party ("If any objection in writing is made within the time limit, the proceeding shall continue").[225] This has been reflected in ICSID's communications in arbitration FM2 (see ¶¶ 139 and 142 above). ICSID Arbitration Rule 56 protects a party with an outstanding costs claim from having the proceedings discontinued without resolution of that claim. This Rule does not require a claimant to positively advance its claims.

256. The withdrawal of a claim (with prejudice) by a disputing party is different to the discontinuance of a proceeding. It entails that a party retracts its claim for relief that was previously made, or as Claimant puts it, "a clear indication by the claimant that it will not pursue its claim."[226] Such withdrawal does not have the effect of the discontinuance of the proceeding, but it does mean that the claim is no longer being pursued and therefore is not pending to be decided as a positive claim. The existence of ICSID Institution Rule 8, by which a request for arbitration may be withdrawn

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proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

224 Transcript (English), 28 January 2025, 289:13-18.

225 R-PHB, Appendix, ¶ 73; C-PHB, Annex, Tribunal Question 7(a).

226 C-PHB, Annex, Tribunal Question 7(a).

prior to its registration, does not alter that assessment. After registration, ICSID Arbitration Rule 56 applies with respect to the discontinuance of the proceeding. Thus, both FM1 and FM2 continue to exist as separate proceedings despite Claimant's withdrawal of its claims with prejudice, but the contents of those proceedings are qualitatively different from the proceedings as they existed at the time of the Request for Consolidation.

257. It is noted that ICSID Arbitration Rule 49 refers to a party "being in default" when it "fails to appear or present its case or indicates that it will not appear or present its case." For the default rule to apply, it presupposes the existence of a case. It does not appear to apply when a party has withdrawn its entire case and there is no longer a case to be decided. In any event, it is not necessary for the Consolidation Tribunal to make a finding on the applicability of ICSID Arbitration Rule 49 and, in light of the decision not to consolidate, it would be inappropriate to do so. For the purpose of the consolidation proceeding and the Consolidation Tribunal's assessment of whether consolidation is in the interests of fairness and efficiency, the possibility that Respondent would seek a decision on the merits from a yet to be constituted FM2 tribunal following Claimant's decision to withdraw its claims with prejudice in FM2 (or, in other words, not to positively advance its claims in arbitration FM2) is not considered a likely scenario such that it should affect the efficiency analysis.

258. The *Canfor* tribunal found three relevant factors to take into account when assessing the relative efficiency of consolidation as compared to the alternative, being (i) time; (ii) costs; and (iii) avoidance of conflicting decisions (see ¶ 192 above).

259. With respect to the time factor, arbitration FM1 is at a relatively advanced stage, having already completed the first round of submissions on jurisdiction and the merits, document production, and a number of procedural matters including the request for provisional measures, a hearing thereon, a decision and an application for revocation of that decision, all over a period exceeding three years. According

to Claimant, the record in that case constitutes "tens of thousands of pages of pleadings, evidence, and correspondence, supported by numerous witnesses and experts."[227]

260. As noted by the *Canfor* tribunal, the principle of procedural economy includes in general the proposition that the more advanced the separate proceedings are, the less likely it is that consolidation will be ordered.[228] Absent other imperatives of fairness and efficiency, procedural economy would not be served in this matter by having the Consolidation Tribunal familiarise itself with steps already undertaken by the FM1 tribunal, which is already familiar with the case and has expended significant time on procedural steps to date.

261. It is true that in the non-consolidation scenario there are time and cost implications for the FM1 tribunal arising from the pursuit of the ancillary claims by Claimant in arbitration FM1. However, several of the implications apply equally to the consolidation and non-consolidation scenarios.

262. In this respect, both the FM1 tribunal and a potential consolidated tribunal may have to consider procedural issues such as: (i) whether updates to submissions previously made by the Parties are necessary; (ii) the appropriate procedure and timetable to address the ancillary claims (if pursued in arbitration FM1) or the claim made in arbitration FM2; and (iii) the implications that the FM1 tribunal's previous directions on provisional measures may have for an ancillary claim (if pursued in arbitration FM1) or the claim made in arbitration FM2.[229]

263. Time considerations that would apply in a non-consolidated scenario only, and therefore weigh in favour of the procedural economy of consolidation, are that

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227 C-PHB, Annex, Tribunal Question 4(b).

