BEFORE THE HONORABLE SECRETARY-GENERAL OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES PURSUANT TO CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

FIRST MAJESTIC SILVER CORP.,
(CLAIMANT)

C.

UNITED MEXICAN STATES,
(RESPONDENT)

(ICSID Cae No. ARB/21/14)
(ICSID Cae No. ARB/23/28)

REQUEST FOR THE ESTABLISHMENT OF A CONSOLIDATION TRIBUNAL

FOR THE UNITED MEXICAN STATES:
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February 12th, 2024

Courtesy Translation

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GLOSSARY

APA	Advance Transfer Pricing Agreement
ICSID	International Centre for Settlement of Investment Disputes
Respondent	*United Mexican States*
Demandante o First Majestic	First Majestic Silver Corp.
FM1	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14
FM2	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28
VAT	Value Added Tax
NOI	Notice of Intent to Submit a Claim to Arbitration
PEM	Primero Empresa Minera S.A. de C.V.
RMPT	Transfer Pricing Resolution
SAT	Service Tax administration
RFA	Request for Arbitration
NAFTA	North American Free Trade Agreement
USMCA	United States-Mexico-Canada Agreement, which came into effect on July 1, 2020
TFJA	Federal Court of Administrative Justice

I. INTRODUCTION

1. Pursuant to Article 1126(3) of the North American Free Trade Agreement (NAFTA), Mexico request that the Secretary General establish an arbitral tribunal pursuant to Article 1126(5) (the "Consolidation Tribunal") to decide on the consolidation of the claims in the following arbitrations pending under NAFTA Chapter 11: *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. These two arbitrations, for which Mexico seeks an order from a Consolidation Tribunal pursuant to Article 1126(2), have been brought by a single disputing investor with respect to a single investment of that investor. The disputing investor, its legal counsel, and the investment are as follows:

Disputing Investor (Claimant):
First Majestic Silver Corp.
1800-925 West Georgia Street
Vancouver, British Columbia
V6C 3L2
Canada

Legal Representatives:
Mr. Riyaz Dattu
150 King Street West, Suite 200
Toronto, Ontario
M5H 1J9
Canada
and
Mr. Lee M. Caplan
Arent Fox LLP
1717 K Street, N.W.
Washington, D.C. 20006
United States of America

Investment:
Primero Empresa Minera S.A. de C.V.
Fanny Anitua 2700
Colonia Los Ángeles
34076 Victoria de Durango, Durango
México

3. Article 1126(5) of the NAFTA provides that "the Secretary-General shall establish a Tribunal comprising three arbitrators" within 60 days of receiving a request under Article 1126(3) from a disputing party. Article 1126(2) provides that where such a tribunal "is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common", it may assume jurisdiction over, and hear and determine the claims together, "in the interests of fair and efficient resolution of the claims".

4. The Claimant's claims in the two arbitrations have issues of law in common. They are intertwined, such that the resolution of both cases, in one way or another, will turn on these common issues. Therefore, consolidation of the claims before a single tribunal pursuant to Article 1126 will ensure the most consistent, fair, and efficient resolution of all matters in dispute. On these grounds, the nature of the order that Mexico seeks under Article 1126(2) is a complete consolidation of the Claimant's claims in the two arbitrations, such that the Consolidation Tribunal assumes jurisdiction over, and hears and determines together, all of the claims.[1]

5. In the sections below, Mexico provides: (i) an overview of the procedural background of the Claimant's claims submitted to arbitration under Article 1120; (ii) a description of the questions of law and fact in common; and (iii) an explanation of the reasons why complete consolidation is in the interests of fair and efficient resolution of the claims.

6. Mexico reserves the right to present its written and oral arguments in full to the Consolidation Tribunal, and to request a hearing should one be necessary. The contents of this request in no way prejudge Mexico's position on the issues of jurisdiction or the merits of the dispute, which Mexico will present at the appropriate procedural time in accordance with the applicable rules.

A. Procedural Background

1. ICSID Case No. ARB/21/14 (FM1)

7. On 13 May 2020, First Majestic Silver Corp. (First Majestic or the Claimant) filed a Notice of Intent to Submit a Claim to Arbitration (NOI) on its own behalf and on behalf of its investment in Mexico, Primero Empresa Minera S.A. de C.V. (PEM), for alleged violations to Articles 1102

[1] NAFTA, Article 1126(2)(a). **Annex 1**.

