

**IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE  
TRADE AGREEMENT**

**-between-**

**FIRST MAJESTIC SILVER CORP.**

**(the “Claimant”)**

**and**

**THE UNITED MEXICAN STATES**

**(the “Respondent”)**

**CONSOLIDATION REQUEST UNDER NAFTA ARTICLE 1126**

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

---

**PROCEDURAL ORDER NO. 2**

***Members of the Consolidation Tribunal***

Prof. Albert Jan van den Berg, Presiding Arbitrator

Ms. Tina M. Cicchetti, Arbitrator

Mr. Christian Vidal-León, Arbitrator

***Secretary of the Consolidation Tribunal***

Ms. Elisa Méndez Bräutigam, Legal Counsel, ICSID

***Assistant to the Consolidation Tribunal***

Ms. Emily Hay

---

29 August 2024

## I. INTRODUCTION

1. On 1 March 2021, Claimant initiated an arbitration against Respondent (collectively, the “**Parties**”) with ICSID Case No. ARB/21/14 (“**FM 1**”) under Chapter 11 of the North American Free Trade Agreement (“**NAFTA**”) and Annex 14-C of the United States-Mexico-Canada Agreement (“**USMCA**”).
2. On 21 July 2023, ICSID registered another arbitration initiated by Claimant against Respondent with ICSID Case No. ARB/23/28 (“**FM 2**”) under Chapter 11 of NAFTA and Annex 14-C of the USMCA.
3. On 12 February 2024, Respondent submitted to ICSID, pursuant to NAFTA Article 1126(3), a request for constitution of a tribunal to decide on the consolidation of claims in FM 1 and FM 2 (“**Consolidation Request**”).
4. On 8 May 2024, ICSID informed the Parties that the members of the Consolidation Tribunal had accepted their appointments to serve on the Consolidation Tribunal in FM 1 and FM 2 (“**Consolidation Tribunal**”). Accordingly, the Consolidation Tribunal was constituted on that date.
5. On 13 May 2024, the Consolidation Tribunal requested the Parties to make an advance payment to cover the costs of the consolidation proceeding.
6. On 20 May 2024, the Consolidation Tribunal circulated a draft Procedural Order No. 1 (“**PO 1**”) and draft Terms of Appointment to the Parties for their comments.
7. On 31 May 2024, Respondent provided the Parties’ joint comments on the draft PO 1 and the draft Terms of Appointment. On 4 June 2024, Claimant confirmed its agreement with the documents submitted by Respondent.
8. On 3 June 2024, the first procedural meeting (originally scheduled for 5 June 2024) was postponed to give more time for payment of the advance.
9. On 25 June 2024, ICSID confirmed receipt of Respondent’s share of the advance.
10. On 2 July 2024, the Parties respectively confirmed their availability for a first procedural meeting on 16 July 2024. In the same communication, Claimant indicated its intention to identify additional items for the agenda of the meeting, including “jurisdiction of the Consolidation Tribunal pursuant to NAFTA Article 1126, timing concerns and good faith application of the procedural rules”.
11. On 10 July 2024, Claimant requested the suspension of the consolidation proceeding on the basis that the Consolidation Tribunal was established after the 60-day period provided for in NAFTA Article 1126(5) (“**Preliminary Objection on 60-day Period**”).
12. On 15 July 2024, Respondent provided its response to Claimant’s Preliminary Objection on 60-day Period.

Procedural Order No. 2

13. Also on 15 July 2024, Claimant requested the Consolidation Tribunal to adjourn the first procedural meeting scheduled for 16 July 2024 on the basis that the tribunal in FM 1 had granted its request for admission of ancillary claims. Claimant further requested the opportunity to make full submissions on whether the out-of-time constitution of the Consolidation Tribunal can be resolved when only Respondent is willing to waive the time limit, and whether the time limit can be waived. Respondent opposed Claimant’s request to adjourn the first procedural meeting on the same date.
14. On 16 July 2024, the Consolidation Tribunal informed the Parties that the first procedural meeting would take place as scheduled, during which the Parties could address the recent correspondence. During the procedural meeting, the Consolidation Tribunal decided to address Claimant’s Preliminary Objection on 60-day Period in an initial written phase and directed the Parties to file their respective written submissions within the timelines agreed upon during the procedural meeting.
15. On 5 August 2024, the Consolidation Tribunal issued PO 1, *inter alia*, reiterating and confirming the aforesaid directions in respect of Claimant’s Preliminary Objection on 60-day Period in accordance with the procedural timetable set out in Annex A of PO 1. In particular, the Consolidation Tribunal fixed the deadline of 7 August 2024 for Claimant’s submission on its Preliminary Objection on 60-day Period and of 22 August 2024 for Respondent’s response.
16. On 8 August 2024, Claimant filed its Preliminary Objection to Jurisdiction dated 7 August 2024 (“**Claimant’s 60-day Submission**”). Since Claimant’s 60-day Submission was filed after the deadline specified in Annex A of PO 1, Claimant also submitted a letter dated 8 August 2024, requesting an extension of one day due to technical difficulties in uploading the documents to ICSID’s files sharing platform, Box.
17. On 12 August 2024, the Consolidation Tribunal granted Claimant’s request for a limited extension and proposed to extend the corresponding deadlines for Respondent’s submission and the Consolidation Tribunal’s decision by one day each, subject to Respondent’s comments.
18. On 13 August 2024, Respondent informed the Consolidation Tribunal that it did not require an extension and would file its response to Claimant’s 60-day Submission within the original deadline prescribed under Annex A of PO 1.
19. On 22 August 2024, Respondent filed its response to Claimant’s 60-day Submission (“**Respondent’s 60-day Submission**”).
20. In this Procedural Order No. 2, the Consolidation Tribunal decides upon Claimant’s Preliminary Objection on 60-day Period.

