**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID Case Nos. ARB/21/14 & ARB/23/28**

BETWEEN:

**FIRST MAJESTIC SILVER CORP.**

Claimant/Investor

**- and -**

**GOVERNMENT OF UNITED MEXICAN STATES**

Respondent/Contracting Party

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# CLAIMANT'S COUNTER MEMORIAL ON RESPONDENT'S REQUEST FOR CONSOLIDATION

**ICSID Case Nos. ARB/21/14 & ARB/23/28**

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## GLOSSARY

| TERM | DEFINITION |
|---|---|
| **APA** | Advanced Purchase Agreement |
| **Claimant or First Majestic** | First Majestic Silver Corp. |
| **Claimant's Memorial** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Memorial on the Merits, dated April 25, 2022. |
| **Claimant's Response to the Preliminary Objection to Jurisdiction** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, dated September 1, 2023. |
| **Consolidation Memori**al | *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Memorial of Consolidation, dated October 7, 2024. |
| **Consolidation Request** | *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Request for the Establishment of a Consolidation Tribunal, dated February 12, 2024. |
| **Decision on Preliminary Objection to Jurisdiction** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, dated December 20, 2023. |
| **Decision on Provisional Measures** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, dated May 26, 2023. |
| **Decision on Revocation Reques**t | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, dated September 1, 2023. |
| **DTT** | Avoidance of Double Taxation Treaty |
| **Expedited Ruling on Ancillary Claims Request** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14 Tribunal's Expedited Ruling on Ancillary Claims Request, dated July 15, 2024. |
| **FM1** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14. |
| **FM2** | *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28. |
| **MAP** | Mutual Agreement Procedures |
| **NAFTA** | North American Free Trade Agreement |
| **NOI** | Notice of Intent |
| **Order** | The Order issued in *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Provisional Measures, dated May 26, 2023, ¶ 143(1). |

| | |
|---|---|
| **PEM** | Primero Empresa Minera, S.A. de C.V |
| **PO 6** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Procedural Order No. 6, dated February 29, 2024. |
| **Preliminary Objection to Jurisdiction** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Preliminary Objection to Jurisdiction, dated July 28, 2023. |
| **Rebuttal on Jurisdiction** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Rebuttal for Respondent's Preliminary Objection to Jurisdiction, dated September 9, 2023. |
| **Rejoinder to Preliminary Objection to Jurisdiction** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Claimant's Rejoinder on Preliminary Objection to Jurisdiction, dated November 6, 2024. |
| **Reply to Revocation Request** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Reply to Respondent's Request for Revocation, dated July 21, 2023. |
| **Request for Admission of Ancillary Claims** | *First Majestic Silver Corp. v. Government of United Mexican States (I),* ICSID Case No. ARGB/21/14, Claimant's Request for Ancillary Claims, dated June 24, 2024. |
| **Request for Expedited Ruling on Ancillary Claims** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14 Claimant's Request for an Expedited Ruling on its Ancillary Claims Request, July 12, 2024. |
| **Request for Provisional Measures** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14 Claimant's Request for Provisional Measures, January 4, 2023. |
| **Respondent** | The Government of the United Mexican States |
| **Revocation Request** | *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Request for Revocation of Recommendation for Provisional Measure, dated June 19, 2023. |
| **RFA** | Request for Arbitration |
| **SAT** | Servicio de Administración Tributaria |
| **USMCA** | United States–Mexico–Canada Agreement |
| **VAT** | Value Added Tax |

## I. OVERVIEW

1. The Claimant opposes the United Mexican States' (**Respondent**) Request for Consolidation (**Consolidation Request**)[1] made pursuant to Article 1126 of North American Free Trade Agreement (**NAFTA**), concerning the following two proceedings registered two years apart by the Claimant with the ICSID Secretariat: ICSID Case No. ARB/21/14 (**FM1**)[2] and ICSID Case No. ARB/23/28 (**FM2**).[3] In FM1, the Claimant advanced claims primarily in relation to the Respondent's repudiation of its Advanced Pricing Agreement (**APA**). In FM2, the Claimant advanced a separate claim concerning the Respondent's refusal to release VAT refunds. Thereafter, the FM1 Tribunal has admitted the VAT refunds claim as an ancillary claim, subject to the Consolidation Tribunal lifting its stay. The Claimant has taken the necessary steps to discontinue the FM2 proceedings concerning the VAT refunds claim which is to be advanced before the FM1 Tribunal. The current procedural posture therefore **leaves no substantive claims before two tribunals for consolidation**.

2. In fact, the only remaining reason for these Consolidation Proceedings is the Respondent's unjustified refusal to accept the Claimant's reasonable offer to reimburse the Respondent's minimal costs relating to the FM2 proceeding. The Respondent has consistently refused to explain its position, or absurdly claimed that the discontinuance of the FM2 proceedings is not within its control even though the very act of objecting to the Claimant's discontinuance, has perpetuated the fiction of an ongoing second claim.

