BEFORE THE HONORABLE ARBITRAL TRIBUNAL ESTABLISHED UNDER CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

FIRST MAJESTIC SILVER CORP,
(CLAIMANT)

V.

UNITED MEXICAN STATES,
(RESPONDENT)

(ICSID Cases No. ARB/21/14 & ARB/23/28)

MEMORIAL OF CONSOLIDATION

FOR THE UNITED MEXICAN STATES:
Alan Bonfiglio Ríos

ASSISTED BY:

Secretaría de Economía
Geovanni Hernández Salvador
Alejandro Rebollo Ornelas
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7 October 2024

GLOSSARY

Abbreviation	Complete name
ICSID	International Centre for Settlement of Investment Disputes
UNCITRAL	United Nations Commission On International Trade Law
FM or Claimant	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
FM3	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 y CIADI No. ARB/23/28
IBA	International Bar Association
VAT	Value Added Tax
Provisional Measure	That the Respondent shall not block VAT refund payments in favor of PEM from the date of the Request for Provisional Measures and in the future, while the arbitration is pending. Such payments shall be made to the accounts indicated by PEM and kept at its free disposal.
NOI	Notice of Intent to Submit a Claim to Arbitration.
PEM	Primero Empresa Minera S.A. de C.V.
Ancillary Claim	(i) VAT refunds that had remained inaccessible to PEM since April 3, 2020; and (ii) Compensation for the alleged losses suffered by the Claimant and PEM due to SAT's unwillingness to release the full amount of VAT refunds to PEM, only to the extent necessary if not already included in the claims before the FM1 tribunal.
RMPT	Transfer Pricing Resolution.
FM2 Second NOI	Notice of Intent of 31 March 2023
FM2 Second RFA	Request for Arbitration of 29 June 2023
SAT	Tax Administration Service (Servicio de Administración Tributaria)
NAFTA	North American Free Trade Agreement
Consolidation Tribunal	Consolidation Tribunal of the *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 y CIADI No. ARB/23/28.

I. INTRODUCTION

1. Pursuant to Article 1126(3) of the North American Free Trade Agreement (NAFTA), on 12 February 2024 the Respondent requested that the Secretary-General establish an arbitral tribunal pursuant to Article 1126(5) (Consolidation Tribunal) to decide on the consolidation of the claims in *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).[1] The Consolidation Tribunal was constituted on May 8, 2024.[2] On 5 August 2024, the Consolidation Tribunal ordered the suspension of the proceedings in FM1 and FM2.[3] On 29 August 2024, the Consolidation Tribunal confirmed that it was duly constituted and that it had jurisdiction to rule on the Respondent's Application for Consolidation.[4]

2. This Memorial sets forth the Respondent's arguments in support of its Request that the Consolidation Tribunal orders, pursuant to NAFTA Article 1126(2)(a), that it assumes jurisdiction over and hears and determines together all claims in FM1 and FM2.

II. PROCEDURAL BACKGROUND

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

3. 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 purported investment in Mexico, Primero Empresa Minera S.A. de C.V. (PEM), for alleged violations of NAFTA Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105

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1 *First Majestic Silver Corp. v. United Mexican States,* ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Mexico's Request for the Establishment of a Consolidation Tribunal, 12 February 2024 (Request for Consolidation). **RM-0026-SPA.**

2 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Procedural Order No. 1, 5 August 2024 (Procedural Order No. 1), ¶ 5.1. **RM-0027-ENG.**

3 Procedural Order No. 1, ¶ 3.2. **RM-0027-ENG.**

4 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Procedural Order No. 2, 12 February 2024 (Procedural Order No. 2), ¶ 76. **RM-0028-ENG.**

(Minimum Standard of Treatment), 1109 (Transfers) and 1110 (Expropriation and Compensation) and applicable principles of international law.[5]

4. On 1 March 2021, the Claimant filed a Request for Arbitration (RFA) on its own behalf and on behalf of PEM, its Mexican subsidiary. In its RFA, the Claimant alleged violations of the following NAFTA Articles: 1102, 1103, 1104 (Standard of Treatment), 1105, 1109 and 1110.[6] According to the Claimant, these alleged violations arose as a result of certain measures taken by Mexican governmental authorities, including, *inter alia*:

- The "repudiation" by the Tax Administration Service (SAT) of the Transfer Pricing Ruling (RMPT);[7]
- The initiation of a *juicio de lesividad* against the RMPT by the Mexican tax authority;
- The determination of tax reassessments - tax liabilities - (*créditos fiscales* in Spanish) to be borne by PEM;
- The attempt to execute, i.e., to collect the tax reassessments - tax liabilities - (*créditos fiscales* in Spanish);
- The initiation of a [redacted] against PEM;
- The blocking of bank accounts, as well as the imposition of restrictions and charges against other assets of PEM;
- The alleged limitations and restrictions imposed on the Claimant and PEM to prevent them from pursuing all available domestic and international remedies for redress.[8]

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[5] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, NOI, 13 May 2020, ¶ 3. **RM-0029-SPA.**

[6] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Request for Arbitration, 1 March 2021, (FM1 RFA), ¶ 88. **RM-0030-ENG**.

[7] The Claimant refers to its Transfer Pricing Ruling as an Advance Pricing Agreement or APA. The tax authorities (in this case the SAT) issue transfer pricing rulings to resolve taxpayer inquiries regarding the method used to determine the prices or compensation paid in transactions with related parties, i.e., companies belonging to the same multinational group. Under Mexican law, a transfer pricing resolution is effective for up to five tax years.

[8] FM1 RFA, ¶ 87. **RM-0030-ENG**.

5. On 20 August 2021, the FM1 tribunal was constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules 2006. The Claimant designated Prof. Stanimir A. Alexandrov and the Respondent Prof. Yves Derains as co-arbitrators. Subsequently, ICSID appointed Prof. Giorgio Sacerdoti as President of the Tribunal.[9]

6. On 25 April 2022, the Claimant filed its Memorial on the Merits.[10]

7. On 25 November 2022, Mexico submitted its Counter-Memorial on the Merits and Jurisdictional Objections.[11]

8. On 4 January 2023, upon completion of the first round of written pleadings, the Claimant filed a Request for Provisional Measures. The Respondent filed its response on 10 February 2023. A hearing was held on 13 March 2023.[12]

9. On 31 March 2023, the Claimant filed a second NOI threatening to initiate a new arbitration in which it would seek recovery of the Value Added Tax (VAT) refunds that had been deposited in PEM's blocked accounts since April 2020 in the amount of approximately [redacted] (Second NOI).[13] The reasons for this new claim —including alleged factual circumstances and violations— were the same as those in the FM1 arbitration claims.

10. On 26 May 2023, the tribunal issued its Decision on Provisional Measures in which it 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

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

10 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Statement of Claim, 25 April 2022. **RM-0032-ENG.**

11 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Counter-Memorial, 25 November 2022, **RM-0033-SPA**.

12 *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, ¶¶ 7, 12 y 16. **RM-0034-ENG**.

13 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Notice of Intent, 31 March 2023, (FM2 Second NOI), ¶ 6. **RM-0035-SPA**.

> pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.[14]

11. On 19 June 2023, Mexico filed a Request for Revocation of the Recommendation for Provisional Measures, arguing that such measure, in the terms in which it was issued by the tribunal, would prejudice the eventual arbitration that could arise from the Second NOI because the claims in FM1 and FM2 overlapped, arising from the same measures and factual background. It was also argued that the interim measure would interfere with the subject matter of the FM2 case, i.e., the lack of access to the VAT refunds deposited in PEM's blocked account.[15] The Respondent argued that the effect of the provisional measure on future VAT refunds could be construed as prejudging the outcome of the new claim, given the Claimant's admission that the provisional measure had already partially addressed the initial claim, which would be contrary to the restriction set forth in NAFTA Article 1134 and would violate the principle of due process.[16]

12. Ten days later, on 29 June 2023, the Claimant filed its second RFA (with which it commenced the FM2 arbitration),[17] which was amended on 19 July 2023 (Second RFA).[18]

13. On 21 July 2023, the Claimant filed its Reply to the Respondent's Request for Revocation of Provisional Measure Recommendation.[19]

14. On 28 July 2023, the Respondent filed a Preliminary Objection on Jurisdiction, arguing that, by initiating a second arbitration based on the same measures, the Claimant had violated the waivers filed in FM1 and FM2 arbitrations. A waiver is a condition precedent to the submission of a claim to arbitration, whereby a claimant party waives its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement

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14 Decision on the Claimant's Request for Provisional Measures, ¶ 143. **RM-0034-ENG.**

15 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Request for Revocation of Recommendation for Provisional Measure, 19 June 2023, (Request for Revocation of Recommendation for Provisional Measure) ¶¶ 6 and 7. **RM-0036-SPA.**

16 Request for Revocation of Recommendation for Provisional Measure, 19 June 2023, ¶¶ 6 and 7. **RM-0036-SPA.**

17 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Second Request for Arbitration, 29 June 2023, (FM2 Second RFA, unamended) **RM-0088-ENG.**

18 FM2 Second amended FRA, **RM-0037-ENG.**

19 *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, footnote 35. **RM-0038-ENG.**

procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 […]".[20] [Emphasis added].