(National Treatment), 1103 (Most-Favoured Nation Treatment), 1105 (Minimum Standard of Treatment), 1109 (Transfers) and 1110 (Expropriation and Compensation) of the NAFTA and applicable international law principles.[2]

8. On March 1st, 2021, after unsuccessful negotiations between the parties, the Claimant filed a Request for Arbitration (RFA) on its own behalf and on behalf of PEM. The RFA alleges violations to the following Articles of the NAFTA: 1102, 1103, 1104 (Standard of Treatment), 1105, 1109 and 1110.[3] According to the Claimant, these alleged violations arose as a result of certain measures taken by Mexican government authorities, including, *inter alia*: illegally repudiating the Transfer Pricing Resolution (RMPT)[4]; initiating a *juicio de lesividad* against the RMPT in an attempt to retroactively nullify it on improper grounds; issuing unlawful retroactive tax reassessments ("*créditos fiscales*" in Spanish); seeking to collect amounts purportedly as taxes, penalties and interest without any legal basis; engaging in unlawful collection methods that violate Mexico's own laws and the Mexican Constitution; pursuing a dubious money laundering investigation; blocking bank accounts and imposing restrictions and charges against other assets of PEM; limiting and restricting the Claimant and PEM from relying on all available domestic and international avenues for seeking redress.[5]

9. On 20 August 2021, the FM1 Tribunal was constituted in accordance with the ICSID Convention and the 2006 ICSID Arbitration Rules. The Claimant appointed Mr. Stanimir A. Alexandrov and the Respondent appointed Mr. Yves Derains as coarbitrators. Prof. Giorgio Sacerdoti was subsequently appointed by ICSID to serve as President of the Tribunal.[6]

10. On 25 April 2022, the Claimant submitted its Memorial on the Merits.[7]

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2 ARB/21/14, NOI, ¶ 3. **Annex 2**.

3 ARB/21/14, RFA, ¶ 88. **Annex 3**.

4 The Claimant refers to its Transfer Pricing Resolution as an Advance Pricing Agreement or APA. Fiscal authorities (in this case the SAT) issue transfer pricing resolutions to rule on taxpayers' consultations regarding the method used to determine the prices or compensation paid in transactions with related parties, that is, companies belonging to the same multinational group. According to Mexican law, a transfer pricing resolution is valid for up to five fiscal years.

5 ARB/21/14, RFA, ¶ 87. **Annex 3**.

6 ARB/21/14, Procedural Order No. 1. **Annex 4**.

7 ARB/21/14, Memorial. **Annex 5**.

11. On 25 November 2022, Mexico filed its Counter-Memorial on the Merits and jurisdictional objections.[8]

12. On 4 January 2023, the Claimant filed a Request for Provisional Measures. The Respondent submitted its response on 10 February 2023. A short hearing was held on 13 March 2023.[9]

13. On 31 March 2023, the Claimant submitted a second Notice of Intent threatening a new arbitration in which it would seek recovery of VAT refunds that had been paid into PEM's blocked accounts since April 2020 that have been approved and whose amount rises to approximately USD $80 million.[10] The grounds for this new claim – including the alleged factual circumstances and violations – were the same as those for the claims in the FM1 arbitration. The new claim is simply an elaboration or extension of the claims in the FM1 arbitration.

14. On 26 May 2023, the Tribunal issued its Decision on Provisional Measures which rejected three of the four provisional measures requested by the Claimant. However, it issued the following recommendation:

> 1. RECOMMENDS as provisional measure pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and Article 1134 of the NAFTA that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.[11]

15. On 19 June 2023, Mexico filed a Request for Revocation of the Provisional Measures, arguing that the provisional measure, as recommended, would prejudice the new arbitration between the parties because it relates to the same facts (the payment by the SAT of VAT refunds into PEM's blocked accounts) that in FM2.[12]

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8 ARB/21/14, Counter-Memorial. **Annex 6**.

9 ARB/21/14, Decision on the Claimant's Request for Provisional Measures, ¶¶ 7, 12 and 16. **Annex 7**.

10 ARB/23/28, Second NOI. **Annex 8**.

11 ARB/21/14, Decision on the Claimant's Request for Provisional Measures, ¶ 143. **Annex 7**.

12 ARB/21/14, Request for Revocation of the Provisional Measures, ¶¶ 6 and 7. **Annex 9**.

16. Ten days later, on 29 June 2023, the Claimant filed its second Request for Arbitration (FM2, which is discussed in the section below).[13]

17. On 21 July 2023, the Claimant submitted its Reply to the Respondent's Request for Revocation of the Provisional Measures.[14]

18. On 28 July 2023 the Respondent filed its Preliminary Objection on Jurisdiction, arguing that by initiating a second claim based on the same measures, the Claimant violated the waiver filed in the FM1 proceeding. The waiver is a condition precedent to the submission of a claim to arbitration by which a claimant party renounces to its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the same measure of the disputing Party that is alleged to be a breach referred to in Article 1116 […]".[15]

19. On 1 September 2023, the Tribunal issued its Decision on the Respondent's Request for the Revocation of Provisional Measures, declining to revoke the provisional measure recommended in its Decision of 26 May 2023.[16]

20. Also on 1 September 2023, the Claimant submitted its Response to the Respondent's Preliminary Objection to Jurisdiction.[17]

21. On 18 December 2023, the Claimant requested that the current calendar be suspended pending the decision on the Respondent's Request for Bifurcation and Preliminary Objection to Jurisdiction.[18]

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13 ARB/23/28, Second RFA. **Annex 10**.