## II. REQUESTS FOR RELIEF

21. Claimant requests that the Consolidation Tribunal “dismiss the Respondent’s Request for Consolidation”. Claimant reserves the right to claim its costs against Respondent.<sup>1</sup>
22. Respondent requests that the Consolidation Tribunal: (i) determine that it is duly constituted and has jurisdiction to decide whether to assume jurisdiction over all claims in ICSID Arbitration Nos. ARB/21/14 and ARB/23/28, and to hear and determine them; and (ii) award Respondent the legal costs and expenses related to this arbitration, considering the clear lack of merit of this preliminary objection to jurisdiction.<sup>2</sup>

## III. NAFTA ARTICLE 1126(5)

23. Claimant’s Preliminary Objection on 60-day Period is based on NAFTA Article 1126(5). This provides as follows:

Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

## IV. CONSOLIDATION TRIBUNAL’S ANALYSIS

24. In this Section, the Consolidation Tribunal sets out the issues raised by Claimant with respect to its Preliminary Objection on 60-day Period, and Respondent’s response thereto, and decides upon those matters. To the extent that the Consolidation Tribunal does not set out in detail every argument made by the Parties, those arguments have been closely reviewed by the Consolidation Tribunal and can be considered subsumed herein.
25. Claimant’s Preliminary Objection on 60-day Period is brought on the basis of an alleged lack of jurisdiction of the Consolidation Tribunal.<sup>3</sup> The Consolidation Tribunal considers that it is empowered by NAFTA Article 1126(1) and Article 21(1) the UNCITRAL Arbitration Rules, 1976 (“**UNCITRAL Arbitration Rules**”) to decide on Claimant’s Preliminary Objection on 60-day Period, and neither Party has contended otherwise. The UNCITRAL Arbitration Rules apply to this consolidation proceeding pursuant to NAFTA

---

<sup>1</sup> Claimant’s 60-day Submission, ¶¶ 78-79.

<sup>2</sup> Respondent’s 60-day Submission, ¶ 77.

<sup>3</sup> Claimant’s 60-day Submission, ¶¶ 77-78.

Article 1126(1). Article 21(1) of the UNCITRAL Arbitration Rules provides that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction”.

**A. Preclusion of Claimant’s Preliminary Objection on 60-day Period**

26. The Consolidation Tribunal will first consider whether Claimant’s Preliminary Objection on 60 Day Period is precluded, whether by estoppel, or by the principle of good faith.

**(1) Claimant’s Position**

27. Claimant argues that it is not estopped from raising the Preliminary Objection on 60-day Period as the requirements for estoppel are not met. Claimant identifies three conditions for estoppel to have arisen: *first*, there must be a clear and unequivocal representation previously made by it to another party, either expressly or impliedly; *second*, the other party was, in the circumstances, entitled to rely and in fact did rely on this representation; and *third*, as a result the other party has been prejudiced or the party making it has secured some benefit or advantage for itself.<sup>4</sup>
28. In respect of the first requirement, Claimant asserts that it has consistently raised its concerns regarding compliance with the 60-day time limit in its correspondence with the ICSID Secretariat dated 22 February 2024 and 1 May 2024, and before the Consolidation Tribunal through correspondence dated 2, 10 and 15 July 2024, and during the first procedural meeting. Therefore, Claimant states that it has not misrepresented its position or misled Respondent regarding the Preliminary Objection on 60-day Period.<sup>5</sup>
29. In this regard, Claimant further states that the draft Terms of Appointment and any alleged waiver to the jurisdictional objection contained therein is not binding on the Parties and cannot constitute a waiver of the mandatory 60-day requirement under NAFTA Article 1126(5). In any event, Claimant reiterates that it has consistently raised its Preliminary Objection on 60-day Period both before and after providing its comments on the draft Terms of Appointment, and again at the first procedural meeting.<sup>6</sup>
30. On the second requirement mentioned in ¶ 27 above, Claimant states that it never made a clear and unequivocal representation that it consented to the Consolidation Tribunal’s jurisdiction. To the contrary, raised its Preliminary Objection on 60-day Period as a serious issue requiring rectification by Respondent. Claimant states that it would, therefore, be unreasonable and disingenuous for Respondent to claim to have relied on its “unsubstantiated” belief in this regard.<sup>7</sup>

---

<sup>4</sup> Claimant’s 60-day Submission, ¶¶ 57-60, 73, *citing* Exhibit CL-0016, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, dated 30 March 2010, ¶¶ 349, 350, 353; Exhibit CL-0017, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, dated 28 December 2009, ¶¶ 214-215.