15. On 1 September 2023, the tribunal issued its Decision on the Respondent's Request for Revocation of the Recommendation, rejecting the Respondent's request and affirming its Decision of 26 May 2023. [21]

16. Also on 1 September 2023, the Claimant filed its Reply to the Respondent's Preliminary Objections to Jurisdiction.[22]

17. On September 9, 2023, the Respondent filed its Reply on the Preliminary Objection to Jurisdiction. [23]

18. On 6 November 2023, the Claimant filed its Rejoinder on the Preliminary Objections to Jurisdiction. [24]

19. On 18 December 2023, the Claimant requested that the current schedule be suspended pending the Decision on the Respondent's Preliminary Objections to Jurisdiction.[25]

20. On 20 December 2023, the tribunal issued its Decision on the Respondent's Preliminary Objections to Jurisdiction, dismissing the preliminary objections raised by the Respondent.[26] The tribunal relied on the reasoning of its Decision on Provisional Measures, determining the following:

> The Tribunal sees therefore no reason to change its position from the one stated in its P[rovisional] M[easures] Decision on this point. The Tribunal therefore confirms its

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[20] NAFTA Article 1121 (1)(b) and (2)(b). **RML-0005-SPA**. See also *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Objection to Jurisdiction, 28 July 2023. **RM-0081-SPA.**

[21] Decision on the Respondent's Request for Revocation of Provisional Measures, ¶ 51. **RM-0038-ENG.**

[22] *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, ¶ 23. **RM-0039-ENG.**

[23] Decision on the Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶ 24. **RM-0039-ENG.**

[24] Decision on the Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶ 24. **RM-0039-ENG.**

[25] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's email to ICSID, 18 December 2023. **RM-0040-ENG.**

[26] Decision on the Respondent's Preliminary Objection to Jurisdiction, ¶ 84. **RM-0039-ENG.**

> conclusion there 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.[27]

21. On 26 December 2023, the tribunal set new dates for the second round of written submissions on the merits. The deadline for the Claimant to submit its Reply was extended from 15 January 2024 to 15 February 2024, and the deadline for the Respondent to submit its Rejoinder was extended from April 25, 2024, to July 1, 2024.[28]

22. On 2 January 2024, the Claimant requested the tribunal to grant it a 3-month extension to file its Reply on 1 April 2024, and to reschedule the hearing for January 2025.[29]

23. On 24 January 2024, the tribunal granted the Claimant's request for an additional extension of time, overruling the Respondent's objection, and setting as a new deadline, 1 April 2024 for the filing of the Claimant's Reply on the Merits and its Counter-Memorial on Jurisdictional Objections.[30]

24. On 29 February 2024, the FM1 tribunal issued Procedural Order No. 6 staying the FM1 arbitration until the Consolidation Tribunal decided whether to assume jurisdiction over the case or order a stay pursuant to NAFTA Article 1126(2). The suspension was to take effect after the Respondent submitted a report on compliance with the provisional measure on 7 March 2024.[31]

25. On 11 March 2023, after requesting a short extension of time, the Respondent submitted the report on compliance with the provisional measure.[32]

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[27] Decision on the Respondent's Preliminary Objection to Jurisdiction, ¶¶ 80, 84. **RM-0039-ENG.**

[28] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, ICSID email to the Parties, 26 December 2023. **RM-0041-ENG.**

[29] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's e-mail to ICSID, 2 January 2024. **RM-0042-ENG.**

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

[31] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Procedural Order No. 6, 29 February 2024, p. 3, subparagraph d). **RM-0044-ENG**.

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

26. On 25 March 2024, the Claimant submitted comments to the Respondent's report on compliance with the provisional measure.[33]

27. On 29 March 2024, the FM1 tribunal issued a communication clarifying the scope of the Decision on Provisional Measures and inviting the Claimant to indicate, before 10 April 2024, whether it maintained its request for redress as set forth on pages 17-18 of its communication of 25 March 2024. [34]

28. On 10 April 2024, the Claimant sent a communication requesting that the deadline to indicate whether it maintained its request for relief from its 25 March 2024 communication be further extended to 1 May 2024.[35]

29. On 1 May 2024, the Claimant requested the FM1 tribunal to further extend, until 31 May 2024, the deadline to indicate whether it maintained the request made in its 25 March 2024 communication.[36]

30. On 6 May 2024, the FM1 tribunal issued a communication urging the Respondent to complete the necessary steps to make available to PEM the VAT refunds deposited in PEM's blocked account from January to July 2023.[37]

31. On 21 May 2024, the Respondent sent a communication to the tribunal requesting clarifications on the status of the FM1 proceeding in order to provide, by 23 May 2024, the comments requested by the Consolidation Tribunal on the Respondent's request for stay of the FM1 proceeding.[38]

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

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

[35] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from Claimant to ICSID, 10 April 2024, p. 2. **RM-0048-ENG**.

[36] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Communication from the Claimant requesting relief, 1 May 2024. **RM-0049-ENG**.

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

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

32. On 22 May 2024, the Claimant requested the FM1 tribunal an opportunity to submit comments, by 29 May 2023, on the Respondent's communication regarding the suspension of the FM1 proceeding. The FM1 tribunal granted the extension on the same day.[39]

33. On 23 May 2024, the Respondent sent a communication to the Consolidation Tribunal making further comments on its request for a stay of the FM1 and FM2 arbitrations.[40]

34. On 29 May 2024, the Claimant sent a communication to the FM1 tribunal commenting on the Respondent's request for clarification on the status of the proceedings.[41]

35. On 4 June 2024, the FM1 tribunal sent a communication to the Respondent urging it to complete the necessary steps to release the amounts of VAT refunds to PEM for the months of January to July 2023 in compliance with the Decision on Provisional Measures, and to inform the Tribunal of the same.[42]

36. On 24 June 2024, the Claimant filed a Request for Admission of Ancillary Claims (Ancillary Claims Request).[43] This action by the Claimant is addressed below.

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

37. As noted above, on 31 March 2023, the Claimant filed a second NOI, requesting access to VAT refunds in the amount of [redacted] that had been deposited in PEM's blocked accounts since April 2020. The Claimant alleged that the Respondent violated NAFTA Articles 1102, 1103, 1105, 1109 and 1110 (the same provisions as in the FM1 NOI).[44]

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39 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, ICSID Communication to the Parties, 22 May 2024. **RM-0052-ENG**.

40 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Respondent's communication to the Tribunal, 23 May 2024. **RM-0053-SPA**.

41 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Communication to ICSID, 29 May 2024. **RM-0054-ENG.**

42 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, ICSID Communication to the Parties, 4 June 2024. **RM-0055-ENG.**

43 *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 (Request for Admission of Ancillary Claims). **RM-0056-ENG.**

44 FM2 Second NOI, ¶ 3. **RM-0035-SPA.**

38. On 29 June 2023, the Claimant filed its second RFA alleging that the Respondent had breached its obligations under NAFTA Articles 1102, 1103, 1104, 1105, 1109 and 1110 (again, the same provisions as in the FM1 RFA). Based on the value of the VAT refunds paid into PEM's blocked bank accounts, the Claimant requested monetary compensation for an estimated minimum of [redacted].[45]

39. On 6 July 2023, ICSID sent a letter requesting the Claimant to clarify whether it had complied with the requirements of NAFTA Articles 1116(2), 1117(2) and 2103. The ICSID requested the Claimant to provide the information by 13 July 2023.[46]

40. On 19 July 2023, the Claimant responded to ICSID's request for clarification. The Claimant argued that the Second RFA complied with the three-year limitation period set forth in Articles 1116 and 1117 because, in its opinion, the Respondent's conduct constituted "a continuing breach, and the limitation period renews throughout the breach period and as long as the investor incurs losses".[47] The Claimant also argued that the measures giving rise to the claim did not qualify as tax measures under Article 2103.[48] On 21 July 2023, ICSID registered the FM2 arbitration.[49]

41. On 19 October 2023, the Claimant appointed Mr. Horacio Grigera Naón as arbitrator.[50]

42. 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 ICSID Arbitration Rule 18 of the ICSID Arbitration Rules and

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45 FM2 Second RFA, ¶¶ 86-88. **RM-0088-ENG.**

46 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from ICSID Re "Request for Arbitration of First Majestic Silver Corp. (R20230049)", 6 July 2023. **RM-0057-ENG.**

47 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Claimant's Communication to ICSID, 19 July 2023, p. 2. **RM-0058-ENG.**

48 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Claimant's Communication to ICSID, 19 July 2023, p. 3. **RM-0058-ENG.**

49 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, ICSID Communication to the Parties, 21 July 2023 (Registration Notice FM2). **RM-0059-ENG**.

50 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Claimant's Communication to ICSID, 1 February 2024. **RM-0060-ENG.**

Article 38 of the ICSID Convention.[51] On 9 February 2024, the Respondent appointed Mr. Toby Landau KC as arbitrator.

43. On 27 March 2024 and 5 April 2024 "the parties requested that [the Secretary-General] provide them with a list of five candidates from which the presiding arbitrator would be selected through a strike-and-rank procedure".[52] On 25 June 2024, the Secretary-General provided the parties with a list of candidates for the presiding arbitrator and requested them to respond with a ranking of their proposed arbitrators by 2 July 2024.[53] On 2 July 2024, within the established deadline, the Respondent submitted its ranking of the proposed arbitrators.[54] The Claimant did not participate in the procedure for the appointment of the President. On 8 July 2024, absent a response from the Claimant, the Respondent requested the Secretary-General to "appo[int] the President of the Tribunal directly".[55]

44. Since that date, and following the issuance of Procedural Order No. 1 issued by the Consolidation Tribunal on 5 August 2024, which ordered the suspension of FM1 and FM2 proceedings, the latter has had no activity since due to the fact that the tribunal has not been constituted.