3. This Response to the Respondent's Memorial on Consolidation (**Consolidation Memorial**),[4] will establish the following:

i. The Respondent's Consolidation Request should be dismissed as being rendered substantively "moot" based on the substantially changed circumstances from those presented on February 12, 2024 in the Consolidation

[1] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Request for the Establishment of a Consolidation Tribunal, dated February 12, 2024, (**Consolidation Request**), **RM-0001**.

[2] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14 (**FM1**).

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

[4] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Consolidation Memorial, dated October 7, 2024, (**Consolidation Memorial**).

Request. Currently, the Claimant is no longer pursuing two claims before two different tribunals. In fact, the Claimant has made it abundantly clear to the Respondent, during the period leading up to July 15, 2024, and consistently thereafter, that the FM1 Tribunal is to have jurisdiction over both the claims. Therefore, at this time the Consolidation Tribunal no longer has before it the question of whether Claimant's substantive claims should be consolidated (and whether the requirements of NAFTA Article 1126(2) have been satisfied) as the Respondent's Consolidation Request has been overtaken by the new circumstances. The Claimant has taken concrete steps to make it possible for the two claims filed against the Respondent to be heard by a single tribunal. The Respondent's steadfast refusal to accept payment by the Claimant of reasonable costs in relation to the discontinuance of the FM2 Tribunal is an artifice, intended to give the impression to this Consolidation Tribunal that the Claimant is proceeding with separate claims before separate tribunals—which is not the case. The Claimant has manifested its decision to discontinue the FM2 proceeding by serving its Request for Discontinuance to ICSID on October 1, 2024 (**Request for Discontinuance**)[5] and repeatedly offered to pay reasonable costs to the Respondent. As further assurance to the Consolidation Tribunal, the Claimant hereby reaffirms that it will not be pursuing its VAT refunds claim separately in the FM2 proceeding, which does not yet have a fully constituted tribunal. As both the admission of the VAT refunds claim in FM1 and the discontinuance of the identical claim in FM2 is underway, ***a ruling by the Consolidation Tribunal is not required to resolve the Respondent's Consolidation Request***.

ii. Alternatively, the Consolidation Tribunal should render a decision that Respondent's Consolidation Request does not satisfy the requirements of NAFTA Article 1126(2), because the two claims are concerned with different

[5] *See 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, dated October 1, 2024, (**Request for Discontinuance**), **RM-0059**.

questions of facts and raise distinct questions of law, and the consolidation of the two claims will not result in the "fair and efficient resolution of the claims."[6]

4. The Claimant will also demonstrate in this submission that the Respondent has not advanced the Consolidation Request with "clean hands", which should result in a negative decision on its Request:

a. The Respondent is not acting in good faith and is engaged in abuse of rights. This is apparent from the Respondent's conduct:

i. in litigating and re-litigating (unsuccessfully) the validity of the FM1 Tribunal's Decision on Provisional Measures (**Decision on Provisional Measures**)[7] and the accompanying Order[8] dated May 26, 2023.

ii. perpetuating the ongoing violation of the international legal obligation imposed by the Order, by refusing to fully make the VAT refunds accessible to the Claimant's Mexican subsidiary, Primero Empresa Minera, S.A. de C.V. (**PEM**) as of January 4, 2023.

iii. refusal to make VAT refunds accessible to the Claimant and PEM, even after bringing its failed challenge to the validity of the Order, and failing in its challenge to the jurisdiction of the FM1 Tribunal so as to nullify the Order.

iv. egregious conduct, which is particularly evident from its most recent measures taken on August 29, 2024, in imposing a freeze on PEM's newly opened bank account (which the Respondent was expressly ordered by the FM1 Tribunal to refrain from doing).[9]

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[6] Art. 1126(2), North American Free Trade Agreement (**NAFTA**), dated January 1, 1994, **RML-0001**.

[7] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Provisional Measures, dated May 26, 2023, (**Decision on Provisional Measures**), **RM-0009**.

[8] *See* Decision on Provisional Measures, dated May 26, 2023, ¶ 143, **RM-0009**.

[9] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated September 3, 2024, **CM-0011**; *see also* Letter from Riyaz Dattu to Sara Marzal, dated October 7, 2024, **CM-0032**.

b. In the further alternative, the Consolidation Tribunal may exercise its discretion when electing whether or not to make the decision concerning consolidating two proceedings. This discretionary decision should not be made in favor of the Respondent in the face of deliberate and ongoing violations of international law.

c. Finally, as discussed further below, an alternate process exists, whereby the FM1 Tribunal, can immediately embark on adjudicating all claims presented by the Claimant including the ancillary claim. However, the Respondent has steadfastly refused to have FM1 adjudicate both claims (for improper reasons) and instead is seeking to displace FM1 Tribunal with the Consolidation Tribunal. The Consolidation Tribunal can thwart the effectiveness of the Respondent's objection to the discontinuance of the FM2 proceeding, by lifting the suspension of both the FM1 Tribunal and the FM2 proceeding. The resolution of the cost issues for both the Consolidation Tribunal and FM2 proceeding, is discussed further below.