14 ARB/21/14, Decision on Respondent's Request for Revocation of Provisional Measures, footnote 35. **Annex 11**.

15 NAFTA Article 1121 (1)(b) and (2)(b). **Annex** 1. See also Respondent's Objection to Jurisdiction. **Annex 25**.

16 ARB/21/14, Decision on Respondent's Request of Revocation of Provisional Measures, ¶ 51. **Annex 11.**

17 ARB/21/14, Decision on the Respondent's Preliminary Objection on Jurisdiction, ¶ 23. **Annex 12**.

18 ARB/21/14, Email from Mr. Riyaz Dattu to Mrs. Sara Marzal, dated 18 December 2023. **Annex 13**.

22. On 20 December 2023, the Tribunal issued its Decision on the Respondent's Preliminary Objection on Jurisdiction, dismissing the Respondent's preliminary objections to the jurisdiction of the Tribunal.[19]

23. On 26 December 2023, the Tribunal set new dates for the second round of pleadings on the merits. The Claimant's deadline to file its Reply was extended from 15 January 2024 to 15 February 2024 and the Respondent's deadline to file its Rejoinder was extended from 25 April 2024 to 01 July 2024.[20]

24. On 2 January 2024, the Claimant requested the Tribunal to grant a 3-month extension to file its Reply on 1 April 2024 and to reschedule the hearing for January 2025.[21]

25. On 24 January 2024, the Tribunal granted the Claimant's request for an additional extension over the Respondent's objection and set the new due date for the Claimant's Reply on the Merits and Counter Memorial on Jurisdictional Objections for 1 April 2024. The Respondent has until 1 October 2024 to submit its Rejoinder Memorial. The due date for the Rejoinder on Jurisdiction has not yet been set by the Tribunal.[22]

2. ICSID Case No. ARB/23/28 (FM2)

26. As noted above, on 31 March 2023, the Claimant submitted a second Notice of Intent, seeking recovery of VAT refunds in the amount of USD $80 million that had been paid into PEM's blocked accounts since April 2020. The Claimant alleged that the Respondent had violated Articles 1102 (National Treatment), Article 1103 (Most-Favoured Nation Treatment), Article 1105 (Minimum Standard of Treatment), Article 1109 (Transfers) and Article 1110 (Expropriation and Compensation).[23]

27. On 29 June 2023, the Claimant submitted its Second RFA alleging that the Respondent had breached its obligations set out in Articles 1102, 1103, 1104 (Standard of Treatment), 1105, 1109, and 1110. Based on the value of VAT refunds paid into PEM's blocked bank accounts, the

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19 ARB/21/14, Decision on the Respondent's Preliminary Objection on Jurisdiction, ¶ 84. **Annex 12**.

20 ARB/21/14, Email from Mrs. Sara Marzal to the Parties, dated 26 December 2023. **Annex 14**.

21 ARB/21/14, Email from Mrs. Jodi Tai to Mrs. Sara Marzal, dated 2 January 2024. **Annex 15**.

22 ARB/21/14, Email from Mrs. Sara Marzal to the Parties, dated 24 January 2024. **Annex 16**.

23 ARB/23/28, Second NOI, ¶ 3. **Annex 8**.

Claimant requested monetary compensation at an estimated minimum of USD 100 million plus interest.[24]

28. On 6 July 2023, ICSID sent a letter requesting the Claimant to clarify a) how the requirements of NAFTA Articles 1116(2) and 1117(2) have been met, and b) how the requirements of NAFTA Article 2103 have been met. ICSID asked the Claimant to provide the information by 13 July 2023.[25]

29. On 19 July 2023, the Claimant replied to ICSID's request for information. The Claimant argued that the Second RFA complies with the three-year limitation period established in Articles 1116 and 1117 because the continuing nature of the Respondent's conduct renews the limitation period with each breach. The Claimant also argued that the measures giving rise to the claim do not qualify as taxation measures under Article 2103.[26]

30. On 21 July 2023, ICSID registered the new claim under docket number ARB/23/28.[27]

31. On 19 October 2023, the Claimant appointed Mr. Horacio Grigera Naón as arbitrator.[28]

32. On 1 February 2024, the Claimant requested the Secretary-General to "take the necessary steps to have the Respondent appoint its nominee to the tribunal and for the appointment of the Chair for the Tribunal" pursuant to Rule 18 of the ICSID Arbitration Rules and Article 38 of the ICSID Convention.[29] The appointment of the presiding arbitrator is still pending.