C. Request for Admission of Ancillary Claims in FM1

45. On 24 June 2024, almost four months after the Respondent filed its Request for Consolidation, the Claimant filed, before the FM1 tribunal, its Request for Admission of Ancillary Claims. In that request, it sought leave of the FM1 tribunal to include ancillary claims along with its Reply. The new claims related to: (i) the VAT refunds that had remained inaccessible to PEM since 3 April 2020; and (ii) compensation for the alleged losses suffered by the Claimant and PEM

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51 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from Claimant to ICSID, 1 February 2024. **RM-0060-ENG.**

52 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, ICSID Communication, to the parties, 25 June 2024. **RM-0061-ENG.**

53 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, ICSID Communication to the Parties, 25 June 2024. **RM-0061-ENG.**

54 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Respondent's Communication to ICSID, 8 July 2024. **RM-0062-SPA.**

55 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Respondent's Communication to ICSID, 8 July 2024. **RM-0062-SPA.**

due to the alleged unwillingness of SAT to release the full amount of the VAT refunds to PEM, to the extent that it was not included in the claims before the FM1 tribunal.[56]

46. The Claimant argued that granting its request would make the resolution of its claims more efficient and effective because it would allow it to discontinue the FM2 arbitration and this, in turn, would eliminate the need for a consolidation procedure and save the parties time and expense.[57] With respect to the condition for the filing of an ancillary claim set forth in Rule 40 of the ICSID Rules, the Claimant argued that the ancillary claims, which encompassed the FM2 claims, arose directly out of the subject matter of the FM1 arbitration.[58] The Claimant also requested that the provisional measures be maintained in the event that the Request for Admission of Ancillary Claims was accepted.[59]

47. On 11 July 2024, the Respondent provided its comments explaining that the ancillary claims should not be admitted because they did not comply with the requirements of Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules (2006) because the admission of the ancillary claims would violate the Claimant's waiver in the FM2 arbitration.[60] The Respondent further observed that if and when the ancillary claims were submitted to the FM1 tribunal, the provisional measure would have to be lifted on account of the prohibition in Article 1134 of the NAFTA.[61]

48. On 12 July 2024, the Claimant requested an expedited ruling on its Ancillary Claims Request in anticipation of the first meeting of the Consolidation Tribunal and the effects its

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[56] Claimant's Request for Admission of Ancillary Claims, ¶¶ 1-3. **RM-0056-ENG.**

[57] The Claimant also pointed out that "at present, due to a lack of funding in a timely manner, the Consolidation Tribunal's proceedings have not advanced to the stage of an initial procedural meeting, nor have the Consolidation Tribunal's Terms of Appointment and the Draft Procedural Order No. 1 been finalized" [emphasis added] Claimant's Request for Admission of Ancillary Claims, ¶¶ 9-10, 61, 89. **RM-0056-ENG.**

[58] Claimant's Request for Admission of Ancillary Claims, ¶¶ 69-73. **RM-0056-ENG.**

[59] Claimant's Request for Admission of Ancillary Claims, ¶¶ 79-86. **RM-0056-ENG.**

[60] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 Response to Request for Admission of Subordinate Claims, 11 July 2024, ¶¶ 5-12. **RM-0063-SPA**.

[61] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 Response to Request for Admission of Subordinate Claims, 11 July 2024, ¶¶ 13-15. **RM-0063-SPA**.

decisions could have on the FM1 arbitration.[62] On 15 July 2024, the FM1 tribunal admitted the Ancillary Claims Request as requested by the Claimant, including the continuation of the provisional measures.[63] It rejected the Respondent's argument that allowing the provisional measures to continue would violate NAFTA Article 1134 and did not address the Respondent's argument that admitting the request would violate the waiver in the FM2 arbitration.[64]

D. The consolidation procedure (FM3)

49. The Respondent's Request for Consolidation was filed with the ICSID Secretary-General on 12 February 2024.[65] The Secretary-General confirmed the composition of the Tribunal on 8 May 2024. Within this period, the Secretary-General proposed three slates of arbitrators and ensured the parties had an opportunity to present their comments on the composition of the Tribunal.

50. On 22 February 2024, the Secretary-General presented the first slate of proposed arbitrators.[66] On 21 March 2024, almost a month after the first deadline established by the Secretary-General, and following several requests for extension by the Claimant, the Claimant objected to the appointment of one of the proposed arbitrators.[67]

51. On 11 April 2024, the Secretary-General presented the second slate of proposed arbitrators, providing the disputing parties until 15 April 2024 to comment.[68] On 17 April 2024, after

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62 *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, (Request for Expedited Ruling on Ancillary Claims). **RM-0064-ENG**.

63 *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, (Expedited Ruling on Ancillary Claims Request). **RM-0065-ENG**.

64 Expedited Ruling on Ancillary Claims Request. **RM-0065-ENG**.

65 *See* Consolidation Request. **RM-0026-SPA**.

66 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the ICSID Secretary to the parties, 22 February 2024. **RM-0066-ENG**.

67 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the Claimant to the ICSID Secretary, 21 March 2024. **RM-0067-ENG**.

68 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the ICSID Secretary to the parties, 25 April 2024. **RM-0068-ENG**.

requesting and being granted a 2-day extension,[69] the Respondent objected to the inclusion of one of the proposed arbitrators.[70]

52. On 25 April 2024, the Secretary-General presented a third proposal to constitute the Tribunal, providing the parties with the opportunity to comment by 30 April 2024.[71] The Respondent and the Claimant stated they had no comments.[72]

53. The Secretary-General established the Tribunal on 8 May 2024.[73]

54. On 10 July 2024, for the first time in the proceedings, the Claimant submitted a letter informing "serious concerns" regarding the jurisdiction of the Tribunal and requesting the stay of the proceeding.[74]

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[69] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Email from the Respondent to the ICSID Secretary, 17 April 2024. **RM-0069-SPA**.

[70] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the ICSID Secretary to the parties, 11 April 2024. **RM-0070-ENG**.

[71] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Email from the Respondent to the ICSID Secretary, 30 April 2024. **RM-0071-SPA**. *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant Communication on Request for Relief, 1 May 2024. **RM-0049-ENG**.

[72] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Email from the Respondent to the ICSID Secretary, 30 April 2024. **RM-0071-SPA**. *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant Communication on Request for Relief, 1 May 2024. **RM-0049-ENG**.

[73] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the ICSID Secretary to the parties, 8 May 2024. **RM-0072-ENG.**

[74] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the Claimant to the ICSID Secretary, 10 July 2024. **RM-0073-ENG**.

55. On 15 July 2024, the Claimant requested the Consolidation Tribunal to adjourn the first procedural meeting scheduled for 16 July 2024 on the basis that the tribunal in FM1 had granted its Ancillary Claims Request.[75] The Respondent objected to this request.[76]

56. The first meeting with the Tribunal was held on 16 July 2024. Taking note of the Claimant's objections to its jurisdiction, the Tribunal gave the disputing parties the opportunity to make observations during the session and established a jurisdictional phase to decide this issue.

57. On 8 August 2024, the Claimant filed its Preliminary Objection to Jurisdiction, one day after the deadline established by the Consolidation Tribunal and requested an additional extension to upload the relevant documents in the ICSID Platform.[77]

58. On 22 August 2024, the Respondent filed its response to the Claimant's Preliminary Objection to Jurisdiction.[78]

59. On 29 August 2024, the Consolidation Tribunal issued Procedural Order No. 2.[79] In this Order, the Consolidation Tribunal rejected the Claimant's objection and confirmed that it was duly constituted and had jurisdiction to decide whether to assume jurisdiction over all claims in FM1 and FM2 and, subject to its decision on the Consolidation Request, to hear and determine them as appropriate.[80]

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75 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the Claimant to the ICSID Secretary, 15 July 2024. **RM-0074-ENG**.

76 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the Respondent to the Consolidation Tribunal, 15 July 2024. **RM-0075-SPA**.

77 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Communication from the Claimant to the ICSID Secretary, 8 August 2024. **RM-0076-ENG**.

78 *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 & ICSID Case No. ARB/23/28, Consolidation Request Under NAFTA Article 1126, Respondent's Response to the Claimant's Preliminary Objection on Jurisdiction, 22 August 2024. **RM-0077-ENG**.

79 Procedural Order No. 2. **RM-0028-ENG**.

80 Procedural Order No. 2. ¶ 76. **RM-0028-ENG**.

E. The Claimant's late strategy to discontinue the FM2 arbitration

60. Following the first procedural meeting with the Consolidation Tribunal, and having been granted leave by the FM1 tribunal to file an ancillary claim with its reply on the merits, the Claimant approached the Respondent on two occasions requesting its consent to discontinue the FM2 arbitration.[81] The Respondent, however, has rejected these offers because it considers that discontinuing the FM2 arbitration at this point would not secure a fair an efficient resolution of the claims, which can only be accomplished by the Consolidation Tribunal pursuant to NAFTA Article 1126, as explained below.

III. LEGAL ARGUMENT

A. The conditions for consolidation

61. The relevant part of NAFTA Article 1126 reads 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[82]

62. The *Canfor* consolidation tribunal found that the "intended purpose and object" of Article 1126 is "procedural economy in the light of the position of State Parties in particular".[83] This includes "the goal of alleviating the resources of the State Parties in defending against multiple

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[81] *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Claimant Communication to the Respondent, 31 July 2024. **RM-0078-ENG**; *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Claimant Communication to the Respondent, 26 August 2024. **RM-0079-ENG**.

[82] NAFTA, Article 1126. **RML-0005-SPA**.

[83] *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, ¶ 75. **RL-0003-ENG**; Consolidation Request, ¶ 34. **RM-0026-SPA**.

claims, as opposed to conserving the resources of the Article 1120 tribunals empaneled to hear the individual disputes".[84]

63. It 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.[85]

64. The first three conditions are addressed in this Memorial. The fourth condition will be met through the parties' submissions on consolidation pursuant to Procedural Order No. 1.