228 Exhibit RL-0003-ENG, *Canfor* Order, ¶ 128.

229 *See* R-PHB, Appendix, ¶¶ 55, 86-100; C-PHB, Annex, Tribunal Question 9(a)-(b).

Respondent indicates that it will object to the jurisdiction of the FM1 tribunal over the ancillary claims, and will continue to object to the discontinuation of arbitration FM2.[230] In addition, the Parties agree that a tribunal would be constituted in arbitration FM2 to decide on the issue of costs. In Respondent's view, it would also be requested to decide upon the merits of Claimant's claim made in arbitration FM2.[231] The Parties disagree, in this respect, on whether that claim remains pending for decision.[232]

264. The Consolidation Tribunal accepts that additional time would be required to address these positions and steps that would not arise in a consolidated arbitration. This means not just time in terms of delay, but time in terms of the number of hours of time to be spent by participants in the respective arbitrations. However, and while noting that it is difficult to accurately assess the time impacts of discrete elements, the Consolidation Tribunal does not consider that more time would be gained in consolidation than would be lost by the Consolidation Tribunal having to familiarise itself with steps already undertaken by the FM1 tribunal. Even taking into account the elements mentioned at ¶ 263 above, the Tribunal considers that overall procedural economy weighs against consolidation from a time perspective, given the stage of the proceedings of arbitration FM1. The Consolidation Tribunal further notes its considerations regarding the withdrawal of Claimant's claim in arbitration FM2 at ¶¶ 252-255 and whether that claim remains pending.

265. The same considerations apply to costs, which closely reflect the time to be spent by participants in arbitrations FM1 and FM2.

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230 R-PHB, Appendix, ¶¶ 81-101; C-PHB, Annex, Tribunal Question 8(a)-9(b).

231 R-PHB, Appendix, ¶ 85.

232 *See* R-PHB, Appendix, ¶ 79; C-PHB, Annex, Tribunal Question 7(b).

266. In respect of the risk of conflicting decisions, in a non-consolidation scenario Respondent asserts that there will be a risk of conflicting findings of fact and law if arbitrations FM1 and FM2 would proceed separately.[233] Claimant denies a risk of conflicting decisions, on the basis that it has withdrawn its claim in arbitration FM2.[234]

267. Without prejudging the consequences of the stated withdrawal "with prejudice" of Claimant's claim in arbitration FM2, Claimant's declared intention not to pursue a claim in that proceeding removes 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.

268. Respondent's contrary position depends on a scenario in which (i) Claimant pursues its ancillary claim in arbitration FM1, and the FM1 tribunal decides upon the merits of that claim, while, in parallel, (ii) a tribunal is constituted in arbitration FM2, accepts Respondent's position that Claimant may not, or has not, validly withdrawn its claim, and proceeds to decide upon the merits of that claim. In light of its considerations at ¶¶ 252-255, the Consolidation Tribunal is not persuaded that this is a reasonably likely or legally realistic scenario and it should therefore not be decisive for its analysis.

269. Together with the efficiency assessment, fairness requires the Consolidation Tribunal to balance the interests of the Parties, to consider their right of due process, to be treated with equality and to be given a full opportunity to present their case.

270. The Parties have fundamentally opposing views on the fairness of a potential consolidation of arbitrations FM1 and FM2. Each side accuses the other of abuse of

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233 R-PHB, Appendix, ¶¶ 57-58, 100-101.