33. On 9 February 2024, Respondent appointed the second co-arbitrator.

B. Legal Requirements under Article 1126

34. The provision for the consolidation of claims under Article 1126 of the NAFTA reflects the wish of the State Parties "to ensure procedural economy in the case of multiple claims arising out of the same event or related to the same measure".[30] In *Canfor Corporation and others v.*

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24 ARB/23/28, Second RFA, ¶¶ 86-88. **Annex 10**.

25 ICSID's Communication re "Request for Arbitration of First Majestic Silver Corp. (R20230049), dated 6 July 2023. **Annex 17**.

26 Claimant's Communication to ICSID, dated 19 July 2023. **Annex 18**.

27 ARB/23/28, ICSID's Communication, July 21, 2023. **Annex 19**.

28 ARB/23/28, Claimant's Communication to ICSID, dated 1 February 2023. **Annex 20**.

29 ARB/23/28, Communication dated 1 February 2024. **Annex 20**.

30 *Canfor*, para. 78. **Annex 21**.

United States of America (*Canfor*), the consolidation tribunal found that the "intended purpose and object" of Article 1126 "are procedural economy in the light of the position of State Parties in particular". This includes "the goal of alleviating the resources of the State Parties in defending against multiple claims, as opposed to conserving the resources of the Article 1120 Tribunals empanelled to hear the individual disputes".[31] The *Canfor* consolidation tribunal considered that the legal concept of "consolidation is well known in many domestic court procedures, including in Canada, Mexico and the United States" as a "procedural device combining two or more proceedings into one proceeding".[32]

35. A consolidation tribunal has discretionary power to make an order under Article 1126 (2).[33] Article 1126 (2) 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.

36. The *Canfor* consolidation tribunal considered that the discretionary power to make an order under Article 1126 (2) is circumscribed by the following 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. To the extent that these conditions are met, a consolidation tribunal may order any form of consolidation under paragraphs (a) and (b) of Article 1126.

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31 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005 [*Canfor*], paras. 75-76. See also ibid., paras. 63-74. **Annex 21**.

32 *Canfor*, para. 77. **Annex 21**.

33 *Canfor*, para. 88. **Annex 21**.

37. The term "question" in the phrase "a question of law or fact in common" means "a factual or legal issue that requires a finding to dispose of a claim".[34] Where an issue has been raised in one of the Article 1120 proceedings, and a party shows with a degree of certainty that the issue will also arise in another Article 1120 proceeding, the consolidation tribunal may legitimately take such an "anticipated" issue into account, especially where the stages of the proceedings are not fully aligned.[35]

38. With respect to the phrase "in the interests of fair and efficient resolution of the claims", the *Canfor* consolidation tribunal considered that "efficiency in the sense of procedural economy is the operative goal of consolidation under Article 1126".[36] It considered this to be "basically an objective, fact-driven standard", and found that it suffices for a consolidation tribunal to be "convinced that efficiency in the resolution of the claims will, under the circumstances before it, be served by a consolidation".[37]

39. The Factors that a consolidation tribunal may take into account include: (i) time, which includes consideration of the status of the Article 1120 arbitrations and of the delay, if any, that might result in the resolution of the claims; (ii) costs, which involves an assessment of the costs to all parties involved; and (iii) avoidance of conflicting decisions, which requires a consideration of whether conflicting decisions on common questions of law or fact could arise in the separate arbitrations.[38]

40. A consolidation tribunal is also required to consider what is "fair", which indicates that the interests of all parties involved should be balanced in determining what constitutes the procedural economy in the specific circumstances of a given case. This balancing includes the consideration that all parties shall continue to receive the fundamental right of due process, including the full opportunity to present their cases.[39]

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34 *Canfor*, para. 109. **Annex 21**.

35 *Canfor*, para. 118. **Annex 21**.

36 *Canfor*, para. 124. **Annex 21**.

37 *Canfor*, para. 124. **Annex 21**.

38 *Canfor*, para. 126. **Annex 21**.

39 *Canfor*, para. 125. **Annex 21**.

41. Once a consolidation tribunal has issued an order on consolidation under Article 1126 (2), its mandate transforms from deciding whether or not to consolidate claims into hearing and determining the consolidated claims.[40] At this stage, the consolidation tribunal has discretionary power to determine, in consultation with the parties, how the consolidated proceedings are to be sequenced (including where, procedurally, they are to begin), and how they are to be conducted.[41]

C. The Claimant's Claims Have Been Submitted to Arbitration under Article 1120

42. As outlined above, the Claimant's claims have each been submitted to arbitration under Article 1120 of the NAFTA.[42] Therefore, this requirement under Article 1126 (2) is met.