B. Condition 1. Claims have been submitted to arbitration under NAFTA Article 1120

65. Claims have been submitted to arbitration under NAFTA Article 1120 by the Claimant in both FM1 (RFA filed on 1 March 2021, arbitration registered on 31 March 2021) and FM2 (RFA filed on 29 June 2023, arbitration registered on 21 July 2023).[86] Thus, the first condition is met.

66. The Claimant cannot now withdraw its submission to arbitration in FM2. When it filed its RFA, the Claimant consented to the FM2 arbitration.[87] Pursuant to Article 25(1) of the ICSID Convention "when the parties have given their consent, no party may withdraw its consent unilaterally".[88] This is supported by the ruling of the tribunal in *Abaclat and others v. Argentine Republic* which clarifies that an RFA can only be withdrawn unilaterally prior to the notice of

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84 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, ¶ 75. **RL-0003-ENG**; Consolidation Request, ¶ 34. **RM-0026-SPA**.

85 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, ¶ 76. **RL-0003-ENG**; Consolidation Request, ¶ 34, 36. **RM-0026-SPA**.

86 *See* Procedural Background, above. Registration dates from ICSID website.

87 The Claimant's RFA states "pursuant to ICSID Institution Rule 2(3), the date on which the parties consented in writing to submit their dispute to ICSID is the date on which First Majestic Silver, Corp., filed this Request for Arbitration". Second RFA, footnote 7. **RM-0037-ENG**.

88 The ICSID Convention and ICSID Arbitration Rules (2022) govern the FM2 arbitration. **RML-0006-SPA**; **RML-0007-SPA**.

registration being issued.[89] The notice of registration for FM2 was issued on 21 July 2023 and for this reason, the Claimant cannot now unilaterally withdraw its RFA in FM2.[90]

67. Nor can the Claimant unilaterally discontinue the FM2 arbitration. Rule 56 of the ICSID Arbitration Rules (2022) provides that if any objection to a request for discontinuance is made within the period fixed by the Secretary-General, the proceeding shall continue.[91]

68. On 1 October 2024, i.e., one week before the Respondent had to file this memorial, the Claimant made a formal request to the Secretary-General to discontinue the FM2 arbitration.[92] The Secretary-General ordered the Respondent to state whether or not it objected to the request by 11 October 2024.[93] The Respondent objected to the request on 7 October 2024[94] and the ICSID Secretariat confirmed that the procedure would continue.[95] Although the Respondent is under no

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89 *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, (*Abaclat*) ¶¶ 614-615. **RML-0008-SPA**.

90 Notice of Registration FM2. **RM-0059-ENG**.

91 ICSID Arbitration Rules (2022), Rule 56. **RML-0007-SPA**.

92 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from the Claimant to ICSID with the Request for Discontinuation of FM2, 1 October 2024. **RM-0084-ENG.**

93 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from ICSID to the parties, 2 October 2024. **RM-0085-ENG.**

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

95 *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from ICSID to the parties, 7 October 2024. **RM-0087-ENG.**

obligation to explain its objection to the discontinuance of FM2,[96] the rationales for its objection are briefly explained in the footnote below.[97]

69. For these reasons, the first condition for consolidation of FM1 and FM2 is clearly met.

C. Condition 2: the claims have "a question of law or fact in common"

70. In its Consolidation Request, Mexico explained that the claims in the FM1 and FM2 arbitrations have common questions of law and fact:

- The Claimant's claims in each of the two arbitrations arise from the same set of factual circumstances.[98] In summary, SAT exercised its verification powers with respect to PEM, for fiscal years 2010, 2011, 2012, 2013 and 2014, and determined tax liabilities for these fiscal years, since the SAT noticed that there were omitted contributions by

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[96] *Abaclat*, ¶ 621. **RML-0008-SPA**; *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award, 8 September 2009, ¶¶ 103-104 (Case law on ICSID rule 44, the predecessor of rule 56 did not read in any obligations for a party to give reasons for its objections to a request for discontinuance). **RML-0009-ENG**; Richard Happ & Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary*. Munich: C.H. Beck, New York: Hart Publishing, Baden-Baden: Nomos, 2022. (*Happ & Wilske Commentary*) p. 585 ("Rule 56(1) refers to "any" objection to highlight the fact that it may not always be straightforward what constitutes an objection. According to the third ICSID Working Paper on the Rules Amendment Process, the term "any objection" means any indication that the party does not agree to the discontinuance – if the other party raises any objection, or seeks to impose a condition on the discontinuance, the proceeding will continue because there has been no acquiescence in the discontinuance of the proceeding."). **RML-0010-ENG**.

[97] One rationale explained below is the recovery of costs in the FM1, FM2 and FM3 proceedings. This rationale has been raised previously in the context of an objection to discontinuation. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper [#1]*, Vol. 3, 2 August 2018, ¶¶ 562-563. **RML-0011-ENG**. The ICSID Secretariat's names the recovery of costs in arbitral proceedings as the rationale given for objecting to such a request in "most cases". As discussed below, the recovery of unnecessary costs in the FM1, FM2 and FM3 arbitrations is one of the reasons for consolidation in this instance. *Happ & Wilske Commentary*, pp. 585-586 ("Imposing a condition on the discontinuance, e.g., with respect to costs, must be distinguished from the case of the other party expressly agreeing to the discontinuance, but the parties being at odds as to costs"). **RML-0010-ENG**. In the case of FM2, costs could not be issued in an Order of Discontinuance as the tribunal has not been established. *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Award, 24 March 2021, ¶ 132 ("The Tribunal acknowledges that the ICSID Convention and Arbitration Rules do not explicitly grant it authority to rule on costs following a discontinuance and that some tribunals have in the past hesitated to include a decision on costs in their discontinuance orders, since a decision on costs is normally included in an award and their orders discontinuing proceedings did not amount to an arbitral award"). **RML-0012-ENG**.

[98] Consolidation Request, ¶ 44. **RM-0026-SPA**.

PEM (these tax liabilities are subject to FM1). By virtue of the above, PEM challenged those tax liabilities, but failed to guarantee the outstanding amounts, as required under Mexican law. [99] The SAT then proceeded to use its powers to execute the tax credits, that is, collect them, blocking PEM's bank accounts in order to guarantee the payment of taxes owed by PEM in the event that the challenge was unsuccessful. PEM can dispose of its frozen bank accounts once the amounts owed to the SAT have been covered.

- As a result of the activities carried out by PEM, it may request VAT refunds that it is entitled to receive; thus, PEM continued to request its VAT refunds, specifying the account in which the refunds should be deposited if they were successful. The SAT continued to deposit these amounts in one of PEM's frozen accounts in accordance with PEM's instructions contained in its VAT refund requests. The blocking of PEM's bank accounts as a consequence of the tax credits (measures claimed in FM1) and the deposit of VAT refunds in the frozen account, at the request of PEM, explain why the Claimant did not have access to the refunds claimed in the FM2 arbitration. In simple terms, the measures claimed in FM2 arise directly from the actions of the Claimant in relation to the measures claimed in FM1. The Claimant does not agree with this narrative and, therefore, the resolution of both cases will require common determinations of fact and law. The existence of two separate procedures carries the risk of contradictory determinations on the same facts, which would be unfair to one or both parties.

- In the two arbitrations, which the Respondent – and even the Claimant in its Request for Admission of Ancillary Claims – seeks to have consolidated, the Claimant's claims challenge the same series of measures. This series of measures – including the assessment of tax liabilities, the blocking of PEM's bank accounts and depositing VAT refunds in the blocked account – have ultimately resulted in the Claimant's inability to access the VAT refunds paid into PEM's blocked bank accounts.[100] It is clear that the

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[99] Article 142, section I of the Tax Code of the Federation: "It is appropriate to guarantee the tax interest when: I. The suspension of the administrative enforcement procedure is requested, including if such suspension is requested before the Federal Court of Tax and Administrative Justice under the terms of the Federal Law of Contentious Administrative Procedure."

[100] Consolidation Request, ¶ 45. **RM-0026-SPA**.

problem of access to the Claimant's VAT refund requests does not lie in the "entitlement", the Claimant's right to receive them, as the Claimant has tried to represent it.

- The common questions of law and fact include:
  - Whether the revocation, through a *juicio de lesividad*, 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. The challenge to the tax liabilities is the underlying cause of the blocking of the bank accounts that prevented access to the VAT refunds.[101]
  - Whether the tax liabilities determined by SAT were issued illegally or improperly. These tax liabilities were subsequently challenged in domestic courts, which in turn triggered the requirement, under Mexican law, to guarantee the full amount outstanding and ultimately led to the account blocking that prevented access to the VAT refunds.[102]
  - Whether SAT's blocking of PEM's bank accounts was illegal or improper. The blocking of the bank accounts was the consequence of PEM's failure to guarantee the amount owed to SAT preventing access to the VAT refunds.[103]
  - Whether SAT unlawfully or improperly refused to accept a guarantee from PEM for amounts claimed by Mexico as outstanding taxes, penalties, and interest, which led to SAT's blocking of PEM's bank accounts and prevented access to the VAT refunds.[104]
  - Whether it was illegal or improper for SAT to deposit the VAT refunds in blocked bank accounts, thereby preventing PEM from recovering, diverting and disposing of these funds.[105] The Claimant alleges that PEM never gave any

101 Consolidation Request, ¶ 47. **RM-0026-SPA**.
102 Consolidation Request, ¶ 45. **RM-0026-SPA**.
103 Consolidation Request, ¶ 47. **RM-0026-SPA**.
104 Consolidation Request, ¶ 47. **RM-0026-SPA**.
105 Consolidation Request, ¶ 47. **RM-0026-SPA**.

direction or authorization for said deposits into the frozen account.[106] The Respondent's position is that such deposits were made under precise instructions by PEM contained in the respective VAT refund requests.