<sup>5</sup> Claimant’s 60-day Submission, ¶¶ 61-64, 74.

<sup>6</sup> Claimant’s 60-day Submission, ¶¶ 65-69.

<sup>7</sup> Claimant’s 60-day Submission, ¶¶ 70-71.

31. In respect of the third requirement mentioned in ¶ 27 above, according to Claimant, Respondent has not indicated that it suffered any damage due to its reliance on Claimant's alleged conduct. Claimant states that any damage suffered by Respondent arises from its own refusal to refile the Consolidation Request, and not from Claimant's actions.<sup>8</sup>

## **(2) Respondent's Position**

32. Respondent disputes that Claimant raised its Preliminary Objection on 60-day Period on time and states that Claimant filed this objection for the first time only hours before the first procedural meeting with the Consolidation Tribunal. Respondent denies that Claimant raised the issue of the Consolidation Tribunal's jurisdiction in its correspondence dated 30 April 2024. In its view, it merely urged the ICSID Secretary-General to establish the Consolidation Tribunal as soon as possible. Respondent also denies that Claimant raised the issue in its correspondence dated 1 May 2024 which, according to Respondent, only noted that the deadline had passed and expressed Claimant's view that compliance with NAFTA Article 1126(5) was mandatory.<sup>9</sup>
33. Respondent states that, to the contrary, Claimant did not object to paragraph 3.3 of the draft Terms of Appointment circulated for comments by the Consolidation Tribunal, which recorded the Parties' agreement that the Consolidation Tribunal had been validly constituted in accordance with NAFTA Article 1126. According to Respondent, therefore, Claimant should not be permitted to go against its own statements and actions to frustrate the mandate of the Consolidation Tribunal.<sup>10</sup>

## **(3) Consolidation Tribunal's Analysis**

34. The Consolidation Tribunal does not disagree, in principle, with Claimant's proposed test to determine whether a procedural estoppel has arisen (see ¶ 27 above). Respondent has not specifically commented on the criteria.
35. For the following reasons, the Consolidation Tribunal agrees with Claimant that it is not estopped from raising the Preliminary Objection on 60-day Period. Taking into account the record of communications by Claimant, the representations made to ICSID and to the Consolidation Tribunal were not an unequivocal acceptance of the constitution of the Consolidation Tribunal after the 60-day period in NAFTA Article 1126(5).
36. On the one hand, Claimant did raise the question of the timeliness of the constitution of the Consolidation Tribunal in certain communications. On 1 May 2024, it stated its view to the ICSID Secretariat and Respondent that the period was mandatory, and invited Respondent's proposal to resolve this "critical issue". On 2 July 2024, it indicated to the Consolidation Tribunal and Respondent its intention to add matters to the agenda for the first procedural meeting such as the "jurisdiction of the Consolidation Tribunal pursuant to

---

<sup>8</sup> Claimant's 60-day Submission, ¶ 72.

<sup>9</sup> Respondent's 60-day Submission, ¶¶ 63, 66-68.

<sup>10</sup> Respondent's 60-day Submission, ¶¶ 64-65, 69-73.

NAFTA Article 1126, timing concerns and good faith application of the procedural rules” (see ¶ 10 above).

37. On the other hand, Claimant did not explicitly object to the constitution of the Consolidation Tribunal on the basis of untimeliness until 10 July 2024 (see ¶ 11 above). Moreover, on 31 May 2024 Claimant did not object to the language circulated in the draft Terms of Appointment for the Parties’ consideration which stated in paragraph 3.3 that “[t]he parties confirm that they have no objection on the basis that the period to establish the Consolidation Tribunal exceeded 60 days from the request for consolidation.”
38. While Claimant’s explicit objection to the timing of the Consolidation Tribunal’s constitution was not communicated until 10 July 2024, Claimant did timely raise concerns related to the expiry of the 60-day period and signalled that it considered some further action to be required to resolve the issue, for example in its correspondence of 1 May 2024. In these circumstances, the Consolidation Tribunal does not consider Claimant’s prior statements to have conveyed a clear and unequivocal acceptance of the delay in the constitution of the Consolidation Tribunal. Claimant is therefore not estopped from raising its objection when it did so, prior to the first procedural meeting.
39. Also relevant to whether Claimant’s objection is precluded, Respondent invokes the principle of good faith, which in its view prevents a party from going against its own prior statements or actions when another party has relied on them.<sup>11</sup> The Consolidation Tribunal does not accept that Claimant has acted contrary to the principle of good faith, since the different communications noted in ¶¶ 36-37 above do not demonstrate a lack of good faith. Nor is lack of good faith evident from the fact that Claimant participated in the process of appointing the Consolidation Tribunal, and in doing so requested extensions of time. The Consolidation Tribunal does not consider Respondent to have established that Claimant deliberately sought to frustrate the prompt constitution of the Consolidation Tribunal, and subsequently to object to the timeliness of its constitution or to have otherwise acted contrary to the principle of good faith.
40. For these reasons, the Consolidation Tribunal determines that Claimant is not precluded from raising the Preliminary Objection on 60-day Period, and will proceed to decide upon it.