5. In summary, the "fair and efficient" resolution of the claims can be best achieved by either:

a. The rejection of the Respondent's Consolidation Request, on the basis of the Consolidation Tribunal's lack of authority to consolidate based on the change in circumstances from the time of the filing of the Consolidation Request, and the consequent lifting of the stays on the FM1 Tribunal and FM2 proceedings, which would allow the VAT refunds claim to be admitted to FM1 and a tribunal to be constituted for the FM2 proceeding solely to decide the remaining issue of costs;

or, in the alternative,

b. The rejection of the Respondent's Consolidation Request, on the basis of the Consolidation Tribunal's authority to consolidate, and the consequent lifting of the stays on the FM1 Tribunal and FM2 proceedings, because the Respondent has failed to demonstrate the existence of a "question of law or fact in common" and/or that the "fair and efficient resolution of the claims" is warranted under the circumstances, leaving within the Consolidation Tribunal's discretion the

determination of the parties' claims for costs, *i.e.*, the Respondent's claim for costs in FM2 and the Claimant's claim for costs in relation to the Consolidation Request.

### A. Respondent's Consolidation Request Should be Dismissed Based on Changed Circumstances

6. Since the Respondent filed its Consolidation Request on February 12, 2024, the circumstances have changed so significantly as to eliminate any need for consolidation.

7. In its Consolidation Request, the Respondent asked for a consolidation order pursuant to NAFTA Article 1126(2) to have the two claims relating to the revocation of the APA and VAT refunds, respectively FM1 and FM2, heard before a single tribunal.

8. In order to avoid delays and costs related to obtaining an order for consolidation—which has already spanned approximately 10 months—the Claimant has taken all the necessary steps within its power to have both claims adjudicated by the FM1 Tribunal. This has included requesting the addition of the FM2 claim to be admitted as an ancillary claim in FM1 pursuant to ICSID Arbitration Rule 40.[10] The FM1 Tribunal granted the Claimant's request to add the ancillary claim by its decision on July 15, 2024.[11]

9. As detailed further below, the Respondent has put up unmeritorious procedural obstacles to the discontinuance of the FM2 proceeding, all for the purpose of denying both claims being advanced before the FM1 Tribunal. In particular, the Respondent has used the suspension of the FM2 proceeding in order to block the resolution of any outstanding costs issues in connection with the discontinuance of the FM2 proceeding.

10. On the basis of the foregoing, the Claimant requests the Consolidation Tribunal to dismiss the Consolidation Request based on the following: (i) there are no longer two claims being pursued by the Claimant before two tribunals because the FM1 Tribunal will have jurisdiction over both the claims once its proceedings are no longer suspended; (ii) the facts presented, which indicate that the two claims will be adjudicated by a single tribunal render it unnecessary for the

[10] To be clear, the "identical claims" are the FM2 claim and the ancillary claims, not the FM1 and FM2 claims as the Respondent falsely states in its Consolidation Memorial in ¶¶ 72-73.

[11] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Tribunal's Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, (**Expedited Ruling on Ancillary Claims Request**), **RM-0040**.

Consolidation Tribunal to determine if requirements of NAFTA Article 1126(2) have been satisfied; and (iii) as the Claimant filed its Request for Discontinuance in relation to the FM2 proceeding, a tribunal to be constituted (because of the Respondent's obstinance in agreeing to reasonable costs) will only address the remaining issue of costs. (Of course, the parties could always resolve the matter by agreement thereby making it unnecessary to fully constitute the FM2 Tribunal).

### B. In the Alternative, the Respondent's Consolidation Request Fails the Test under NAFTA Article 1126(2)

11. The following submissions have been made in the alternative, if the Consolidation Tribunal determines that it is required to analyze (notwithstanding the very different circumstances that exist now relative to when the Consolidation Request was made) whether the requirements of NAFTA Article 1126(2) have been met by the Respondent's Consolidation Request. In order to do so, however, it would have to assume—contrary to existing reality—that the VAT refunds claim previously submitted in FM2 were no longer going to be admitted as an ancillary claim in FM1 (which has already been ruled to be the case by the FM1 Tribunal). Effectively, the Consolidation Tribunal would have to proceed on the basis of a fiction, that the Respondent is seeking to perpetuate, concerning the second claim being before a second tribunal. This fictional construct is the opposite of the Claimant's stated intentions and necessary actions undertaken, including the filing of the Notice of Discontinuance on October 1, 2024.