- Whether SAT intended to collect amounts for outstanding taxes, penalties and interest without a legal basis for doing so, as alleged by the Claimant.[107]

71. The Claimant itself acknowledges that the FM1 and FM2 arbitrations concern common questions of law and fact. In its Ancillary Claims Request, the Claimant takes the position that the ancillary claims, which encompass the FM2 claims, arise directly out of the subject matter of the FM1 arbitration.[108] In fact, the Claimant has acknowledged that consolidation is in the interest of both parties to this dispute by requesting leave to file an ancillary claim instead of continuing the FM2 arbitration.

72. In its decision to approve the admission of the Claimant's Ancillary Claims Request, the FM1 tribunal also acknowledged that the two arbitrations concerned common questions of law and fact in the following statements:

> 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.[109]
>
> [T]he 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.[110]
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> [Emphases added].

73. It is clear from this ruling that the ancillary claim is "identical" to the claim submitted in the FM2 arbitration and that the FM2 claim "is intimately related" and "arises directly from" the

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106 Second NOI, ¶ 9. **RM-0035-SPA**.

107 Consolidation Request, ¶ 47. **RM-0026-SPA**.

108 Ancillary Claims Request, ¶¶ 69-73. **RM-0056-ENG**.

109 Expedited Ruling on Ancillary Claims Request. **RM-0065-ENG.**

110 Expedited Ruling on Ancillary Claims Request. **RM-0065-ENG.**

subject matter in the FM1 arbitration. Accordingly, there is no question that the FM1 and FM2 disputes have a "question of law or fact in common".

74. For the above reasons, the second condition for consolidation is clearly met.

D. Condition 3. The consolidation order is "in the interests of fair and efficient resolution of the claims"

75. Article 1126 provides that a consolidation tribunal may consolidate "in the interests of fair and efficient resolution of the claims". In its Consolidation Request, the Respondent explained why it was in the interests of the fair and efficient resolution of the claims to consolidate the FM1 and FM2 arbitrations.[111] The Respondent confirms those arguments.

76. However, through its actions and arguments since the filing of the Consolidation Request, the Claimant has attempted to subvert the application of the third condition to the facts in this dispute. Rather than applying the third condition to assessing consolidation against the FM1 and FM2 arbitrations, the Claimant is seeking to assess consolidation against a theoretical broadened FM1 arbitration. This is unprecedented and impermissible.

77. Four months after the Consolidation Request was filed, the Claimant sought to file an ancillary claim with the FM1 tribunal that was identical to the claim submitted in the FM2 arbitration, broadening the scope of the FM1 arbitration, after which it sought to discontinue the FM2 arbitration.[112] The Claimant argued that broadening the scope of the FM1 tribunal by granting its request for admission of an ancillary claim would "render the resolution of all the Claimant's claims more efficient and effective" and that the "parties will therefore save time and expense" [emphasis added].[113] The Claimant argued that the parties would save time and expense "because: (1) all claims will be before [the FM1]… Tribunal; (2) the added expense of completing the constitution of the [FM2] VAT Arbitration tribunal can be avoided; and (3) the added expense and prolongation of the resolution of the dispute under Consolidation Proceedings can be avoided".[114] It asserted that "[n]otably, at present, due to a lack of funding in a timely manner, the Consolidation

111 Consolidation Request, ¶¶ 50-57. **RM-0026-SPA**.

112 Ancillary Claims Request, ¶¶ 1-3, 7. **RM-0056-ENG**.

113 Ancillary Claims Request, ¶¶ 9-10. **RM-0056-ENG**.

114 Ancillary Claims Request, ¶ 10. **RM-0056-ENG**.

Tribunal's proceedings have not advanced to the stage of an initial procedural meeting, nor have the Consolidation Tribunal's Terms of Appointment and the Draft Procedural Order No. 1 been finalized" [emphasis added].[115] In response to these arguments, the reasons why Condition 3 is fully met are explained in the following four subsections.

1. Meaning of "fair and efficient resolution of the claims"

78. The "efficient and effective" threshold referenced by the Claimant is different from the "fair and efficient resolution of the claims" threshold required by the third condition in Article 1126.

79. The meaning of "fair and efficient resolution of the claims" in Article 1126 was meaningfully elaborated upon in only one arbitration: *Canfor*.[116] Although the tribunal's reasoning was specific to the facts before it (the facts were different from this proceeding including because they did not involve the Claimant pursuing a scope modification to one of the Article 1120 arbitrations), the tribunal found that the intended purpose and object of Article 1126 was "procedural economy in light of the position of State Parties in particular" [emphasis added].[117] The term "procedural economy" was used by the tribunal "advisedly in the sense of an effective administration of justice" [emphasis added].[118] The "administration of justice" is the process by which a legal system is administered, with the objective of providing justice for those accessing the legal system.[119]

80. According to the *Canfor* tribunal, "efficiency", in the sense of procedural economy (i.e., the effective administration of justice), is the operative goal of consolidation.[120] Determining efficiency "is basically an objective, fact-driven standard which an Article 1126 Tribunal can apply

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115 Ancillary Claims Request, ¶ 10. **RM-0056-ENG**.

116 See *Canfor.* **RL-0003-ENG**.

117 *Canfor*, ¶ 75. **RL-0003-ENG**.

118 *Canfor*, ¶ 76. **RL-0003-ENG**.

119 David Weissbrodt, *The Administration of Justice and Human Rights*, 1 CITY U.H.K.L. REV. 23 (2009), p. 2 ("The administration of justice is a broad term that includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing justice: criminal, administrative, and civil."). **RML-0013-ENG**.

120 *Canfor*, ¶ 124. **RL-0003-ENG**.

as it deems appropriate under the circumstances" [emphasis added].[121] 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" [emphasis added].[122] The *Canfor* tribunal went on to state that "[f]actors to take into account in making such a comparison are: (i) time; (ii) costs; and (iii) avoidance of conflicting decisions."[123] With respect to point (i), "the more advanced the separate proceedings are, the less likely it is that consolidation will be ordered".[124] With respect to point (ii), "consolidated proceedings will be less expensive than […] separate arbitrations"[125] for all the parties involved. With respect to point (iii), "an effective administration of justice, which is demanded by efficient proceedings as referred to in Article 1126(2), requires the avoidance of conflicting results".[126]

81. According to the *Canfor* tribunal, the "fairness" requirement "indicates that the interests of all parties involved should be balanced in determining what is the procedural economy (*i.e.,* the effective administration of justice) in the given situation […] The necessary balancing further includes the consideration that all parties shall continue to receive the fundamental right of due process… the parties are treated with equality and each party is given a full opportunity of presenting [their] case" [emphasis added].[127]

82. The fairness principle permeates the arbitral process. Arbitration rules and procedural orders generally require disputing parties to present all of their arguments and supporting evidence in their initial submissions.[128] This is intended to ensure that both parties have a fair opportunity

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121 *Canfor*, ¶ 124. **RL-0003-ENG**.

122 *Canfor*, ¶ 126. **RL-0003-ENG**.

123 *Canfor*, ¶ 126. **RL-0003-ENG**.

124 *Canfor* ¶ 128. **RL-0003-ENG**.

125 *Canfor* ¶ 215. **RL-0003-ENG**.

126 *Canfor* ¶ 131. **RL-0003-ENG**.

127 *Canfor* ¶ 125. **RL-0003-ENG**.

128 See for example ICSID Model Procedural Order No. 1, which states in ¶¶ 16.1 and 16.3 that "the Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder" and "[n]either party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party." [emphasis added]. **RML-0014-ENG**.

to defend their positions and avoid tactical advantages arising from the introduction of new arguments or evidence at a late stage of the proceeding.[129] This is a fundamental part of the principle of equality in arms, which mandates that each party is given the right to respond adequately to the arguments and evidence presented by the other.[130] Following the same logic, the IBA Guidelines on the Taking of Evidence include provisions advocating for due process and a fair dispute settlement.[131]

83. With respect to other factors to be taken into account, the tribunal in *Canfor* stated:

> 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). [132] [emphasis added].

84. Although this statement references the party requesting consolidation, consistent with balancing the interests of all parties involved, it would apply equally to an abuse of process by the party opposing consolidation.

85. Abuse of process has been considered in various investor-State disputes. There is no uniform definition of an abuse of process, suggesting that tribunals should consider the relevant circumstances that might lead to it on a case-by-case basis. In general terms, an "abuse of process" has been considered to include a tactic or scheme that can "cause significant prejudice to the party against whom it is aimed and can undermine the fair and orderly resolution of disputes by

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129 Reza Mohtashami, "Chapter II: The Arbitrator and the Arbitration Procedure, Towards Procedural Predictability in International Arbitration: Confronting Guerrilla Tactics", in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration*, *2017*, 2017, p. 107 ("Submissions in arbitration should be shaped like a funnel. The major part of the pleadings and evidence are to be filed in the first round of written submissions and only responsive arguments and evidence (in the form of documents and/or witness/expert evidence) in the second round, thereby sharpening the issues in dispute. Procedural orders typically follow such a mechanism and some orders may even state expressly that second round submissions are intended to be responsive only"). **RML-0015-ENG.**

130 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, 5 February 2002, ¶ 57. **RML-0016-ENG.**

131 IBA Guidelines on the Taking of Evidence in International Arbitration, e.g. Articles 4.6 and 5.3 and establish that witness statements and expert reports may be submitted with revisions or additions only if they respond to matters contained in the other party's submissions and evidence, or other submissions that had not been previously presented in the arbitration; or new factual developments that could not have been addressed before. **RML-0017-ENG**.