234 C-PHB, Annex, Tribunal Question 4(c).

the procedure.[235] Respondent asserts that it is "not normal" for a claimant to divide closely related claims into two parallel arbitrations for the express purpose of avoiding an objection under NAFTA Article 1134. In addition, it contends that Claimant only attempted to unilaterally reorganise its claims into one proceeding after Respondent's Consolidation Request and with the explicit goal of undermining the authority of the Consolidation Tribunal.[236] Claimant, on the other hand, accuses Respondent of forum-shopping by seeking resolution of the dispute before the Consolidation Tribunal instead of the FM1 tribunal, with whose rulings Respondent disagrees.[237]

271. The Consolidation Tribunal considers that the fair resolution of the Parties' dispute confirms its assessment not to order consolidation. In both the consolidated and non-consolidated scenarios, due process will be respected and the Parties will be treated equally and have a full opportunity to present their respective cases. In particular, Respondent may raise its jurisdictional arguments and defend its position with respect to the ancillary claims in arbitration FM1.

272. The Consolidation Tribunal does not consider it established that potentially facing all of Claimant's claims in arbitration FM1 would result in unfairness to Respondent (procedural or otherwise). Nor is the Consolidation Tribunal satisfied that Respondent has lost any procedural rights or the ability to make its jurisdictional objections and defences before the FM1 tribunal in relation to all of Claimant's claims.

273. The Consolidation Tribunal further notes that while Respondent is entitled to object to the discontinuance of arbitration FM2 as provided for in ICSID Arbitration

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235 Respondent's Consolidation Memorial, ¶¶ 120-121; R-PHB, ¶¶ 64-69; Claimant's Consolidation Counter-Memorial, ¶¶ 237-238.

236 R-PHB, Appendix, ¶ 8.

237 C-PHB, ¶¶ 5, 100, 113-121.

Rule 56, it has not provided a reason for objecting to the discontinuance that would weigh in favour of consolidation. It takes the position that it is not required to provide substantive reasons for opposing a request to discontinue.[238] While it is not required to provide reasons, any reason given could have been of potential relevance to the fairness or efficiency of consolidation.

274. With respect to fairness to Claimant, to the extent that there is uncertainty in the procedural status of its potential ancillary claims in arbitration FM1 and the result of its withdrawal of its claim (with prejudice) in arbitration FM2, the Consolidation Tribunal does not consider such circumstances to create unfairness for Claimant, which has taken those actions and continues to actively pursue those outcomes.

275. The Consolidation Tribunal further recalls that as stated by the *Canfor* tribunal:[239]

> The alleged presence of abusive and disruptive litigation techniques, such as making a request for alleged tactical reasons or for the alleged purpose of forum shopping, are equally irrelevant, unless a party can show that the party requesting consolidation is guilty of an abuse of right under international law (a matter that is neither alleged nor proven in the present proceedings). (citations omitted)

276. The Consolidation Tribunal does not consider it established that Respondent's Request for Consolidation is an abuse of process. Respondent validly exercised its right to seek consolidation as provided for by NAFTA Article 1126, in the presence of multiple claims. As assessed by the Consolidation Tribunal, at the time Respondent made its Request, those multiple claims had questions of law and fact in common (see ¶ 233 above).

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238 R-PHB, Appendix, ¶ 74.

239 Exhibit RL-0003-ENG, *Canfor* Order, ¶ 137.

277. The Consolidation Tribunal rejects Claimant's assertion that Respondent was merely using the right to seek consolidation as a means to seek a potentially more favourable venue, which is unproven. In particular, the existence of multiple proceedings was a procedural situation created by Claimant (see ¶ 244 above).

278. Nor does the Consolidation Tribunal consider it established that Claimant has engaged in an abuse of process (see ¶ 249 above). The Consolidation Tribunal is mindful that the right to seek consolidation as provided for in NAFTA Article 1126 should not be rendered meaningless by abusive procedural conduct or manoeuvring by a party opposing consolidation. This assessment will depend very much on the circumstances of a particular case. In the present case, while Claimant is responsible for creating the procedural situation that was the basis for the Request for Consolidation, and for the conduct which fundamentally removed the need for a consolidation, the Tribunal is not persuaded that in either case Claimant engaged in an abuse of process as opposed to pursuing its litigation strategy. As such, Respondent has not been unfairly deprived by Claimant's actions of its right to seek consolidation under NAFTA Article 1126.

279. Additionally, the Consolidation Tribunal confirms that Claimant's actions have not affected the jurisdiction or authority of the Consolidation Tribunal, which has decided Respondent's Consolidation Request on the merits.