12. Assuming the foregoing unrealistic premise, the Claimant's position is that the Respondent has nevertheless failed to demonstrate (1) the existence of "question of law or fact in common" (the questions arising in FM1 are distinct from those in FM2); and (2) that the consolidation of claims under the Consolidation Tribunal would result in a "fair and efficient resolution of the claims."[12]

#### 1. FM 1 – Question of Facts and Law are Complex and Unique

13. The facts and law relevant for the FM1 proceedings are complex and relate to events that have transpired over the course of a decade. In the year 2012, the Respondent's tax

[12] Art. 1126(2), North American Free Trade Agreement (**NAFTA**), dated January 1, 1994, **RML-0001**.

authority, the Servicio de Administration Tributaria (**SAT**), negotiated and entered into an Advanced Pricing Agreement (**APA**) with the Claimant's Mexican subsidiary, PEM.

14. APAs are widely used in many countries in order to provide certainty and transparency in transfer pricing for income tax purposes between related entities.[13] The goal of an APA is to agree on a transfer pricing methodology for certain types of described transactions, so as to avoid future disputes concerning revenues earned and profits.[14]

15. Under Mexican law, an APA is a contractual agreement negotiated between a taxpayer and the SAT and is legally binding on both parties.[15] It provides the taxpayer stability and predictability on the revenues to be declared for purposes of calculating profits and income taxes over a five-year period.[16] The benefit of the APA obtained by PEM was that it confirmed that PEM's fixed selling price for its exports, made to a related entity between the years 2010 to 2014, would be treated as an arm's length transaction price.[17]

16. However, beginning in 2015 and then more forcefully as of 2019 (due to the change in administration after a national election, including in the leadership of the SAT), the SAT made several attempts to revoke the APA (using both legal and extra-legal means, by exerting pressure through government enforcement and by the use of threats and harassment), leaving the Claimant no choice but to consider resolution of the dispute before a neutral and independent arbitration tribunal constituted pursuant to Chapter 11 of NAFTA.[18]

17. Notwithstanding the Respondent's many legal and extra-legal actions seeking to revoke the APA, the APA continues to this date to be valid.

18. However, should the Respondent ultimately succeed in revoking the APA pursuant to a final decision of the Mexican courts (with all further legal avenues of appeal being exhausted),

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[13] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Memorial on the Merits, dated April 25, 2022, ¶¶ 41-42, 63-64 (**Claimant's Memorial**), **RM-0007**.

[14] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 63-64, **RM-0007**.

[15] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 63-74, **RM-0007**.

[16] *See* Claimant's Memorial, dated April 25, 2022, ¶ 381, **RM-0007**.

[17] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 63-70, **RM-0007**.

[18] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 5(b)-(p), **RM-0007**.

the claim for damages in the FM1 proceedings will exceed [redacted] based on the provisions of Chapter 11 of NAFTA.

2. FM 2 – By Contrast, Question of Facts and Law are Recent and Distinct

19. The claims in relation to the FM2 proceedings (in contrast to the FM1 proceedings) are entirely distinct, relatively recent, cover the period of years 2020 to 2022, and arise from circumstances that do not raise the same questions of facts and law as the claims before the FM1 Tribunal.

20. The FM2 proceedings were in part prompted by declaratory statements made by the Respondent's counsel during the hearing held on March 13, 2023, concerning the Claimant's Request for Provisional Measures (**Request for Provisional Measures**). During the hearing, the Respondent confirmed that PEM was lawfully entitled to its VAT refunds and that the Claimant "would only need to identify the details of that account in their refund request. This clearly, in our opinion, does not require the intervention of the Arbitral Tribunal."[19]

21. These statements confirmed that the Claimant's wholly-owned subsidiary, PEM, was entitled to the VAT refunds based on its mining activities in Mexico (and the export of silver from Mexico).

22. This is corroborated by the fact that during the relevant period, VAT refunds were payable to PEM, and were regularly deposited by the SAT into a bank account belonging to PEM. This is uncontroverted evidence that the VAT refunds were owed by the SAT, and once paid and deposited into the designated bank account, belonged to PEM.

23. However, PEM was not able to access these VAT refunds, which at the time of the hearing on March 13, 2023, amounted to [redacted] (representing the accumulation of three years of VAT refunds).

24. At the hearing, the Respondent's counsel assured the FM1 Tribunal and the Claimant, that notwithstanding the freezing of PEM's bank account where the VAT refunds were being deposited on a regular basis by the SAT, PEM would be able to access the VAT refunds by

[19] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Transcripts on Hearing for Provisional Measures, dated March 13, 2023, pp. 56-57, (**Hearing Transcripts**), **CM-0003**.

opening a new bank account and directing the SAT to deposit the refunds into the new bank account.[20]

25. The FM1 Tribunal, in its Order, dated May 26, 2023, required the Respondent (consistent with the statements made at the hearing), to pay to PEM, on a monthly basis, VAT refunds as of January 4, 2023 (the date of the Provisional Remedies Request). These VAT refunds were required to be paid into a new bank account that would be opened by PEM.[21] The FM1 Tribunal also ordered the Respondent not to take any steps in the future to impede PEM from being able to access funds from that newly opened bank account.[22]