132 *Canfor* ¶ 137. **RL-0003-ENG**.

international arbitration".[133] In the context of an "abuse of right under international law" as identified by the tribunal in *Canfor* ,[134] an "abuse of process is considered an application of the abuse of rights principle, and 'consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established'".[135]

86. The tribunal in *Sanum v. Laos* rejected claims of abuse of process based on the pursuit of overlapping claims in two different arbitral tribunals established under two different BITs because the Respondent refused to consolidate the proceedings.[136] This is not the situation in this arbitration. After facing substantial claims-related issues in the FM1 and FM2 arbitrations resulting from the Claimant's tactical actions, the Respondent pursued every available remedy to offset the negative consequences of those actions, including challenging the provisional measures and objecting to the jurisdiction of the FM1 tribunal. These remedies were unsuccessful, leading the Respondent to exercise a right established in NAFTA requesting for consolidation of the two arbitrations in this proceeding.

87. Tribunals have also found that an abuse of process can arise from procedural misconduct such as causing excessive delays, thereby increasing the costs of arbitration.[137] As explained below, the Claimant's conduct in the FM1, FM2 and FM3 proceedings amounted to procedural misconduct.

88. It has also been accepted that the actions oriented for the sole purpose of obtaining a treaty's benefits constitute an abuse of process.[138] Consistent with balancing the interests of all parties

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133 Gaillard, E., Abuse of Process in International Arbitration, ICSID Review, 2017, p. 2. **RML-0018-ENG**.

134 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, ¶ 137. **RL-0003-ENG**.

135 Gaillard, E., Abuse of Process in International Arbitration, ICSID Review, 2017, p. 18, citing Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice, A Commentary* (OUP 2006) 831, ¶ 65. **RML-0018-ENG**.

136 *Sanum Investments Limited v. Lao People's Democratic Republic I*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶ 367. **RML-0019-ENG**.

137 *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶ 158. **RML-0020-ENG**.

138 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 142. **RML-0021-ENG**; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17),

involved, the same applies to actions oriented towards the sole purpose of circumventing a treaty's provisions.

89. From the above, the following guidance emerges as to whether an order for consolidation is "in the interest of a fair and efficient resolution" of claims:

- An indicative test is the comparison of consolidation with the existing situation and that would continue to exist if the consolidation were not ordered.
- The focus of Article 1126 is on the effective administration of justice in light of the position of State parties in particular, which means that the procedure in Article 1126 must provide justice for those accessing it, in particular the Respondent.
- Determining whether the resolution of claims is "efficient" is an objective, fact-based standard that a Consolidation Tribunal may apply as it sees fit. It must be done on a case-by-case basis.
- Determining whether the resolution of claims is "fair" requires balancing the interests of all parties involved and ensuring that all receive the fundamental right to due process, are treated equally and that each party has a full opportunity to present its case.
- It is relevant whether a party is guilty of an abuse of procedure. An "abuse of procedure" includes a tactic or scheme that may cause significant harm to the party against whom it is directed and may undermine the fair and orderly resolution of disputes through international arbitration. It may arise from procedural misconduct and it may arise from actions directed with the sole purpose of evading treaty obligations.

90. The following sections apply these guidelines to the facts at issue.

Final Awards on Jurisdiction, Merits or Damages, 9 January 2015, ¶ 191. **RML-0022-SPA**; *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 444. **RML-0023-ENG**; *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, 30 January 2023, ¶ 222. **RML-0024-ENG**.

2. The Claimant's consolidation assessment scenario involving its proposed broadened FM1 arbitration is theorical and need not be considered

91. The Consolidation Tribunal must compare the consolidation of the FM1 and FM2 arbitrations with the continuation of the arbitrations, applying the "indicative test" (explained in guideline (1)), "a comparison of consolidation with the situation as it exists, and would continue to exist, if no consolidation were ordered".[139] The Respondent's submissions regarding Condition #3 set out in its Consolidation Request apply and, for those reasons, the Consolidation Tribunal should order consolidation.[140]

92. The Claimant's position is that ordering consolidation must be compared against its proposed broadened FM1 arbitration and not against the continuation of the FM1 and FM2 arbitrations. In its view, under this comparison, consolidation of the FM1 and FM2 arbitrations is not "in the interests of fair and efficient resolution of the claims".

93. The Claimant's proposed comparison is only *theoretical* and need not be considered by the Consolidation Tribunal because claims were submitted to arbitration by the Claimant in the FM1 and FM2 arbitrations and they cannot be withdrawn or discontinued (see Condition #1, above). The "situation as it exists" is two arbitrations, both suspended by the Consolidation Tribunal. If "no consolidation [was] ordered", the situation that would "continue to exist" would be the lifting of the suspensions and, consequently, the continuation of the two arbitrations.

94. The Respondent is justified in pursuing consolidation rather than consenting to the discontinuation of FM2 arbitration and to the Claimant's proposed broadened FM1 arbitration for the following reasons, which are elaborated upon below:

- The Claimant's actions in the FM1, FM2 and FM3 proceedings have introduced claims related issues that go beyond the original claims, that expand the issues in the FM1 and FM2 arbitrations, and that cross-over between the three proceedings. Resolving these issues is integral to resolving the claims. In this light, the consolidation it's the only way:

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139 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005 ¶ 126. **RL-0003-ENG**.

140 *See* Consolidation Request, Section I.E. **RM-0026-SPA**.

(i) the Respondent can receive full opportunity to present its case on all these issues, and, therefore, on all of the claims (guideline (4));

(ii) the Respondent can receive the fundamental right of due process and equality of treatment with the Claimant in respect of the issues and claims (guideline (4));

(iii) the Claimant's abuse of process can be addressed (guideline 5));

(iv) justice in respect of the Respondent can be efficiently administrated (guideline (2)); and

(v) the resolution of the claims can be done in an efficient way (guideline 3)).

- The broadened issues in the proceedings and the cross-over issues between the proceedings, which must be addressed by the Consolidation Tribunal when deciding to consolidate, include:

(i) the circumvention by the Claimant of the prohibition in NAFTA Article 1134 against provisional measures related to a "measure alleged to breach to which refers Article 1116 or 1117" that arises from the Claimant's conduct in the FM1 and FM2 proceedings;

(ii) the addition of an ancillary claim to the FM1 arbitration by the Claimant will breach the Claimant's waiver in the FM2 arbitration;

(iii) the presentation of the Claimant's case in a tactical manner that lacks clarity, which constantly evolved and included the presentation of contrary positions in the FM1, FM2 and FM3 proceedings;

(iv) the Claimant's imposition of unnecessary costs on the Respondent in the FM1, FM2, and FM3 proceedings; and

(v) the prejudice to the Respondent in the presentation of its case, including the denial of due process, arising from the Claimant's conduct in the FM1, FM2 and FM3 proceedings.

95. Thus, in determining whether the consolidation should be ordered, the Consolidation Tribunal must compare the consolidation order against the continuation of the FM1 and FM2 arbitrations. This is addressed in the Respondent's Request for Consolidation. If the Tribunal

decides that the comparison should be made against the Claimant's proposed broadened FM1 arbitration instead of the FM1 and FM2 arbitrations, consolidation would still be in the interest of a fair and efficient resolution of the claims for the reasons set out below.

3. Through its actions, the Claimant has expanded the reach of what must be decided to resolve its claims, in such a way that only the Consolidation Tribunal can resolve the claims in a fair and efficient manner

96. The Claimant has expanded the scope of what must be ruled upon, such that resolving the claims in a fair and efficient manner requires ruling on claim-related issues arising in the FM1, FM2 and FM3 arbitrations, and on claim-related issues arising from the relationship between the arbitrations. Only the Consolidation Tribunal can achieve this objective. The following actions of the Claimant have led to this situation.

a. The Claimant's choice to exclude the FM2 claims in the FM1 arbitration was the start of its expansion of claim-related issues and the first tactic action by the Claimant

97. The Claimant's choice to exclude the FM2 claims in the FM1 arbitration was the first action that laid the foundations for the expansion of claim-related issues and cross-over issues between the arbitrations that must be addressed by a Consolidation Tribunal.

98. The Claimant submitted its RFA in the FM1 arbitration on March 1 of 2021, challenging the repudiation of the RMPT and related measures (e.g., blocking of PEM's bank accounts).[141] The RFA did not include a claim related to the inaccessibility of PEM's VAT returns, despite the fact that such inaccessibility, which was subsequently challenged by the Claimant in FM2 arbitration, began in April 2020, almost a year before the RFA was submitted in the FM1 proceeding. All of this was known by the Claimant when it submitted its RFA.

99. If the Claimant had properly included the claims related to the inaccessibility of VAT returns in its FM1 RFA, or in an ancillary claim filed shortly thereafter, and addressed them in its Memorial on the Merits, none of the issues that now make consolidation necessary would have arisen. The Respondent would have had full opportunity to submit its case on all the issues in

[141] *See* the Request for Consolidation, Section I.A.1. **RM-0026-SPA**.

dispute, the procedural guarantees and equal treatment would have been respected, and the abuse of process related to the provisional measures would not have occurred.