## **B. Jurisdiction of the Consolidation Tribunal**

### **(1) Claimant’s Position**

#### *(i) Mandatory nature of the 60-day timeline under NAFTA Article 1126(5)*

41. Claimant submits that compliance with the timeline of 60 days prescribed under NAFTA Article 1126(5) is a mandatory condition for a consolidation tribunal to be validly constituted. In this regard, Claimant relies on, *first*, the language of NAFTA Article

---

<sup>11</sup> Respondent’s 60-day Submission, ¶ 65.



- 1126(5) and specifically, the use of the word “shall” therein, and *second*, the alleged practice of States party to NAFTA (“**NAFTA Parties**”). Further, Claimant states that neither the Parties nor the Consolidation Tribunal can waive the non-compliance with the 60-day timeline under NAFTA Article 1126(5).<sup>12</sup>
42. In respect of the first submission, Claimant argues that as per Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (“**Vienna Convention**”), NAFTA Article 1126(5) must be interpreted in accordance with the “ordinary meaning” of its terms (see ¶ 233 above).<sup>13</sup>
43. Claimant states that the ordinary, dictionary meaning of the word “shall” indicates a “requirement” or “command” or what is “mandatory”. Further, Claimant contrasts the use of “shall” with that of “may” in Chapter 11 of NAFTA generally and Article 1126 specifically. According to Claimant, the choice between these two words in these provisions indicates whether a directive is mandatory or not. Claimant states, therefore, that Article 1126(5) imposes a mandatory requirement or condition that must be adhered to before a consolidation tribunal can be validly constituted.<sup>14</sup>
44. In respect of the second submission referred to in ¶ 41 above, Claimant states that consistent and long-standing practice of the NAFTA Parties, including Respondent, confirms the mandatory nature of the 60-day time limit within Article 1126(5). In particular, Claimant relies on Respondent’s position in *B-Mex, et al. v. Mexico*<sup>15</sup> where, according to Claimant, Respondent took the view that the use of the word “shall” in NAFTA imposes a mandatory legal obligation and, therefore, the procedural requirements in NAFTA Articles 1119 and 1121 relating to the submission of a notice of intent to submit a claim to arbitration were mandatory.<sup>16</sup>
45. On the aspect of waiver, Claimant argues that a mandatory (“shall”) procedural requirement is established by agreement of the NAFTA Parties and cannot be modified, except through amendment, or jointly issued interpretation, agreed upon by all three NAFTA Parties.<sup>17</sup> Claimant further states that where the NAFTA Parties intended to permit the disputing Parties to modify a default procedural rule, they indicated so expressly, by including phrases, such as “unless the disputing parties agree otherwise.” Claimant submits, therefore, that without the NAFTA Parties’ consent, neither the disputing Parties

---

<sup>12</sup> Claimant’s 60-day Submission, ¶¶ 8-9, 16-17, 21.

<sup>13</sup> Claimant’s 60-day Submission, ¶ 9.

<sup>14</sup> Claimant’s 60-day Submission, ¶¶ 10-16, *citing* Exhibit CL-0003, “Shall,” Black’s Law Dictionary, (12th ed.), dated 2024; Exhibit CL-0004, “Shall,” Oxford English Dictionary, last visited 6 August 2024; and Exhibit CL-0005, “Shall,” Merriam-Webster, last visited 6 August 2024.

<sup>15</sup> Exhibit CL-0006, *B-Mex, LLC Deana Anthonie, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Respondent’s Memorial on Jurisdiction Objections, dated 30 May 2017, ¶¶ 40, 43.

<sup>16</sup> Claimant’s 60-day Submission, ¶¶ 17-20, *citing* Exhibit CL-0006, *B-Mex, LLC Deana Anthonie, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Respondent’s Memorial on Jurisdiction Objections, dated 30 May 2017, ¶¶ 40, 43, 44.

<sup>17</sup> Claimant’s 60-day Submission, ¶ 21, *citing* Exhibit CL-0002, Article 24(2) and Article 40, Vienna Convention.



nor the Consolidation Tribunal can change a mandatory requirement under Chapter 11 of NAFTA, including the 60-day time limit for constitution of a consolidation tribunal.<sup>18</sup>

46. According to Claimant, Respondent’s departure in this case from its otherwise consistent position on the mandatory meaning of the word “shall,” cannot be the basis to disregard the mandatory 60-day time limit under NAFTA Article 1126(5). Claimant relies on correspondence among the Parties and the ICSID Secretariat leading up to the constitution of the Consolidation Tribunal wherein both Parties acknowledged the lapse of the 60-day timeline under NAFTA Article 1126(5). Claimant highlights that it had raised the issue in its correspondence dated 1 May 2024 and had invited Respondent to provide proposals to resolve it. Claimant argues, therefore, that the Parties have not and could not have waived the 60-day requirement under NAFTA Article 1126(5).<sup>19</sup>

*(ii) Legal effect of failure to constitute the Consolidation Tribunal within 60 days*