26. The FM1 Tribunal also made it clear that based on its jurisdictional limitations and the applicable law for granting interim relief, it was required to restrict the relief to the period as of January 4, 2023.[23]

27. In order to preserve its legal rights to recover the [redacted] of VAT refunds covering the period 2020 to 2022, the Claimant had to take the additional step of filing and registering its NAFTA Chapter 11 claim with the ICSID Secretariat, based on the United States–Mexico–Canada Agreement (**USMCA**) legacy claims provisions. It was required to do this immediately, and within a very short period of about a month after the Order was issued on May 26, 2023, and prior to July 1, 2023 so as to be timely under the NAFTA legacy provisions deadline. The VAT refunds claim was filed with ICSID on June 29, 2023.[24]

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[20] *See, e.g.*, Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[21] *See* Decision on Provisional Measures, dated May 26, 2023, ¶ 143(1), **RM-0009**.

[22] *See* Decision on Provisional Measures, dated May 26, 2023, ¶ 143(1), **RM-0009**.

[23] *See* Decision on Provisional Measures, dated May 26, 2023, ¶ 129, ("In this context, the Tribunal observes that the Claimant's request concerns future deposits and not the amounts already deposited in the past. On the other hand, the unblocking of these previously deposited amounts would not be a proper object of a provisional measure because it would be a sort of anticipation of a decision on the merits on this issue"), **RM-0009**.

[24] *See First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Notice of Registration, dated July 21, 2023, **RM-0034**; *see also First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Request for Arbitration, dated June 29, 2023, **RM-0063**.

3. Questions of Fact in FM1 and FM2 are *not* in common

28. Having briefly summarized the relevant facts and legal issue in both the FM1 and the FM2 proceedings, this section sets out the factual differences. The next section will compare the differences in the legal questions for both claims.

29. The facts concerning the recovery of the VAT refunds are straightforward. The Respondent recognizes that the VAT refunds paid during the years 2020 to 2023 belong to PEM (as confirmed at the hearing on the Request for Provisional Measures).[25] However, the FM1 Tribunal indicated that it was constrained from ordering that all the VAT refunds should be made accessible to PEM. It determined that VAT refunds should be paid to PEM beginning January 4, 2023, and that these amounts should be deposited into a new bank account that would remain free of any restrictions.

30. When advancing its claim for the VAT refunds owed by the SAT to PEM, the Claimant limited its claim to recovery of the VAT amounts (*i.e.*, prior to 2023) not recoverable pursuant to the Order.

31. On the other hand, and as we discuss further below, the facts in relation to the FM1 claim spanning over a decade, beginning in 2010, are complex and nuanced. These include:

a. The details of the negotiations in 2011 and 2012 of the APA,

b. The completeness of the information that was provided by PEM to the SAT to obtain the APA,

c. Whether the technical requirements for the APA process were satisfied and their relevance for the question of the APA's validity,

d. The question of the relevance of the relationship between a single supervisory government official within the SAT responsible for large taxpayers and an outside expert (among many) retained by PEM to assist in the negotiations for obtaining an APA,

[25] There has never been any dispute between the parties that PEM is entitled to these VAT refunds.

e. The factual basis for the fixed selling price for the sale of silver for export, and the relevance of the streaming agreement implemented in 2010 by predecessor corporations and thereafter assumed by PEM,

f. The basis for the SAT's denial of remedies both domestic and international to PEM and to the Claimant,

g. The grounds for SAT's enforcement during the COVID-19 lockdown and in the face of a valid court injunction prohibiting such measures,

h. The SAT's refusal to accept PEM's guarantees in lieu of the enforcement actions,

i. The nature of the extra-legal and legal actions undertaken by the SAT to revoke the APA, and

j. The SAT's refusal to participate in the processes set out under three avoidance of double taxation treaties known universally as Mutual Agreement Procedure (**MAP**).

32. As explained further below, access to the VAT refunds was an issue that appeared to the Claimant to be resolvable based on PEM providing SAT with a guarantee in accordance with Mexican law. It was also unrelated to the issue of the legal ability of the SAT to revoke the APA and disrupt the transfer pricing methodology reflected in the APA.

4. Questions of Law in FM1 and FM2 are *not* in common

33. Not only are the facts underlying the two claims different (spanning over substantially different time periods), the questions of law at issue in the two claims filed two years apart are entirely different.[26]

34. In the case of the claims before the FM1 Tribunal, the legal questions to be resolved are complex and coextensive with the set of facts spanning over a decade in the case of the FM1 Tribunal proceedings. These legal questions in the FM1 Tribunal proceedings include:

[26] Based on the various challenges made by the Respondent, which are discussed further below, the FM1 Tribunal has decided that the Respondent's measures being challenged in the two proceedings are not the same, and therefore in granting the provisional relief there was no impediment imposed by Article 1134 of NAFTA. Furthermore, the Claimant did not breach its undertaking to avoid duplicate proceedings because the measures at issue in the two claims are different.