100. The choice to exclude the FM2 claims in the FM1 arbitration is the Claimant's first of its tactical actions that prejudiced the Respondent in the presentation of its case. These actions constitute an abuse of process through which the Claimant denied the Respondent full opportunity to present its defense and equality of treatment with the Claimant.

101. Along with the issues addressed below, this action must be assessed by a Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

b. The Claimant's Request for Provisional Measures

102. The Claimant's Request for Provisional Measures was the second action that expanded the claim-related issues in the FM1 and FM2 arbitrations and created cross-over issues between them that must be addressed by a Consolidation Tribunal to resolve the claims in a fair and efficient manner.

103. On 4 January 2023, the Claimant filed its request for provisional measures that included "[r]equiring the SAT to make all payments of VAT refunds owed to PEM after the filing of the Request for Arbitration and all future VAT refund payments into a newly opened bank account of PEM that will remain free from SAT's seizure or freezing order".[142] The Claimant could have requested provisional measures immediately after the establishment of the FM1 tribunal or after the filing of its Memorial on the Merits, but instead it waited 40 days after the Respondent filed its Counter-Memorial in November 2022, preventing the provisional measures from being fully addressed in the Respondent's Counter-Memorial.

104. The Respondent filed its response to the Request for Provisional Measures, and a short hearing was held on 13 March 2023.[143] On 26 May 2023, the FM1 Tribunal issued its Decision on the Provisional Measures, recommending that the Respondent refrain from blocking Access to the Claimant's VAT refunds as of the date of the Request for Provisional Measures: 4 January 2023.[144] The Tribunal rejected the Respondent's argument that the provisional measures related to

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142 Request for Consolidation, ¶ 12. **RM-0026-SPA**. *See* also the Claimant's Request for Provisional Measures, 4 January 2023, ¶ 153(c)). **RM-0080-ENG**.

143 Request for Consolidation, ¶ 12. **RM-0026-SPA**.

144 Request for Consolidation, ¶ 4. **RM-0026-SPA**.

measures alleged to be in breach of the Respondent's NAFTA obligations that were at issue in the FM1 arbitration and, as such, were prohibited by NAFTA Article 1134 (which prohibits provisional measures that concern issues alleged to constitute a breach). Instead, the Tribunal accepted the Claimant's argument that the measures covered by the provisional measures were not being challenged in the FM1 arbitration, finding that:

> the above recommendation [granting the provisional measure] is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." This is because the denial by SAT of PEM's free access to future VAT refunds is not a measure challenged by the Claimant in its Request for Arbitration nor discussed in its Memorial. [145]
>
> [Emphasis added].

105. On 19 June 2023, after the FM2 arbitration was initiated (discussed below), the Respondent filed a Request for Revocation of the Provisional Measures, arguing that the provisional measures, as recommended, would prejudice the new FM2 arbitration between the parties because it related to the same measures (i.e. the blocking of PEM accounts and the SAT payment of the VAT refunds into PEM's blocked accounts).[146]

106. On 1 September 2023, the Tribunal issued its decision on the Respondent's Request for Revocation of the Provisional Measures, declining to revoke the provisional measures. The tribunal considered whether the initiation of the FM2 arbitration represented a relevant change of circumstances that justified the elimination of the provisional measures and concluded that it did not.[147] The Tribunal went to state:

> The Tribunal recognizes that the fact that the provisional measure is in place may (de facto) have an impact on the new case. Thus, as mentioned by Claimant itself, compliance by Respondent with the provisional measure (that is, making the VAT refunds accrued from 4 January 2023 freely available to PEM) might make the claim submitted by Claimant in ICSID Case No. ARB/23/28 in part moot.[148]

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145 Decision on the Claimant's Request for Provisional Measures, ¶ 135. **RM-0034-ENG**.

146 Request for Consolidation, ¶ 15. **RM-0026-SPA**.

147 Decision on the Respondent's Request for Revocation of Provisional Measures, ¶¶ 40-42. **RM-0038-ENG**.

148 Decision on the Respondent's Request for Revocation of Provisional Measures, ¶ 47. **RM-0038-ENG**.

> 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.[149] [Emphasis added].

107. In these statements, the tribunal acknowledges the connection between provisional measures in the FM1 arbitration and the claims in the FM2 arbitration, a factor that must be considered by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

108. Since the granting of the provisional measures did not require the FM1 tribunal to rule on the merits of the bank account blocking measure, the Respondent was denied the opportunity to fully present its defense of the application of the freezing order to the VAT refund payments amounting to a denial of due process and equality of treatment. The Respondent acknowledges a similar situation often arises when provisional measures are ordered. However, this is not the situation in this proceeding which becomes clear when the provisional measures are viewed in the context of the FM2 arbitration and the subsequent request for admission of ancillary claims (discussed below).

109. This action created the second cross-over issue between FM1 and FM2 arbitrations that must be addressed by a Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

c. The Claimant's initiation of FM2 arbitration.

110. The Claimant's initiation of FM2 arbitration was the third action that expanded the claim-related issues in FM1 and FM2, and created cross-over issues between them that must be addressed by a Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

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[149] Decision on the Respondent's Request for Revocation of Provisional Measures, ¶ 48. **RM-0038-ENG**.

111. On 31 March 2023, the Claimant submitted a NOI to initiate the FM2 arbitration, in which it developed and expanded the claims in the FM1 arbitration, covering the subject matter of the provisional measures and including additional claims.[150] On 29 June 2023, it filed its RFA.[151]

112. On 28 July 2023, the Respondent submitted a Request for Bifurcation in the FM1 arbitration to which it attached its Preliminary Objection on Jurisdiction to support its request.[152] Respondent argued that, by initiating the second claim based on the same measures, the Claimant breached the waiver filed in the FM1 proceeding. A waiver is a condition precedent to the submission of a claim to arbitration whereby a claimant waives 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 measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [...]".[153]

113. On 20 December 2023, the Tribunal issued its Decision on the Preliminary Objection, dismissing the objection and confirming its reasoning in its Decision on Provisional Measures, that the measures challenged in FM2 were not the same as those in FM1:

> As mentioned above, after having heard the clarifications of the Parties at the hearing on the PM Request, the Tribunal was convinced that granting a provisional measure recommending Mexico that SAT makes the refunds effectively available to PEM, by paying or transferring the amounts of refunds to an unblocked account of PEM, was not contrary to Article 1134 NAFTA, since the Claimant was not challenging in the present arbitration the fact that refunds were being made in a way that deprived PEM of their use. In this context, the Tribunal notes the Claimant's statements that SAT has not complied with its requests, notwithstanding the granting by the Tribunal of the provisional measure to this effect, and notwithstanding the fact that the Claimant has indicated on which unblocked account such payments could be made.[154]
>
> [Emphasis added].

114. By tactically leaving the FM2 claims out of the FM1 arbitration, the Claimant was able to seek provisional measures against some of the FM2 claims, allegedly without violating NAFTA

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150 Decision on the Respondent's Request for Revocation of Provisional Measures, ¶ 13. **RM-0038-ENG**.

151 *See* FM2 Second RFA. **RM-0037-ENG**.

152 Preliminary Objection on Jurisdiction. **RM-0081-SPA.**

153 NAFTA, Article 1121. **RML-0005-SPA**.

154 Decision on the Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶ 77. **RM-0039-ENG**.

Article 1134.[155] That Article establishes that a Tribunal "may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to the Articles 1116 or 1117". [156] If the Claimant had properly included the FM2 claims in the FM1 arbitration, the provisional measure it obtained from FM1 Tribunal would not have been available. The Respondent raised this concern several times before the FM1 Tribunal since the filing of the Request for Provisional Measures.

115. This action enabled the Claimant to circumvent the prohibition in NAFTA Article 1134, an action whose sole purpose was to circumvent a treaty's provisions and which amounted to an abuse of process that favored the Claimant to the detriment of the Respondent in a fundamentally unfair manner.[157]

116. The Respondent was prejudiced in the presentation of its case because the Claimant's actions denied the Respondent due process in the form of the loss of an opportunity to fully defend the legal merits of these measures. Had the FM2 claims been properly included in the FM1 RFA, or in an ancillary claim filed shortly thereafter, the Respondent would have fully addressed the claims in its Counter-Memorial. The Claimant unfairly benefited by securing the order of provisional measures without having to prove the merits of its position and without having to incur the costs or delay of having the matter fairly resolved in a full proceeding.

117. This denial of an opportunity for the Respondent to fully present its case, denial of due process, denial of equality of treatment, and abuse of process, crosses over the FM1 and FM2 arbitrations and must be addressed by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

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155 The claims in the FM2 arbitration concerned the accessibility of VAT refunds from April 2020. This covered the accessibility of VAT refunds covered by the interim measures that applied from January 2023. Therefore, the overlap began in January 2023 and continues up to the time of filing of this Memorial

156 NAFTA, Article 1134. **RML-0005-SPA**.

157 The Respondent was ordered to allow free access to VAT refunds as of January 4, 2023, including VAT refunds already deposited in PEM's frozen account from January 4, 2023 until the date of the Decision on Provisional Measures. With respect to those deposits, the tribunal's order implied, for all practical purposes, the lifting of the bank account freeze that was put in place to protect the tax authority's ability to recover outstanding taxes and penalties associated with the tax reassessments - tax liabilities - (*créditos fiscales* in Spanish).

d. The Claimant's request for admission of ancillary claims

118. The Claimant's Request for admission of ancillary claims was the fourth action that expanded the claim-related issues in the FM1 and FM2 arbitrations and created cross-over issues between them that must be addressed by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

119. Having obtained a favorable ruling from the FM1 Tribunal on the provisional measures, the Claimant is now proposing to convert its claims in the FM2 arbitration into an ancillary claim in the FM1 arbitration. The Claimant's position, which was accepted by the FM1 Tribunal, is that the ancillary claims, which encompass the FM2 claims including VAT refunds covered by the provisional measures, arise directly out of the subject matter of the FM1 arbitration.[158] This would have the effect of converting the FM1 provisional measures into claims under Articles 1116 and 1117 in the FM1 arbitration upon which an award on the merits and damages could be made. Such an award is not available for provisional measures. [159] Despite the fact that the addition of the FM2 claims as ancillary claims in the FM1 arbitration would give rise to a violation of Article 1134 (discussed above), the Claimant is taking the position that the provisional measure should remain in force. [160]

120. Viewed collectively, the provisional measures, the FM2 arbitration and the request for admission of ancillary claims, demonstrate a fundamental unfairness to the Respondent and an abuse of process. By not including the claims in FM2 in the FM1 arbitration, the Claimant was able to obtain provisional measures without giving the Respondent the opportunity to present a full defense. By then initiating the FM2 arbitration and subsequently attempting to move it to the

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158 Claimant's Request for Admission of Ancillary Claims, ¶¶ 69-73. **RM-0056-ENG**; Expedited Decision on Admission of Ancillary Claims, ¶ 2. **RM-0065-ENG**.