47. Claimant submits that the consequence of non-compliance with the timeline of 60 days under NAFTA Article 1126(5) is that the Consolidation Tribunal lacks jurisdiction. Claimant states that non-compliance with mandatory procedural requirements, such as pre-arbitration negotiation and litigation requirements, has been held by other investment tribunals to negate the jurisdiction of the tribunal and is not merely a matter of admissibility.<sup>20</sup>
48. Claimant further states that in cases where tribunals have treated specific requirements as mere “formalities”, they have done so where one of the parties has thereafter taken steps to remedy the failure.<sup>21</sup> Claimant asserts, however, that the present case is different as NAFTA Article 1126(5) imposes a strict condition and time limit for compliance, without any ability for the parties or the ICSID Secretary-General to extend that time limit. Claimant also asserts that since NAFTA Article 1126 sets out a complete code for the adjudication of requests for consolidation, the very first step prescribed therein cannot

---

<sup>18</sup> Claimant’s 60-day Submission, ¶¶ 21-22.

<sup>19</sup> Claimant’s 60-day Submission, ¶¶ 23-30.

<sup>20</sup> Claimant’s 60-day Submission, ¶¶ 31-38, *citing* Exhibit CL-0007, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, dated 2 July 2013, ¶¶ 6.1.7, 6.2.9, 6.3.13-15; Exhibit CL-0008, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, dated 22 August 2012, ¶¶ 192-194, 286; Exhibit CL-0009, *ICS Inspection and Control Services Limited v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction, dated 10 February 2012, ¶¶ 262, 1 (Decisions); Exhibit CL-0010, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, dated 21 June 2011, ¶ 94; Exhibit CL-0011, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, dated 8 December 2008, ¶ 160(2); Exhibit CL-0012, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, dated 2 June 2010, ¶¶ 314-318; Exhibit CL-0013, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules, dated 1 November 2019, ¶¶ 38, 48.

<sup>21</sup> Claimant’s 60-day Submission, ¶¶ 39-40, *citing* Exhibit CL-0014, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, dated 26 January 2006, ¶ 117; Exhibit CL-0015, *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, dated 29 April 2014, ¶ 320.

simply be ignored. Further, Claimant states that there exists no ability here for the Parties to extend a deadline contained in an investment treaty.<sup>22</sup>

49. According to Claimant, therefore, the establishment of a consolidation tribunal within the 60-day time limit is a condition precedent to valid jurisdiction, and distinguishable from formalities or omissions which may be remedied.<sup>23</sup>

*(iii) Prejudice to Claimant if the alleged defect in jurisdiction is not cured*

50. Claimant argues that non-compliance with the 60-day time limit for constituting the Consolidation Tribunal would make any subsequent award issued by the Constitution Tribunal vulnerable to challenge, which will cause grave prejudice to Claimant. Claimant alleges that Respondent has not acted in good faith during the FM1 and FM2 proceedings as well as this consolidation proceeding, and its conduct demonstrates “the very real likelihood” that Respondent will challenge any subsequent final award on jurisdictional grounds if this suits its purpose.<sup>24</sup>

51. Claimant asserts that Respondent is attempting to use this consolidation proceeding to forum-shop, delay the FM1 proceedings and avoid complying with the provisional order issued in the FM1 proceedings. Claimant states that Respondent’s purported objective for filing the Consolidation Request, i.e., having all claims heard by a single tribunal, can be met through withdrawal of the FM2 proceedings now that the FM1 tribunal has admitted Claimant’s ancillary claims. Claimant states that despite this, Respondent has refused to cooperate in withdrawing the FM2 proceedings and is avoiding submitting all claims to the tribunal in the FM1 proceedings, contrary to its stated objective for filing the Consolidation Request.<sup>25</sup>

52. Claimant states that if Respondent’s actions are *bona fide*, it must refile its Consolidation Request to avoid any challenges to the resulting award. According to Claimant, Respondent’s insistence on ignoring the mandatory 60-day time limit under NAFTA Article 1126(5) is hindering the fair and efficient resolution of the disputes between the Parties.<sup>26</sup>

**(2) Respondent’s Position**

*(i) Mandatory nature of the 60-day timeline under NAFTA Article 1126(5) and legal effect of failure to constitute the Consolidation Tribunal within 60 days*

53. Respondent argues that the 60-day timeline under NAFTA Article 1126(5) is only a procedural requirement imposed upon the ICSID Secretary-General, and not a “condition precedent” or “strict requirement”, non-compliance with which would affect the

---

<sup>22</sup> Claimant’s 60-day Submission, ¶¶ 39-44.

<sup>23</sup> Claimant’s 60-day Submission, ¶ 45.

<sup>24</sup> Claimant’s 60-day Submission, ¶¶ 46-48.

<sup>25</sup> Claimant’s 60-day Submission, ¶¶ 50-55.

<sup>26</sup> Claimant’s 60-day Submission, ¶¶ 49, 56.