a. the constitutional and legal validity of the SAT's measures concerning revocation of the APA, and whether the revocation should have retroactive effect to the year 2010 (the first of the five taxation years the APA was to apply), in order to establish the transfer pricing methodology for the exported silver and the determination of revenues for calculating income taxes payable,

b. whether the Respondent unlawfully denied PEM access to the usual remedies that should have been available, under both the domestic law and the provisions of avoidance of double-taxation treaties – *i.e.*, blocking the Claimant's ability to resolve its dispute with the Respondent within Mexican courts and under the MAP contained in three avoidance of double taxation treaties entered into by Mexico with each of Barbados, Luxembourg, and Canada, and

c. the unlawfulness of the enforcement actions taken by the SAT against PEM and the Claimant in April 2020. These enforcement actions of the SAT were pursued notwithstanding the legal injunction issued by the Mexican courts that was in place prohibiting the SAT from taking such measures. Furthermore, the timing of these enforcement actions coincided with the period when the courts were ordered closed (and as such there was no legal recourse available) due to the COVID-19 pandemic, and during which businesses were also required by the Mexican government to be closed to avoid the lethal spread of COVID-19. Vaccines against the spread of COVID-19 were not yet available at this time, thereby putting at risk the health and indeed the lives of PEM's employees who were required to be present in the office during the SAT's enforcement activities.

35. In sharp contrast, the legal questions that will need to be addressed in relation to the claims concerning the recovery of the VAT refunds for the years 2020 to 2022 are straightforward. PEM's legal entitlement to the VAT refunds is well established and has not been contested by the Respondent. The Respondent has admitted in the proceedings before the FM1 Tribunal that the VAT refunds for the period prior to January 4, 2023 belong to the Claimant.[27]

[27] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Response to the Preliminary Objection to Jurisdiction, dated September 1, 2023, Appendix A, **CM-0010**. The Claimant submitted

36. Indeed, during the entirety of the year 2020 to the present time, the SAT has deposited the VAT refunds it owes PEM into PEM's bank account. However, PEM was not able to access these VAT refunds until it opened a new account, which was to remain unrestricted pursuant to the Order. PEM thereafter directed the SAT to deposit the VAT refunds into the newly opened bank account. That is, the recovery of the VAT refunds was made possible pursuant to the FM1 Tribunal's Order but only as of January 4, 2023.

37. With respect to the period prior to January 4, 2023, and in the face of the Respondent's unwillingness to make the VAT refunds accessible to PEM, the Claimant was left with no choice but to file its claim for VAT refunds for the period 2020 to 2023 with ICSID on June 29, 2023.

38. In summary, the legal issues in the case of the FM2 proceedings concern not whether PEM has entitlement to the VAT refunds (which has been admitted by the Respondent), or whether the VAT refunds belong to PEM (which has also been admitted by the Respondent), but simply whether the Respondent has any legal grounds for retaining the VAT refunds amounting to in excess of [redacted].

### 5. Consolidation will not advance the "fair and efficient" resolution of the claims

39. The submissions contained herein, in addition to demonstrating to the Consolidation Tribunal that the two claims are factually and legally distinct, also confirm that the consolidation requested by the Respondent will not advance the "interests of fair and efficient resolution of the claims."[28]

40. In fact, by filing its Consolidation Request on February 12, 2024, the Respondent has already added close to a year to the total time it will take to achieve final resolution of the dispute between the parties concerning the revocation of the APA. Furthermore, the Respondent's decision to request a consolidation has already resulted in substantial additional legal costs for the Claimant. These costs and inefficiencies are all the more difficult to justify in light of the FM1

a chart listing 10 occasions on which the Respondent admitted that VAT refunds belong to PEM (and that the Claimant supposedly only needs to direct the SAT to direct the refunds into a new bank account in order to receive them).

[28] Art. 1126(2), NAFTA, dated January 1, 1994, **RML-0001**.

Tribunal's decision to admit the VAT refunds claim as an ancillary claim and the Claimant's offer to settle the Respondent's reasonable costs in relation to FM2.

41. If the Consolidation Request had not been made, by now, the Claimant would have filed its Reply Memorial by April 1, 2024, and the Respondent would have filed its Rejoinder by October 1, 2024. Both parties had expressed their interest in proceeding expeditiously to the oral hearing, with a hearing expected to take place in the January to February period in 2025.

### C. Purpose of NAFTA Article 1126 and Mexico's Conduct is Lacking in Good Faith

42. The Respondent's stated position for making the Consolidation Request, which is to achieve the resolution of all claims before a "single tribunal,"[29] when closely examined, is in fact disingenuous.[30] Furthermore, its actions demonstrate a lack of good faith conduct, and are inconsistent with the purpose and objective of NAFTA Article 1126.