280. Since neither Party has engaged in an abuse of process, this factor is not relevant in the Consolidation Tribunal's analysis of fairness and efficiency.

281. Considering all of the relevant factors, the Consolidation Tribunal is not persuaded that overall fairness and efficiency are in favour of consolidation in this case. In light of the reasonably likely scenario that Claimant pursues an ancillary claim in arbitration FM1 and does not pursue that claim in arbitration FM2, even taking into account that there are procedural questions in both proceedings that remain to be resolved, the Consolidation Tribunal does not consider that fair and efficient

resolution of the claims would be served by consolidation of the proceedings. The integrity of the right to seek consolidation is best preserved, in the present case, by rejecting the Request for Consolidation. Claimant has stated that it will no longer pursue claims in arbitration FM2. 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.

E. Conclusion

282. For the above reasons, the Consolidation Tribunal rejects the Request for Consolidation.

283. The Consolidation Tribunal lifts the suspension on arbitrations FM1 and FM2 effective immediately as of the date of this Order.

VI. COSTS

284. Each Party requests costs to be awarded in their favour in respect of the consolidation proceeding.[240] In Section A, below, the Consolidation Tribunal will set out the relevant provisions of the UNCITRAL Rules 1976. In Section B, the Consolidation Tribunal will examine the allocation of costs. Section C deals with the quantification of costs. Section D contains the Consolidation Tribunal's conclusion on costs.

A. Relevant Provisions

285. Article 38 of the UNCITRAL Rules 1976 sets out as follows:

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[240] R-PHB, ¶ 74; C-PHB, ¶ 128; Claimant's Cost Statement, ¶ 4(a).

> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> *(a)* The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> *(b)* The travel and other expenses incurred by the arbitrators;
>
> *(c)* The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> *(d)* The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> *(e)* The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> *(f)* Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

286. Article 39 of the UNCITRAL Rules 1976 specifies:

> 1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
>
> 2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
>
> 3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If

> the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
>
> 4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

287. Article 40(1)-(2) of the UNCITRAL Rules 1976 provides as follows:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (*e*), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

B. Allocation of Costs

(a) Parties' Positions

288. Respondent contends that Claimant should pay the total costs of the consolidation proceeding because it has abused the investment arbitration mechanism to obtain undue advantage. In addition, Respondent submits that Claimant has sought to delay the consolidation proceeding by (i) attempting to suspend the first session; (ii) filing a meritless jurisdictional objection; (iii) attempting to unilaterally discontinue

arbitration FM2; and (iv) requesting the unilateral withdrawal of its claims in arbitration FM2 one week prior to the hearing.[241]

289. According to Respondent, it should not have been obliged to institute the consolidation proceeding, which could have been avoided if Claimant had presented all of its claims in arbitration FM1.[242] It argues that Claimant's conduct in deliberately dividing its claims creates unnecessary conflict and constitutes procedural manipulation and abuse.[243]

290. In Claimant's view, Respondent's Consolidation Request should be considered unsuccessful and its conduct as being dilatory and in bad faith.[244] In this respect, Claimant submits that the very fact of the continuation of the consolidation proceeding evidences bad faith, and is part of a series of subversive tactics to deny Claimant its rights in relation to the VAT refunds.[245] Claimant further argues that Respondent has been obstructionist by refusing Claimant's reasonable offers to discontinue arbitration FM2 and to pay Respondent's reasonable costs.[246]

(b) Consolidation Tribunal's Analysis

291. For the purposes of its analysis, the Consolidation Tribunal finds it helpful to distinguish between the "Arbitration Costs", being the costs referred to in Article 38(a)-(c) and (f) of the UNCITRAL Rules 1976, and "Legal Representation and Assistance Costs" referred to in Article 38(e) of the UNCITRAL Rules 1976 (see ¶

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241 R-PHB, ¶ 73; Transcript (English), 27 January 2025, 104:17-105:16 (Respondent's Submissions).

242 Transcript (English), 27 January 2025, 108:6-11 (Respondent's Submissions).

243 R-PHB, ¶ 72.

244 Transcript (English), 27 January 2025, 266:14-17 (Claimant's Submissions).

245 *Id.*, 268:15-23 (Claimant's Submissions).