43. The tribunal in the FM1 arbitration has issued preliminary decisions concerning narrow jurisdictional issues and provisional measures, but it has not considered the merits of the claims. The disputing parties have exchanged first-round memorials. Under the current procedural calendar, the Claimant must submit its Reply on the Merits and Counter-Memorial on jurisdictional issues on 1 April 2024, and the Respondent is scheduled to submit its Rejoinder on 1 October 2024. The tribunal in the FM2 arbitration has not yet been established, and the proceedings have not progressed beyond the Claimant's Notice of Arbitration. The fact that both cases are in their early stages weigh in favour of their consolidation.

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40 *Canfor*, para. 151. **Annex 21**.

41 *Canfor*, para. 153. **Annex 21**.

42 In the case of the FM2 arbitration (ICSID Case No. ARB/23/28), the Claimant has purported to submit the new claim to arbitration under Annex 14-C of the USMCA. Annex 14-C permits the submission of a "legacy investment claim" to arbitration in accordance with Section B of NAFTA Chapter 11 (including Article 1120) where the Claimant is alleging breach of an obligation under, *inter alia*, Section A of Chapter 11. As such, the submission of a claim to arbitration under Annex 14-C entails submission of the claim to arbitration under Article 1120. This description is provided without prejudice to Mexico's right to challenge, as a preliminary jurisdictional matter, whether the Claimant's claim is eligible, in whole or in part, for submission to arbitration under Annex 14-C of the USMCA.

D. Issues of Fact and Law in Common

1. Claimant's Claims arise from the Same Factual Circumstances

44. The Claimant's claims in each of the two arbitrations arise from exactly the same set of factual circumstances, which can be succinctly summarized as follows:[43]

- On October 17, 2011, PEM filed before the Central Administration of Transfer Pricing Tax Audit of the Tax Administration Service (SAT), a consultation related to the methodology to determine the agreed-upon prices in transactions between related parties for fiscal years 2010 to 2014. On October 4, 2012, the SAT issued a Ruling on Transfer Pricing Matters (RMPT 2012) by which it resolved the consultation made by the taxpayer.[44] The Respondent refers to this RMPT as an Advance Transfer Pricing Agreement or "APA".
- RMPTs are issued by the tax authority (the SAT in Mexico). In this particular case, the 2012 RMPT that PEM obtained was valid for five fiscal years (2010 to 2014). Through this RMPT, the tax authority accepted, in advance, the methodology that the taxpayer would use to determine the price to be used in transactions with related parties, *i.e.*, with companies that are part of the same multinational group. The price used in these transactions must comply with the arm's length principle. [45]
- Beginning in July 2015, the SAT initiated audits to ensure that PEM duly complied with its tax obligations. As a result of these audits, the SAT determined that PEM was non-compliant, and reassessed PEM's income taxes fiscal years 2010-2013 (*i.e.*, the so-called "*tax liabilities*" or "*tax reassessments*"). Specifically, the SAT determined that PEM faced MX $7,641,401,401,853.57 (more than US $447 million taking the current exchange rate of Mexican pesos to dollars) in taxes including penalties, updates and surcharges.[46]
- On August 4, 2015, the SAT challenged the validity of the 2012 RMPT through a *juicio de lesividad* before the Federal Court of Administrative Justice (TFJA).[47] The

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[43] The following summary is provided as an outline of the basic facts leading to the issue of the lack of access to the VAT refund, which is common to both arbitrations. It does not purport to be a complete statement of the facts or the parties' positions in relation thereto.

[44] ARB/21/14, Counter-Memorial, ¶ 110. **Annex 6**.

[45] The arm's length principle is a concept contained in Article 9 of the OECD Model Tax Convention in the following terms: "*where conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*". See OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration, OECD (2022), p. 19.

[46] ARB/21/14, Counter-Memorial, ¶¶ 224 - 230. **Annex 6**.

[47] According to the Mexican legal system, the "*juicio de lesividad"* is a legal process carried out before the Federal Court of Administrative Justice through which an authority seeks to challenge an

SAT resorted to this measure after concluding that the 2012 RMPT was obtained in irregular circumstances and in contravention of applicable legal provisions, to the detriment of the Mexican tax authorities.[48]