Consolidation Tribunal’s jurisdiction.<sup>27</sup> Respondent disputes Claimant’s interpretation of the first sentence of NAFTA Article 1126(5) in this regard.<sup>28</sup>

54. Respondent states that Claimant’s interpretation erroneously focuses on only one element of Article 31(1) of the Vienna Convention, i.e., the “ordinary meaning” of the word “shall”, while ignoring the context of the provision and the “object and purpose” of NAFTA. Respondent does not dispute that the word “shall” ordinarily implies a “mandatory” requirement. However, according to Respondent, the relevant context, object and purpose for interpretation of NAFTA Article 1126(5), which include the NAFTA, ICSID Convention and UNCITRAL Arbitration Rules, do not support Claimant’s interpretation of NAFTA Article 1126(5).<sup>29</sup>
55. In this regard, Respondent argues, *first*, that the 60-day timeline is imposed on the Secretary-General of ICSID, which is a neutral, administrative and procedural position meant to facilitate submission of investment disputes to arbitration. Respondent states that the 60-day timeline enables the ICSID Secretary-General to follow due process by allowing parties sufficient time to comment on the proposed arbitrators. Respondent states that, consequently, the procedure is not entirely in the control of the ICSID Secretary-General and depends on the actions of the Parties. According to Respondent, this is relevant context which supports the interpretation that the 60-day time limit is only a procedural requirement which does not affect the jurisdiction of the Consolidation Tribunal.<sup>30</sup>
56. *Second*, Respondent argues that the 60-day time limit under NAFTA Article 1126(5) is not a condition precedent to the Parties’ consent to arbitration. Respondent distinguishes the 60-day requirement under Article 1126(5), which is applicable to the ICSID Secretary-General and does not condition the Parties’ consent to arbitration, from mandatory conditions under other provisions of NAFTA which are to be fulfilled by a disputing investor before filing a claim. According to Respondent, the investment arbitration decisions cited by Claimant confirm this distinction. According to Respondent, failure to comply with the 60-day timeline is a “technical failure” which was cured in the present case, by establishing the Constitution Tribunal once the independence and impartiality of the three arbitrators had been confirmed.<sup>31</sup>
57. *Third*, Respondent argues that interpretation of NAFTA Article 1126(5) must be done in light of the object and purpose of NAFTA and Section B of Chapter 11 of NAFTA, which include the creation of “effective procedures . . . for the settlement of disputes”, “equal treatment among investors” and “due process of law before an impartial tribunal”. Respondent further notes that the UNCITRAL Arbitration Rules (which pre-date NAFTA), which are applicable to the constitution of the Consolidation Tribunal, emphasize the

---

<sup>27</sup> Respondent’s 60-day Submission, ¶¶ 36, 37, 43.

<sup>28</sup> Respondent’s 60-day Submission, ¶¶ 31-32, 37, 40, 42.

<sup>29</sup> Respondent’s 60-day Submission, ¶¶ 30-33.

<sup>30</sup> Respondent’s 60-day Submission, ¶¶ 34-36.

<sup>31</sup> Respondent’s 60-day Submission, ¶¶ 37-41, *citing* Exhibit RL-0001-ENG, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, dated 11 October 2002, ¶ 44.

requirement of impartiality and independence of arbitrators.<sup>32</sup> Respondent submits that Claimant’s interpretation of NAFTA Article 1126(5) is contrary to the aforesaid object and purpose for the following reasons:

- (i) Claimant’s interpretation of NAFTA Article 1126(5), which would deny jurisdiction to a consolidation tribunal composed after 60 days, would also prevent the ICSID Secretary-General from ensuring compliance with the fundamental requirements of due process, impartiality and independence. Respondent submits that the 60-day timeline is essential to allow the ICSID Secretary-General to obtain parties’ comments on the proposed tribunal and, therefore, to ensure due process and facilitate the constitution of an impartial and independent tribunal. Respondent argues that even in the present case, the delay of 26 days in establishing the Consolidation Tribunal was necessary to allow the Parties adequate time to complete their review process. Respondent accordingly states that Claimant’s interpretation would render useless the objectives of due process and impartiality and independence of the consolidation tribunal and must be rejected.<sup>33</sup>
- (ii) Similarly, Claimant’s interpretation would defeat NAFTA’s stated objective of effective and efficient dispute resolution. Respondent argues that Claimant’s assertion that the Consolidation Tribunal does not have jurisdiction and Respondent must file a new consolidation request due to lapse of the 60-day timeline, impedes the efficient resolution of disputes and only adds to the time and cost of the process.<sup>34</sup> Respondent notes that Claimant’s proposed solution would require Respondent to re-file its request and the Secretary-General to re-compose the same tribunal of previously appointed arbitrators leading to unnecessary procedural redundancy and delay.<sup>35</sup>
- (iii) The purpose of NAFTA Article 1126 has been held to be the “avoidance of procedural harassment” of parties. Further, the procedural rights of both sides must be balanced in consolidation proceedings. Claimant’s interpretation would give parties the ability to unilaterally prevent the proper constitution of a consolidation tribunal by delaying this process, thereby rendering Article 1126 useless.<sup>36</sup>

*(ii) Prejudice to Claimant if the alleged defect in jurisdiction is not cured*

58. Respondent denies that Claimant will suffer prejudice if its Preliminary Objection on 60-day Period is rejected. Respondent states that, practically, awards in investor-State cases have only been annulled for improper constitution of the tribunal when the defect involves

---

<sup>32</sup> Respondent’s 60-day Submission, ¶¶ 42-49.

