IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES (1976)

FIRST MAJESTIC SILVER CORP.,

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

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

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA") and Section 20 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[1]

Consolidation (NAFTA Article 1126)

2. Article 1126 permits the consolidation of claims submitted to arbitration under Article 1120 where they "have a question of law or fact in common" and where consolidation serves "the interests of fair and efficient resolution of the claims."[2] After hearing the disputing parties, the consolidation tribunal may assume jurisdiction over, and hear and determine together, all or part of the claims on consolidation.[3] Alternatively, the tribunal may assume jurisdiction over,

[1] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

[2] NAFTA Article 1126(2).

[3] NAFTA Article 1126(2)(a).

and hear and determine one or more of the claims, if it believes such determination would assist in the resolution of the others.[4]

3. The policy objectives underlying Article 1126 include avoiding a multiplicity of parallel claims and promoting their expeditious and cost-effective resolution. As one commentator has noted:

> The broad scope of investments with regard to which investors may bring a claim, either on their own behalf or on behalf of an enterprise, without the need for an arbitration clause or even a contract with the State Party, gives rise to the possibility of a large number of claims arising from a single measure taken by a State Party. . . . [Article 1126 thus] usefully addresses the possibility of multiple claims arising from a single measure taken by a State Party.[5]

4. Although Article 1126 accords the right to seek consolidation to both claimants and respondents, it is primarily "intended to relieve *a State Party* from the hardship of having to defend multiple claims arising from the same measure,"[6] and to "provide an effective means . . . to avoid procedural harassment" by claimants.[7] The United States agrees with the tribunal in *Canfor v. United States*, 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

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[4] NAFTA Article 1126(2)(b).

[5] Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393, 413-14 (2000) ("Alvarez"). *See also* MEG KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1126-4 (2006); "*The Basic Features of Investment Treaties*," in Campbell McLachlan, Laurence Shore, et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES § 2.50 (2nd ed., 2017) ("This consolidation provision allows multiple claims arising from a single measure taken by a NAFTA party to be decided consistently in a way that relieves States from the administrative difficulties and potential legal perils of facing a multiplicity of actions arising out of the same underlying facts.").

[6] Alvarez at 414 (emphasis added).

[7] Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN-U.S. L. J. 39, 49 (1994). *See also Canfor Corp. v. United States of America; Tembec v. United States of America; Terminal Forest Products Ltd. v. United States of America,* NAFTA/UNCITRAL, Order of the Consolidation Tribunal ¶ 73 (Sep. 7, 2005) ("*Canfor* Order of the Consolidation Tribunal") ("[A]voidance of procedural harassment appears to be the main rationale of the provisions set forth in Article 1126 of the NAFTA. . . . The initial, main concern seemed to have been that a State Party would be faced with a multitude of claims by investors arising out of the same event or related to the same measure by that State.").

taking into account and balancing the interests of the disputing investors."[8] The tribunal further noted that "procedural economy" refers "in particular to 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."[9] Additionally, "[i]n the case of the NAFTA, the States wished to ensure procedural economy in the case of multiple claims arising out of the same event or related to the same measure."[10] Article 1126, which establishes the conditions for consolidation, refers to "claims" and does not stipulate that consolidation is restricted to cases involving multiple claimants.[11]

5. Another purpose of Article 1126, elaborated further below, is to "avoid[ ] inconsistent results in cases arising from the same measure."[12]

Common Questions of Law or Fact

6. Article 1126(2) provides that a tribunal may order consolidation if it is satisfied that the claims have "a question of law or fact in common."[13] The notion of "question" in the phrase "question of law or fact in common" means "a factual or legal issue that requires a finding to dispose of a claim."[14] The standard for commonality in Article 1126(2) is not purely a quantitative question, but incorporates a qualitative element. The United States concurs with the tribunal in *Canfor v. United States*, which recognized that: "[t]he determination that one question of law or fact is in common, requires a further determination that resolution of that question is in

[8] *Canfor* Order of the Consolidation Tribunal ¶ 75.

[9] *Id*. ¶ 76.

[10] *Id*. ¶¶ 78, 136.

[11] *See also*, North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, vol. 1, 103d Cong., 1st Sess., at 146 (1993) (noting that pursuant to Article 1117(3) "claims arising out of the same events" brought by the same investor under both Articles 1116 and 1117 "should be heard together by a tribunal under Article 1126").

[12] Alvarez at 414*; see also* JULIAN D. LEW, ET AL., COMPARATIVE INTERNATIONAL ARBITRATION 378 (2003) ("[Consolidation] proceedings have the effect of avoiding conflicting decisions which may arise out of separate arbitration proceedings.").

[13] *Canfor* Order of the Consolidation Tribunal ¶ 95. *Id*. ¶ 113 ("The object and purpose of the relevant part of the NAFTA are mainly related to procedural economy. Within that perspective, 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.").

[14] *Id*. ¶ 109.

the interests of fair and efficient resolution of the claims."[15] Thus, 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. In particular, common issues that are dispositive of the case as a whole will weigh in favor of consolidation.

Fair and Efficient Resolution of Claims

7. 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. As the tribunal in *Canfor v. United States* acknowledged:

> [E]fficiency in the sense of procedural economy is the operative goal of consolidation under Article 1126. . . . 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 Tribunal is convinced that efficiency in the resolution of the claims will, under the circumstances before it, be served by a consolidation. In making that determination, an Article 1126 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 given situation.[16]

8. 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.[17] Consolidation may be warranted where time and expense – including judicial or arbitral resources – would likely be saved by addressing the claims on a consolidated basis. Additionally, consolidation is justified to avoid the possibility of multiple tribunals producing conflicting determinations of law or fact regarding the same measure. An "effective administration of justice, which is demanded by efficient proceedings as referred to in Article

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[15] *Id.* ¶ 114.

[16] *Id.* ¶¶ 124-125. *Id.* ¶ 125 ("In that respect, the procedural economy that will redound to the benefit of a disputing State Party is another relevant factor[.] . . . The necessary balancing further includes the consideration that all parties shall continue to receive the fundamental right of due process[.]").

[17] *Id.* ¶ 208 ("[T]he three factors to be considered in relation to the term 'in the interests of fair and efficient resolution of the claims' are: (i) time; (ii) costs; and (iii) avoidance of conflicting decisions.").

1126(2), requires the avoidance of conflicting results."[18] In cases where there are inconsistent decisions on common questions of law or fact, the disputing parties may face uncertainty on how to proceed in a manner that could effectively resolve the dispute.

9. The disputing investor's preference 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.[19] By consenting to arbitration under Chapter 11, Section B of the NAFTA, the disputing investor accordingly also consents to Article 1126, with the potential consequence that its claims may be adjudicated by a consolidation tribunal.[20]

Respectfully submitted,

[Signed]

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December 23, 2024

[18] *Id.* ¶ 131.

[19] *Id.* ¶ 135 ("[P]arty autonomy (to which Claimants 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.").

[20] *Id.* ¶ 79.