- In May 2018, First Majestic acquired all of the issued and outstanding shares of Primero Mining Corp and its subsidiary in Mexico, PEM.[49]
- In September and November 2019, PEM challenged the tax reassessments for 2010 and 2011, respectively, through an administrative review procedure known as *recurso de revocación*, which is substantiated and resolved by the SAT itself.[50] Subsequently, in February 2020, PEM filed an appeal seeking to revoke the 2012 tax reassessment, and in March 2021 it filed another appeal against the 2013 tax reassessment. All appeals were dismissed as unfounded, except for the latter, which is currently *sub judice*.[51] In view of these adverse resolutions in the appeals for revocation, PEM initiated nullity proceedings against the tax reassessments before the TFJA. [52]
- In December 2019, PEM challenged the 2010 and 2011 tax reassessments. In May 2020, PEM challenged the 2012 tax reassessment. The nullity lawsuits related to the 2010 and 2012 tax reassessments have concluded in their first instance, and such outstanding taxes have been recognized as valid; however, PEM has different means of defense under Mexican law, such as the *amparo* proceeding, to challenge the resolutions issued by the TFJA. The nullity lawsuit related to the 2011 tax reassessment is *sub judice*.[53] PEM is required, under Mexican law, to guarantee the tax interest (*interés fiscal*) upon initiating this type of proceedings, and when requesting the suspension of the Administrative Enforcement Proceeding (*i.e.*, the collection of the outstanding taxes).[54]
- On April 3, 2020, SAT determined that PEM had not provided the required security to guarantee the tax interest derived from the nullity trials initiated against the tax reassessments, and froze certain of PEM's bank accounts, including the account that PEM had selected to receive VAT refunds from the SAT. The Mexican tax

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administrative resolution that has been issued in favour of an individual. The individual to whom the resolution was issued participates in this process.

48 ARB/21/14, Counter-Memorial, ¶ 152. **Annex 6**.

49 ARB/21/14, Memorial, ¶ 39. **Annex 5**.

50 Under Mexican law, a taxpayer may challenge a tax reassessment through an administrative review procedure (known as *recurso de revocación*) which is processed before the SAT and does not require the taxpayer to guarantee payment of the total outstanding amount.

51 ARB/21/14, Counter-Memorial, ¶ 240. **Annex 6.**

52 Under Mexican law, a taxpayer may also challenge a tax reassessment through a nullity proceeding before the TFJA, provided that it guarantees the entire outstanding amount through a bond or other means. This requirement is intended to guarantee the national interest in case the taxpayer loses the challenge and refuses or resists paying.

53 ARB/21/14, Counter-Memorial, ¶¶ 245-246. **Annex 6**.

54 Articles 142 and 145 of the Federal Fiscal Code. **Annex 23**.

authorities have been depositing the VAT refunds into this blocked account on a monthly basis at PEM's request.[55]

- On September 23, 2020, the TFJA issued its ruling on the *juicio de lesividad*, which was favorable to the SAT. The TFJA ruled that the RMPT was illegal, declaring it null and void and ordered SAT to issue a new RMPT analysing the taxpayer's consultation request.[56]
- On November 30, 2020, PEM challenged the TFJA ruling through an injunction proceeding known as "*juicio de amparo*".[57]
- Despite PEM's attempts to guarantee the tax interest, the SAT has rejected the proposals after determining that the collateral offered did not comply with the requirements under Mexican law (i.e., there were liens against the collateral). In case of non-compliance with the obligation to guarantee the tax interest, the SAT has the power to seek collection of the reassessed amounts. Under Mexican law, the SAT has the power to freeze bank accounts and/or seize other assets to guarantee payment of the outstanding tax liabilities when the taxpayer, who contests a tax reassessment, fails to guarantee the total outstanding amount.

2. Claimant's Claims have Issues of Fact and Law in Common

45. In the two arbitrations which the Respondent seeks to have consolidated, the Claimant's claims challenge the same series of measures. This series of measures –including, *among others*, the repudiation of the RMPT, the assessment of tax credits, and the blocking of PEM's bank accounts– have ultimately resulted in the Claimant's inability to access the VAT refunds paid into PEM's blocked bank accounts.

46. From the foregoing, it is clear that the Claimant's claims in the FM1 arbitration (ARB/21/14) raise common issues of fact and law that are not only directly relevant and material to the Claimant's claims in the FM2 arbitration (ARB/23/28), but are ultimately essential to

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55 ARB/21/14, Counter-Memorial, ¶ 257. **Annex 6**.

56 ARB/21/14, Counter-Memorial, ¶¶ 164-169. **Annex 6**.

57 ARB/21/14, Counter-Memorial, ¶ 191. **Annex 6**.

According to the Mexican legal system, the amparo trial is a constitutional process regulated in the Constitution and the Amparo Law that can be initiated by any person, physical or legal, who is called "complainant", against acts of authority that, in its opinion, violate the human or fundamental rights provided for in the Mexican Constitution or the human rights provided for in the international treaties to which Mexico is a Party. There are "*amapros directos*" (against final rulings) and "a*mparos indirectos*" (against acts of authority other than final rulings). The Collegiate Circuit Courts are competent to resolve direct amparo proceedings and the District Judges are competent to resolve indirect amparo proceedings.

resolving whether the Claimant's inability to access the VAT refunds paid into the blocked bank accounts gives rise to the violations of NAFTA Chapter 11 that it alleges.