246 *Id.*, 268:24-269:8 (Claimant's Submissions).

285 above). There being no witness evidence in these proceedings, there were no costs associated with Article 38(d) of the UNCITRAL Rules 1976.

292. The Parties agree that the losing party should bear the Arbitration Costs related to this consolidation proceeding, unless the Consolidation Tribunal considers otherwise.[247] As Claimant puts it, "there's a presumption but no hard rule that the loser pays and so the circumstances of the case are also very important factors."[248]

293. Article 40(2) of the UNCITRAL Rules 1976 further provides with respect to the Legal Representation and Assistance Costs (see Article 38(e) at ¶ 285 above) that the Consolidation Tribunal shall be free to determine which party shall bear such costs or to apportion them as it determines is reasonable (see ¶ 287 above). As such, the Consolidation Tribunal has full discretion to allocate those costs.

294. Respondent is the losing party of the consolidation proceeding, as its Consolidation Request is rejected by the Consolidation Tribunal. However, the Consolidation Tribunal considers that the context and circumstances of the case require deviation from the default "loser pays" principle with respect to the Arbitration Costs under the UNCITRAL Rules 1976.

295. In this regard, the Consolidation Request was not rejected for lack of merit but primarily because a number of procedural developments initiated by Claimant since the filing of the Consolidation Request meant that consolidation ultimately was not, in all the circumstances, in the interests of fair and efficient resolution of the claims.

296. The consolidation proceeding arose because Claimant commenced arbitration FM2 against Respondent, which was related to arbitration FM1, while arbitration FM1 was ongoing. Faced with multiple related proceedings against it, Respondent

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247 *Id.*, 265:19-266:6; R-PHB, ¶ 71.

248 Transcript (English), 27 January 2025, 266:7-9 (Claimant's Submissions).

exercised its right to seek consolidation under NAFTA Article 1126. Claimant did not agree to consolidation but sought to discontinue arbitration FM2 and have an identical claim authorised to be filed as an ancillary claim in arbitration FM1. In the Consolidation Tribunal's view, this serves as an admission that Claimant could have avoided this consolidation proceeding by either (i) filing the claim made in arbitration FM2 in arbitration FM1 from the outset; or (ii) commencing arbitration FM2 and seeking immediate consolidation with arbitration FM1.

297. While the Consolidation Tribunal does not consider Claimant to have engaged in an abuse of process, Claimant's conduct in commencing separate proceedings and then seeking to discontinue the second arbitration caused significant time and costs to be incurred in addressing the procedural situation that it created. It should be noted that Claimant did not take steps to seek authorisation to file its ancillary claims in arbitration FM1 and discontinue arbitration FM2 until after the Consolidation Tribunal was constituted.

298. In addition, Claimant made an unsuccessful Preliminary Objection on 60-day Period, which added to the costs of the consolidation proceeding.

299. In these circumstances, the Consolidation Tribunal finds it appropriate for Claimant to bear the Arbitration Costs arising from the consolidation proceeding, and to reimburse Respondent for its reasonable Legal Representation and Assistance Costs incurred.

C. Quantification of Costs

(a) Parties' Positions

300. Respondent seeks reimbursement of the following costs (excluding advances to ICSID), which total USD 632,381.43:[249]

Concept	Person/Entity	Amount in USD
Legal representatives	Ministry of Economy	209,766.89
External consultants	Pillsbury Winthrop Shaw Pittman, LLP	6,281.50
	Tereposky & DeRose, LLP	398,556.00
Travel expenses of the legal representatives	Ministry of Economy	17,777.05
	Total	**632,381.43**

301. Claimant quantifies its costs (excluding advances to ICSID) as follows:[250]

	Amount in USD
Legal Fees	1,198,500.35
Expenses	0.00
Total	**1,198,500.35**

302. No claim for interest was made by either Party.

(b) Arbitration Costs

303. The Arbitration Costs comprise the fees and expenses of the Consolidation Tribunal and other direct expenses, which consist of the costs relating to ICSID's

[249] Respondent's Cost Statement, p. 1. The Consolidation Tribunal notes that Respondent's costs total USD 632,381.44, which differs by USD 0.01 from the costs claimed. The Consolidation Tribunal uses Respondent's calculation of its costs as representing the amount claimed by it.