<sup>33</sup> Respondent’s 60-day Submission, ¶¶ 50-53.

<sup>34</sup> Respondent’s 60-day Submission, ¶¶ 54-57.

<sup>35</sup> Respondent’s 60-day Submission, ¶ 42.

<sup>36</sup> Respondent’s 60-day Submission, ¶¶ 58-62, *citing* Exhibit RL-0003-ENG, *Canfor Corporation and others v. United States of America*, UNCITRAL, Order of the Tribunal, 7 September 2005, ¶ 74.

a serious deviation from a fundamental rule of procedure, and non-compliance with the 60-day time limit under NAFTA Article 1126(5) would be irrelevant in this regard.<sup>37</sup>

59. Respondent further states that given Respondent’s position in these proceedings, there would be no legal basis or reason for Respondent to go against its own actions and challenge an award on grounds of non-compliance with the 60-day time limit. Respondent has not challenged the jurisdiction of the Consolidation Tribunal and has taken the position that any technical failure to comply with the time limit was promptly remedied when the ICSID Secretary-General established the Consolidation Tribunal as soon as the impartiality and independence of the arbitrators was confirmed.<sup>38</sup> Respondent asserts that Claimant has also not suffered any prejudice from the delay of 26 days in the constitution of the Consolidation Tribunal.<sup>39</sup>

### **(3) Consolidation Tribunal’s Analysis**

60. There is no dispute that the Consolidation Tribunal was constituted 26 days after the expiry of the 60-day period specified in NAFTA Article 1126(5).<sup>40</sup>
61. The Consolidation Tribunal interprets NAFTA Article 1126(5) in accordance with Article 31(1) of the Vienna Convention, i.e., in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
62. The Consolidation Tribunal agrees with Claimant that the word “shall” in NAFTA Article 1126(5) indicates a mandatory requirement. However, mandatory does not mean that the requirement is properly characterized as a condition precedent to consent to the consolidation proceedings. As Respondent points out, the mandatory requirement falls upon the Secretary-General of ICSID and not upon the disputing Parties (“the Secretary-General shall establish”, see ¶ 23 above). Being an obligation upon a third party and outside the direct control of the Parties, the plain language does not support an interpretation that the 60-day period for establishing the Consolidation Tribunal is a condition of consent of the disputing Parties for consolidation proceedings. In this regard, the Consolidation Tribunal disagrees with Claimant that the 60-day period set out in NAFTA Article 1126(5) is analogous to certain pre-conditions for requesting arbitration, such as a mandatory requirement to exhaust domestic remedies or a mandatory period for negotiations.<sup>41</sup> Nor is it constructed as a condition precedent to the consolidation proceedings continuing.
63. The Consolidation Tribunal agrees with Respondent that the purpose of NAFTA Article 1126(5) is to serve efficiency, in the sense of procedural economy. The 60-day period specified for the constitution of the Consolidation Tribunal allows the consolidation proceedings to move forward with due dispatch, while preserving due process by allowing

---

<sup>37</sup> Respondent’s 60-day Submission, ¶¶ 74-75.

<sup>38</sup> Respondent’s 60-day Submission, ¶ 41.

<sup>39</sup> Respondent’s 60-day Submission, ¶ 76.

<sup>40</sup> Claimant’s 60-day Submission, ¶ 27; Respondent’s 60-day Submission, ¶ 1.

<sup>41</sup> Claimant’s 60-day Submission, ¶ 32-38.



- time for the Parties to provide their views on the prospective members of a consolidation tribunal. Indeed, the reason for the delay in constituting the Consolidation Tribunal was because both Parties availed themselves of the opportunity to have input on the candidates.
64. The Consolidation Tribunal does not consider this interpretation to be inconsistent with other uses of the word “shall” in different provisions of NAFTA, which relate to different requirements specified under the treaty, with distinct contexts and purposes.
  65. Were Claimant’s interpretation to be accepted, the procedure would require Respondent to refile its Consolidation Request, and subsequently for ICSID to re-constitute a consolidation tribunal. In the Consolidation Tribunal’s view, this would frustrate the efficiency objectives of NAFTA Article 1126.
  66. In addition, the Consolidation Tribunal considers that the particular factual circumstances of this case confirm the view that non-compliance with the 60-day period does not constitute a bar to the jurisdiction of the Consolidation Tribunal. Specifically, the ICSID Secretary-General initiated the process for the constitution of the Consolidation Tribunal promptly after the submission of Respondent’s request of 12 February 2024. Ten days later, on 22 February 2024, the ICSID Secretary-General submitted a first list of potential arbitrators and requested the Parties to provide their comments by 29 February 2024. Claimant then requested the ICSID Secretary-General to extend the deadline to provide comments by 14 days, which was granted. Claimant requested a second, four-day extension of the deadline for the submission of comments, which was, again, granted. Finally, Claimant successfully requested a third, three-day extension of the deadline. On 21 March 2024 (that is, 38 days after Respondent’s consolidation request), Claimant submitted its comments objecting to one of the three proposed arbitrators and Respondent requested an opportunity to react to Claimant’s objection. This opportunity was granted and, on 1 April 2024, Respondent filed its comments on Claimant’s objection to a proposed arbitrator.
  67. On 11 April 2024, the ICSID Secretary-General submitted a revised list of arbitrators, which, this time, was met with Respondent’s objection to the new proposed arbitrator. This objection was filed on 17 April 2024. Thereafter, on 25 April 2024, the ICSID Secretary-General submitted a third list of arbitrators to which none of the Parties objected. The Consolidation Tribunal was thus constituted on 8 May 2024.
  68. Against this background, it bears recalling that NAFTA Article 1126(5) significantly restricts the pool of arbitrators from which the ICSID Secretary-General may choose. One of them must be a national of the “disputing Party” (Respondent) and another must be a national of the disputing investor (Claimant). The Consolidation Tribunal is thus mindful of the complexity and importance of the delicate task entrusted to the ICSID Secretary-General to identify potential candidates and ensure their availability and suitability to serve on a tribunal before they can be proposed to the parties for consideration.
  69. Despite the several requests from the Parties, the ICSID Secretary-General was able to submit two lists of arbitrators within 60 days from the Consolidation Request. Even after the expiry of the 60-day period, the Secretariat was confronted with a further objection to