43. The Respondent's position, if given the benefit of doubt, was somewhat understandable when the Consolidation Request was first made.[31] Now, however, the Respondent's position is lacking in rationality and is unreasonable. To insist on continuing with the Consolidation Request is clearly contributing to inefficiencies and causing considerable delays.

44. Therefore, and as we explain further below, the Consolidation Tribunal would be right to question the motivation of the Respondent to continue with its Consolidation Request. If a "single tribunal"[32] hearing claims in both a fair and efficient manner initially provided the Respondent the motivation for filing the Consolidation Request, the subsequent willingness of the Claimant (and agreement of FM1 Tribunal) to have the VAT refunds claim joined as an ancillary claim to FM1, should have been welcomed by the Respondent. By adding the VAT refunds claim as an ancillary claim, the Claimant was able to offer the Respondent what it was seeking: a single tribunal (namely FM1 Tribunal) assuming jurisdiction over the two claims. Yet, the Respondent

[29] *See* Consolidation Request, ¶ 4.

[30] *See* Consolidation Memorial, ¶¶ 2, 139.

[31] But without merit, as the two cases present different facts and questions of law, and not conducive to a "fair and efficient" hearing as is apparent from the delay already caused by the filing of the Consolidation Request.

[32] *See* Consolidation Request, ¶ 4.

has been unwilling to accept this offer, including the Claimant's willingness to pay the Respondent's reasonable costs in connection with discontinuing the FM2 proceeding.

45. The Claimant has made repeated offers to pay the Respondent's costs, and yet the Respondent has rebuffed these offers.

46. A close examination of the Respondent's position seeking to on the one hand consolidate, but on the other hand unwilling to have the FM1 Tribunal assume jurisdiction over all the claims (even though the Respondent continues to claim that all it is interested in is a "single tribunal"[33] assuming jurisdiction over both claims), simply cannot be taken at face value. Rather, it would appear that the Respondent's real motivation in bringing its Consolidation Request is to avoid having to comply with the FM1 Tribunal's Order requiring the SAT to provide PEM its VAT refunds (without any restrictions).

47. First, as the Consolidation Tribunal is aware, the FM1 Tribunal issued a decision on July 15, 2024 to accept the Claimant's request to add the FM2 VAT refunds claim as an ancillary claim to FM1.

48. The FM1 Tribunal has a comprehensive understanding of all the relevant facts, as it has grappled with the relevant issues, including the Respondent's allegations of overlap between FM1 and FM2 claims, and has twice rejected them, supported by cogent reasons. Nevertheless, the Respondent is intent on bringing up these same arguments once again before this Consolidation Tribunal.[34]

49. The FM1 Tribunal has also had more than three years of involvement in relation to the APA-related issues and close to two years of involvement in the VAT refunds claim issues.[35] This has been made clear by the FM 1 Tribunal in its decision of July 15, 2024:

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[33] *See* Consolidation Request, ¶ 4.

[34] As we will explain below, the Respondent's motivation for submitting its Consolidation Request is to avoid complying with the FM1 Tribunal's Order to pay PEM its VAT refunds. The Respondent should be estopped from 1.) arguing that provisional measures are unnecessary because all the Claimant needs to do is to indicate the bank account for the Respondent to deposit the VAT refunds, then 2.) ignoring the Claimant's numerous letters asking for it to comply with the Order; and 3.) repeating its failed arguments dismissed by FM1 Tribunal by presenting them before the Consolidation Tribunal in order to again avoid its obligations to pay the Claimant its VAT refunds that are indisputably owed to PEM.

[35] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, **RM-0040**.

The Tribunal has reviewed the Claimant's request dated June 24, 2024, seeking permission to submit ancillary claims in the current proceedings. These claims pertain to refunds issued by the SAT to PEM for VAT payments that PEM has been unable to access due to the funds being held in PEM's blocked accounts (the 'Request'). The Tribunal has also taken into account the Respondent's reply dated July 11, 2024, which urges the Tribunal to dismiss the Claimant's request. Furthermore, the Tribunal has considered the Claimant's letter dated July 12, 2024, which outlines the urgency of the Request. The Claimant indicates that if the Tribunal grants authorization, it will withdraw the identical claim currently pending in ICSID Case ARB/23/28, thereby rendering the upcoming decision of the Consolidation Tribunal, scheduled for July 16, 2024, unnecessary.

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

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

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

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

> subsequently adding such a claim to the proceedings, provided the conditions of Article 46 of the ICSID Convention are met.

For these reasons, the Tribunal grants the Claimant the requested authorization.[36]

50. Notwithstanding the ability of the FM1 Tribunal to proceed far more expeditiously to adjudicate the two claims together (indeed, immediately) than is practically possible for this Consolidation Tribunal based on the procedural requirements of NAFTA Article 1126, the Respondent has chosen the path of obstructing the most expeditious means for the resolution of the disputes between the parties before a single tribunal.