47. These common questions of fact and law include, but are not necessarily limited to, the following:

- Whether the repudiation of the RMPT granted to PEM was contrary to Mexico's obligations and, if so, whether the RMPT could still have legal effect with respect to the tax years 2010 to 2014, as the Claimant alleges.[58] As explained above, the challenge to the tax reassessments is the underlying cause of the blocking of the bank account into which PEM requested the deposit of the VAT refunds.
- Whether the tax reassessments determined by SAT were issued illegally or improperly.[59] These tax reassessments gave rise to the *nullity trials,* which in turn triggered the requirement to guarantee the full amount outstanding.
- Whether SAT's freezing and blocking of PEM's bank accounts was illegal or improper.[60] As explained above, the measures of freezing and blocking the bank accounts were a consequence of PEM's failure to guarantee the amount owed to the SAT.
- Whether the SAT unlawfully or improperly refused to accept a guarantee from PEM for amounts claimed by Mexico as outstanding taxes, penalties, and interest.[61]
- Whether it was illegal or improper to deposit the VAT refunds in frozen and blocked bank accounts, thereby preventing PEM from recovering, diverting and disposing of these funds.[62]
- Whether the SAT intended to collect amounts for outstanding taxes, penalties and interest without a legal basis for doing so, as alleged by the Claimant.[63]

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58 ARB/21/14, Memorial, ¶ 158.a. **Annex 5**.

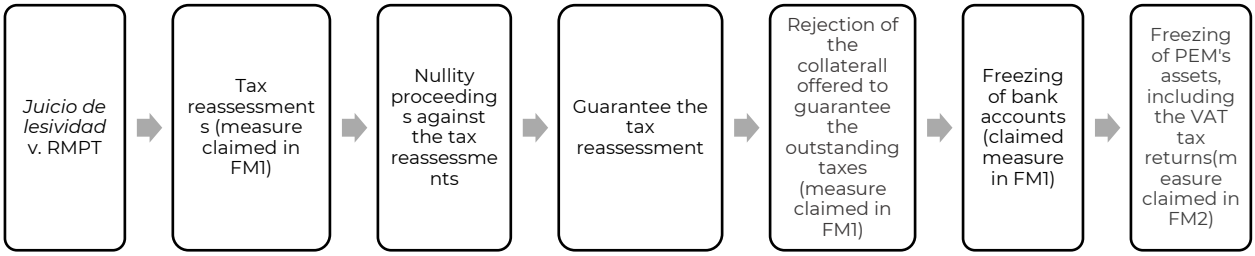
59 ARB/21/14, Memorial, ¶ 158.c. **Annex 5**.

60 ARB/21/14, Memorial, ¶ 158.k. **Annex 5**.

61 ARB/21/14, Memorial, ¶ 158.i. **Annex 5**.

62 ARB/21/14, Memorial, ¶ 158.l. **Annex 5**.

63 ARB/21/14, Memorial, ¶ 158.e. **Annex 5**.



48. In the FM2 arbitration (ARB/23/28), the Claimant complains about the SAT's failure to allow PEM to access the approximately USD 100 million in VAT refunds.[64] At paragraph 23 of the RFA for the FM2 arbitration, the Claimant asserts: "[a]s explained further below, this claim relates to the Government of Mexico's steadfast refusal to allow PEM access to Value Added Tax (VAT) refunds which it has been entitled to since April 2020".[65] At paragraph 27 of the RFA, the Claimant further notes that "the matter of the imposition of the measures related to the 'blocking' and refusal to lift the 'blocking' is the subject of an ongoing arbitration between First Majestic and the Government of Mexico (ICSID Case No. ARB/21/14)."[66] This statement illustrates how issues raised in the claims submitted to arbitration in the FM1 proceeding are not only in common with the claims submitted to arbitration in the FM2 proceeding, but foundational to them.

49. The Claimant also acknowledged in the RFA for the FM2 arbitration that "[t]he dispute concerning the release of VAT refunds from PEM's blocked account, was the subject of a provisional measures application submitted pursuant to a parallel proceeding: First Majestic Silver Corp. v. United Mexican States (ICSID Case. No. ARB/21/14)."[67] Again, this statement illustrates that the claims submitted to arbitration in the FM2 proceeding have questions of fact and law in common with the claims submitted to arbitration in the FM1 proceeding. The following statement by the Claimant in FM2 is even clearer: "the claim set out in the Request for Arbitration is in

64 ARB/23/28, RFA, ¶ 62. **Annex 10**.

65 ARB/23/28, RFA, ¶ 23 **Annex 10**.

66 ARB/23/28, RFA, ¶ 27. **Annex 10**.

67 ARB/23/28, RFA, ¶ 42. **Annex 10**.

relation to PEM's ability to obtain access to funds that have already been paid and deposited by Mexico in a blocked bank account." [68]

E. Consolidation is Consistent with the Objective of Ensuring a Fair and Efficient Resolution of the Claims

50. It is apparent from the foregoing that a consolidation tribunal "may, in the interests of fair and efficient resolution of the claims", assume jurisdiction over, and hear and determine together, all of the claims in the FM1 and FM2 arbitrations. The claims in the FM2 arbitration are intertwined with those in the FM1 arbitration, arising from the same factual circumstances and involving the same set of legal issues.