[250] Claimant's Cost Statement, p. 2.

administration of this proceeding and translation services incurred in the course of this proceeding.

304. The Arbitration Costs have been paid out of the advances made by the Parties in equal parts.

305. In accordance with Article 41(5) of the UNCITRAL Rules 1976 and paragraph 10.5 of the Consolidation Tribunal's Terms of Appointment, following issuance and translation of this Order in accordance with paragraph 11.13 of Procedural Order No. 1, the ICSID Secretariat shall, on behalf of the Consolidation Tribunal, render an accounting to the Parties. That accounting shall specify the total final amount of the Arbitration Costs.

306. In light of the Consolidation Tribunal's determination at ¶ 297 above, Claimant is to bear the Arbitration Costs in full. Accordingly, Claimant is ordered to reimburse Respondent half of the Arbitration Costs as will be set out in ICSID's accounting to the Parties in due course.

307. Also in accordance with Article 41(5) of the UNCITRAL Rules 1976 and paragraph 10.5 of the Consolidation Tribunal's Terms of Appointment, following issuance and translation of this Order, the ICSID Secretariat shall, on behalf of the Consolidation Tribunal, return any unexpended balance to the Parties in the proportion in which it was advanced.

(c) Legal Representation and Assistance Costs

308. The Consolidation Tribunal finds the Parties' respective Legal Representation and Assistance Costs to be reasonable in amount taking into account the nature and complexity of the proceedings. In particular, Respondent's Legal Representation and Assistance Costs which are to be borne by Claimant are lower than Claimant's own Legal Representation and Assistance Costs.

309. In the light of the Consolidation Tribunal's determination at ¶ 297 above, Claimant is to bear the Legal Representation and Assistance Costs in full. As such, Claimant shall bear its own Legal Representation and Assistance Costs and reimburse Respondent USD 632,381.43 in respect of its Legal Representation and Assistance Costs.

D. Conclusion on Costs

310. For the above reasons, the Consolidation Tribunal determines that Claimant shall bear the Arbitration Costs and Legal Representation and Assistance Costs in full. Claimant shall pay to Respondent USD 632,381.43 in respect of its Legal Representation and Assistance Costs, and half of the Arbitration Costs as will be reflected in the accounting rendered to the Parties by ICSID.

VII. DECISION OF THE CONSOLIDATION TRIBUNAL

311. For the foregoing reasons, the Consolidation Tribunal by order:

(1) REJECTS the Consolidation Request for failing to meet the conditions in NAFTA Article 1126;

(2) ORDERS Claimant to bear the Arbitration Costs and Legal Representation and Assistance Costs, and to pay to Respondent in respect of such costs USD 632,381.43 plus half of the Arbitration Costs as will be reflected in the accounting rendered to the Parties by ICSID in due course;

(3) LIFTS the suspension on arbitrations FM1 and FM2 effective immediately as of the date of this Order;

(4) REJECTS all other requests.

Ms. Tina M. Cicchetti
Arbitrator

Date:

Mr. Christian Vidal-León
Arbitrator

Date:

(Subject to a Dissenting Opinion)

[Signed]

Prof. Albert Jan van den Berg
President of the Consolidation Tribunal

Date: July 28, 2025

[Signed]

Ms. Tina M. Cicchetti
Arbitrator

Date: July 28, 2025

Mr. Christian Vidal-León
Arbitrator

Date:

(Subject to a Dissenting Opinion)

Prof. Albert Jan van den Berg
President of the Consolidation Tribunal

Date:

[Signed]

Ms. Tina M. Cicchetti
Arbitrator

Date:

Mr. Christian Vidal-León
Arbitrator

Date: July 28, 2025

(Subject to a Dissenting Opinion)

Prof. Albert Jan van den Berg
President of the Consolidation Tribunal

Date:

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).