a proposed arbitrator, thus requiring it to submit a third list of arbitrators for consideration. The ICSID Secretary-General thus acted actively and diligently during the constitution of the Consolidation Tribunal. The delay beyond the 60-day period is rather a function of the specific circumstances of this case, which, as explained above, included requests of both Parties during the constitution process either to extend deadlines for submission of comments, object to proposed arbitrators, or to be afforded an opportunity to react to the other Party's objections. This lends further support to the conclusion that the delay beyond the 60-day period may not amount to a bar to jurisdiction, especially where the Parties' requests throughout the Consolidation Tribunal's constitution heavily contributed to this delay.

70. For the above reasons, the Consolidation Tribunal considers that the 60-day period is not a requirement that has a bearing on its jurisdiction. As such, non-compliance with the 60-day period does not deprive, especially in the circumstances of this case, the Consolidation Tribunal of jurisdiction under NAFTA Article 1126(5).
71. Since the purpose of the 60-day period is to balance efficiency with due process, the Consolidation Tribunal accepts Respondent's submission that the successful constitution of the Consolidation Tribunal has cured the procedural defect of untimeliness, taking into account that: (i) due process was respected; and (ii) neither Party has been prejudiced by the 26-day delay in the Consolidation Tribunal's constitution.
72. In respect of prejudice, Claimant's primary argument is that an award rendered by the Consolidation Tribunal (in a scenario in which Respondent's Consolidation Request is granted) would be vulnerable to challenge in post-award proceedings.<sup>42</sup> In support of the likelihood of this scenario, Claimant argues that Respondent's conduct lacks good faith, constitutes forum-shopping and constitutes a pattern of obstructionist behaviour.<sup>43</sup> The Consolidation Tribunal considers this risk to be speculative and the allegations with respect to Respondent's conduct to be unproven, at least at this stage of the proceedings. The Consolidation Tribunal is not satisfied that Claimant will suffer serious prejudice as a result of the constitution of the Consolidation Tribunal after the 60-day period provided for in NAFTA Article 1126(5). On the other hand, the refiling of Respondent's Consolidation Request causes prejudice to both Parties in the form of considerable delay and additional expense.
73. For the above reasons, the Consolidation Tribunal considers Claimant's Preliminary Objection on 60-day Period to be without merit and rejects it. The Consolidation Tribunal confirms that its establishment after the 60-day period provided for in NAFTA Article 1126(5) does not impact its jurisdiction to decide whether to assume jurisdiction over all claims in ICSID Arbitration Nos. ARB/21/14 and ARB/23/28, and, subject to its decision on the Consolidation Request, to hear and determine them as appropriate.

---

<sup>42</sup> Claimant's 60-day Submission ¶¶ 46-47.

<sup>43</sup> Claimant's 60-day Submission ¶¶ 50, 52, 56.

Procedural Order No. 2

74. The Consolidation Tribunal does not consider it appropriate to make any decision with respect to the costs associated with this preliminary objection at this time and reserves the issue of costs for consideration at a later stage of these proceedings.
75. In light of the Consolidation Tribunal’s decision, the balance of the Procedural Timetable (Annex A to PO 1) is in effect and Respondent’s Memorial of Consolidation is due on 7 October 2024, in accordance with that timetable.

**V. ORDER**

76. The Consolidation Tribunal has carefully considered the positions of the Parties. As set out above, the Consolidation Tribunal:
- (i) REJECTS Claimant’s Preliminary Objection on 60 Day Period;
  - (ii) CONFIRMS that it is duly constituted and has jurisdiction to decide whether to assume jurisdiction over all claims in ICSID Arbitration Nos. ARB/21/14 and ARB/23/28, and, subject to its decision on the Consolidation Request, to hear and determine them as appropriate;
  - (iii) RESERVES the issue of costs; and
  - (iv) CONFIRMS the next steps in the Procedural Timetable as set out in Annex A to PO 1.

On behalf of the Consolidation Tribunal,

[Signed]

---

Prof. Albert Jan van den Berg  
President of the Consolidation Tribunal  
Date: 29 August 2024