51. In this regard, it would not be possible for a tribunal in the FM2 arbitration to resolve the issues relating to SAT's payment of VAT refunds into the blocked bank accounts without also considering the issues before the tribunal in the FM1 arbitration concerning the measures leading up to and underpinning the blocked bank accounts and the restriction of access to the funds therein. These circumstances call for a full consolidation of the claims into a single proceeding before a single tribunal in accordance with NAFTA Article 1126.

52. Three factors to be considered in relation to the phrase "in the interests of fair and efficient resolution of the claims" are: (i) time; (ii) costs; and (iii) avoidance of conflicting decisions.[69]

53. With respect to factor (i), time, the arbitral tribunal in the FM1 proceeding has not yet issued any decisions on the Respondent's original jurisdictional objections, let alone on liability or damages.[70] The second round of written submissions is pending, and the hearing has not yet been scheduled. Although the Tribunal has issued preliminary decisions on (i) a narrow jurisdictional objection that Mexico raised specifically in relation the Claimant's initiation of the second arbitration and the violation of the waivers that the NAFTA requires (Article 1121), and (ii) a recommended provisional measure, the Tribunal will not be issuing decisions on the original jurisdictional objections or the merits for some time. In the FM2 arbitration, the Tribunal has not yet been established. As noted above, the early stages of these proceedings weigh in favour of consolidation.

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68 ARB/23/28, Claimant's communication to ICSID dated 19 July 2023. **Annex 18**.

69 *Canfor*, para. 208. **Annex 21**.

70 *Canfor*, para. 209. **Annex 21**.

54. While the consolidation proceeding could potentially result in a slight delay with respect to the claims submitted to arbitration in the FM1 proceeding, this would not be a material delay. Moreover, even a slight delay with respect to the FM1 claims must be balanced against the cost savings, fairness, and overall efficiency of hearing and determining all of the Claimant's claims (and the Respondent's jurisdictional objections) together in a single proceeding before a single tribunal. Moreover, there would be no delay for the claims submitted to arbitration in the FM2 proceeding, considering that the arbitral tribunal has not yet been established.

55. With respect to factor (ii), costs, it is apparent on its face that a single consolidation tribunal going forward will be more economically efficient than two separate arbitral tribunals. Unlike a situation in which the claims of multiple claimants are consolidated into a single proceeding, the economic efficiency in this case will benefit *both* the single Claimant and the Respondent.[71]

56. With respect to factor (iii), avoidance of conflicting decisions, it is clear that separate tribunal decisions in the FM1 and FM2 arbitrations could result in inconsistent findings of fact and law on the questions in common, including with respect to the legality and propriety of the government measures at issue. Such an outcome could lead to unfairness not only for Mexico, but also for the Claimant.

57. The foregoing factors weigh strongly in favour of the procedural economy obtained through consolidation of the Claimant's claims in the FM1 and FM2 arbitrations into a single proceeding before a single tribunal. Further, with respect to the "fair" resolution of these claims, both parties will continue to receive the fundamental rights of due process, including the full opportunity to present their cases.

F. The Nature of the Order Sought by Mexico

58. On the basis of the foregoing, the nature of the order sought by Mexico is full consolidation of all of the Claimant's claims, such that the consolidation tribunal would "assume jurisdiction over, and hear and determine together, all … of the claims" in the FM1 and FM2 arbitrations pursuant to Article 1126 (2)(a).

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[71] In comparison, see the *Canfor* consolidation tribunal's conclusion "that consolidated proceedings will be less expensive than three separate arbitrations for the United States and that, for each of the Claimants, costs will increase but not excessively". *Canfor*, para. 215. **Annex 21**.

59. In addition, Mexico also requests that, in accordance with Article 1126(9), when the consolidation tribunal is constituted, it orders that the FM1 and FM2 proceedings be suspended pending the decision of the Accumulation Court in accordance with the Article 1126(2).

G. Petitions

60. By virtue of the foregoing, Mexico 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.

Respectfully submitted,

Director General de Consultoría Jurídica de Comercio Internacional

Signature

Alan Bonfiglio Rios