159 In its Decision on the Respondent's Revocation Request, ¶¶ 44-45, the FM1 tribunal recognized the difference between a provisional measure and a claim before an arbitral tribunal in the following statements: "based on statements made by Claimant itself, the effective payment of those VAT refunds [i.e., the subject of the provisional measures] was not a claim that Claimant was making in this arbitration"; the "[provisional measures] order was provisional, to be in force as long as the present dispute was not decided"; and "[i]n 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 the Respondent for which Claimant is entitled to damages of a corresponding amount". **RM-0038-ENG**.

160 Claimant's Request for Admission of Ancillary Claims, ¶ 79. (Approval of the request "should not interfere with the Tribunal's Decision on Provisional Measures, which should remain in place"). **RM-0056-ENG**.

FM1 arbitration through an ancillary claim, the Claimant has split its case, enabling it to circumvent the Article 1134 prohibition (by keeping the claims separate to obtain provisional measures) and requesting an ancillary claim for damages in relation to the measures covered in the FM2 arbitration, including the provisional measures (by subsequently rejoining the claims with the provisional measures in place).

121. This manifest abuse of process that involved FM1 and FM2 arbitrations, the provisional measures and the ancillary claim must be addressed by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

e. The Claimant's conduct in the consolidation proceeding.

122. The Claimant's fifth action that expanded the claim-related issues in the FM1, FM2 and FM3 proceedings and created cross-over issues between them that must be addressed by a consolidation tribunal concerns the Claimant's conduct in the FM3 consolidation proceeding.

123. Recognizing that the objectives of its tactics would be subverted by the Respondent Consolidation Request, the Claimant sent a communication to the FM1 Tribunal requesting that the Tribunal expedite its decision on the Claimant's Ancillary Claims Request.[161] Its reasoning was as follows:

> Currently, the first procedural meeting before the Consolidation Tribunal is scheduled for Tuesday, July 16, 2024. However, the Claimant has requested a postponement as the decision of this Tribunal, if it permits the Admission of the Ancillary Claims, will make it unnecessary for the Claimant to pursue the recovery of the VAT refunded amounts in the second arbitration. This will also render it unnecessary for the Consolidation Tribunal to make any decision on the Respondent's Request for Consolidation.[162]

124. It is clear from this statement that the Claimant wanted to delay the actions of the Consolidation Tribunal to enable it to achieve its objectives. This tactic was confirmed by the Claimant's non-payment of its advance payment, requiring the ICSID Secretariat to notify the

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161 Request for Expedited Decision on Admission of Ancillary Claims. **RM-0064-ENG**.

162 Request for Expedited Decision on Admission of Ancillary Claims, p. 1. **RM-0064-ENG**.

parties of the Claimant's default and invite either party to pay the outstanding amount.[163] The Claimant finally paid approximately two weeks later.[164]

125. These actions, which cross-over the FM1, FM2 and FM3, provide important context to claim-related issues mentioned above and must be addressed with those by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

f. Unnecessary costs imposed on the Respondent

126. The unnecessary costs caused by the Claimant's above actions are the sixth action that expanded the claim-related issues in the FM1, FM2 and FM3 proceedings and created cross-over issues between them that must be addressed by a Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

127. If the Claimant would have properly included the claims regarding the inaccessibility of VAT refunds in its FM1 RFA, or in an ancillary claim filed shortly thereafter, and addressed them in its Memorial on the Merits, none of the issues above would have arisen and the consequent extensive costs would not have been incurred. Instead of simply filing its Counter-Memorial in the FM1 arbitration and waiting for the Claimant's Reply, the Respondent had to incur unnecessary costs related with a series of proceedings in the FM1 arbitration (e.g., the proceedings on provisional measures, the jurisdictional challenges related to the initiation of the FM2 arbitration, the Ancillary Claims Request), the FM2 arbitration costs, and the FM3 arbitration costs. The Respondent will be seeking recovery of these unnecessary costs that it had to incur solely because of the Claimant's strategies.

128. These costs cross-over the FM1, FM2 and FM3 arbitrations and must be addressed by the Consolidation Tribunal in order to resolve the claims in a fair and efficient manner.

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[163] ICSID Communication to the Parties, First Majestic Silver Corp. v. United Mexican States, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, 3 September 2024. **RM-0082-ENG**.

[164] ICSID Communication to the Parties, First Majestic Silver Corp. v. United Mexican States, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, 16 September 2024. **RM-0083-ENG**.

g. The consolidation of proceedings would be the quickest way to resolve the claims

129. Respondent's allegations regarding the temporal effectiveness of consolidation as compared to the parallel proceedings in FM1 and FM2 are set out in its Request for Consolidation.[165]

130. It would not be possible for the Claimant's proposed broadened FM1 arbitration to address the claims and claim-related issues in a fair and efficient manner, so the question of time efficiency is moot. Alternatively, if the Consolidation Tribunal considers that the proposed broadened FM1 arbitration could address all issues and claims, it would not be more time efficient.

131. *First*, because many of the issues in the FM1, FM2 and FM3 arbitrations are intertwined, they will undoubtedly give rise to jurisdictional objections related to a broadened FM1 tribunal that will address issues arising in two other arbitrations. This will require additional time and resources to resolve.

132. *Second*, in terms of advancing the merits and damages in the original claims, a Statement of Claim and Counter-Memorial have been filed in the FM1 arbitration. These submissions were filed on 25 April and 25 November 2022, respectively, and reflect the Claimant's original claims and positions on the relevant facts as they stood two years ago. These would have to be revised and resubmitted or supplemental submissions would have to be filed to account for changes in the Claimant's case. The remaining pleadings have not been filed, including, in their entirety, those related to FM2. Taken together, the filing of the pleadings to complete the dispute would involve the same actions and timing requirements under consolidation and under the proposed broadened FM1 arbitration. Therefore, with respect to the filing of submissions, there will be no time savings associated with the proposed broadened FM1 arbitration.

133. For these reasons, it is more time efficient for the Consolidation Tribunal to resolve the claims in a fair and efficient manner.

4. Conclusion

134. The claims and claims-related issues in FM1, FM2 and FM3 arbitrations are intertwined. Only the Consolidation Tribunal can resolve them in a fair and efficient manner. To the extent that

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165 Request for Consolidation, Section I.E. **RM-0026-SPA**.

the Consolidation Tribunal conducts a comparative analysis between consolidation and the Claimant's proposed broadened FM1 arbitration, it may consider the tribunal's determination in *Canfor*:

> Determining what is efficient 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 consolidation.[166]

135. The above arguments relating to Condition 3 make it absolutely clear that the consolidation will be in the interests of efficiency.

IV. MEXICO'S ACTIONS IN THIS DISPUTE REFLECT THE PROPER EXERCISE OF ITS PROCEDURAL RIGHTS

136. The Claimant alleges that the Respondent's actions in FM1, FM2 and FM3 proceedings constituted procedural misconduct in the form of: (i) "persistent unlawful conduct in denying PEM access to the VAT refunded amount"; (ii) its recurring actions "to utilize every means and procedural avenue—however bereft of any chance of success—to avoid complying with the Tribunal's Decision on Provisional Measures"; (iii) its "dilatory and obstructive tactics" requesting the revocation of the provisional measures and objecting to the jurisdiction of the FM1 court on the basis of a waiver violation; and (iv) the filing of a consolidation request.[167]

137. These allegations are totally unfounded. Throughout this dispute, the Respondent has simply invoked the applicable procedures, as any respondent State would have done in any arbitration in which it faced similar procedural issues. The Respondent's actions were lawful and clearly did not constitute a "procedural misconduct", they were merely the exercise of a right under the NAFTA.

138. Pursuant to NAFTA Article 1121, the Claimant submitted waivers in the arbitrations that it initiated in which it "consents to arbitration in accordance with the procedures set out in [the NAFTA]", one of which is the consolidation procedure provided for in Article 1126. Thus, the initiation of this consolidation proceeding is not only the exercise of a procedural right of the

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166 *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, ¶ 124. **RL-0003-ENG**.

167 Claimant's Request for Admission of Ancillary Claims, ¶¶ 4-5. **RM-0056-ENG**.

Respondent, but a proceeding that the Claimant consented to by submitting its claims to arbitration under NAFTA.

V. PETITIONS

139. 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 the Claimant in the FM1 and FM2 arbitrations.

Respectfully submitted,

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