51. The Respondent has indicated in its Consolidation Memorial that the reason for its refusal to discontinue the FM2 Tribunal (which would then allow for the FM1 Tribunal to adjudicate all the claims) has been the issue of costs.[37]

52. This is a misleading position because the Claimant has offered no less than **three times** to pay reasonable costs to the Respondent in order to discontinue FM2 and expedite adjudication of all claims under the FM1 Tribunal.[38] On all three occasions, the Respondent has refused to engage in any discussions concerning expediting the proceedings for the resolution of all the disputes before the FM1 Tribunal, including in relation to costs.[39]

53. Second, the FM1 Tribunal is the most appropriate tribunal to review all the issues that are in dispute between the parties. Introducing a new tribunal at this point in the proceedings would be wasteful of costs, time, and efforts expended since 2021. Over the span of three years, the FM1 Tribunal has presided over numerous pleadings and procedural issues between the parties, which we have listed out later in this submission. Based on the extensive exchange of pleadings, document production requests, and interim decisions (including the pleadings preceding these decisions), over the past three (almost four) years, the FM1 Tribunal has been in a position to

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[36] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, (emphasis added), **RM-0040**.

[37] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Consolidation Memorial, dated October 7, 2024, fn. 97, (**Consolidation Memorial**).

[38] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated July 31, 2024, **RM-0053**; *see also* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 26, 2024, **RM-0054**; Letter from Riyaz Dattu to Alan Bonfiglio, dated October 14, 2024, (**Letter Request #6 and Offer #3**), **CM-0027**.

[39] *See* Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 5, 2024, **CM-0025**; *see also* Geovanni Hernández Salvador to Claimant's Counsel, dated August 28, 2024, **CM-0026**; *see also* Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated October 17, 2024, **CM-0028**.

develop extensive and deep knowledge of the relevant facts, legal issues, and understanding of the parties' positions.

54. Third, the Consolidation Tribunal should reject the Respondent's Consolidation Request because the Respondent has and continues to engage in an abuse of rights under international law. For nearly two years of the total of three years before the FM1 Tribunal, the Respondent has relied on procedural challenges consistently shown to be lacking in merit to delay the progress of the FM1 proceedings. All of these procedural challenges brought before the FM1 Tribunal have failed. They have all been brought singularly so that the Respondent can avoid complying with its legal obligation to provide VAT refunds to PEM. We provide additional details in the submissions below to demonstrate how the Respondent's unwillingness to comply with the Order requiring it to pay VAT refunds has played a dominant role in the Respondent's various challenges and actions.

## II. FACTS

55. In this section, the Claimant expands on what has been summarized in the Overview, as follows:

a. Setting out additional relevant facts that would permit the Consolidation Tribunal to dismiss the Respondent's Consolidation Request based on the substantial change in circumstances after its filing on February 12, 2024 and the resulting loss of authority.

b. Providing the procedural background and chronology for each of the FM1 and FM2 proceedings, and the Respondent's decision to bring its Consolidation Request on February 12, 2024, just after it had failed to challenge the jurisdiction of FM1 on December 20, 2023 on the grounds that the same measures were in dispute in the two proceedings.

c. Demonstrating to the Consolidation Tribunal why the circumstances presented for its decision do not satisfy the requirements for consolidation pursuant to NAFTA Article 1126(2), because the facts and legal questions for the two claims are very different.

d. Establishing that the consolidation of the two claims will not be consistent with the stated goal of achieving the "fair and efficient" resolution of both claims, as is required by NAFTA Article 1126(2).

e. Making it evident that the very making of the Consolidation Request has resulted in unfairness to the Claimant and has impeded the goal of achieving expeditious and fair resolution of the disputes between the parties. The Claimant will provide evidence of the Respondent's conduct throughout the course of the FM1 arbitration proceeding and this consolidation proceeding, so as to allow the Consolidation Tribunal to draw the conclusion that the Respondent's Consolidation Request is wrongly motivated, and its conduct is lacking in good faith.

f. The Respondent's irreconcilable conduct with the fairness and efficiency objectives of Article 1126 of NAFTA, including:

    1) The Respondent's repeated challenges to the FM1 Tribunal's Provisional Measures Decision and its Jurisdiction, all grounded in its unwillingness to pay VAT refunds (whether before January 4, 2023 or thereafter) which the Respondent has conceded belong to PEM.

    2) The Respondent's decision in filing the NAFTA Article 1126 Consolidation Request, after having failed in setting aside the Provisional Measures Decision and ousting the jurisdiction of the FM1 Tribunal. In the meantime, the Respondent has chosen to act in violation of its legal obligations set out in the Order, while seeking yet again to sidestep the FM1 Tribunal's jurisdiction, by having this Consolidation Tribunal replace the FM1 Tribunal.

### A. Respondent's Consolidation Request should be Dismissed based on Changed Circumstances

56. The circumstances presented in the Consolidation Request dated February 12, 2024 no longer exist. It is therefore critical that the Consolidation Tribunal, in deciding on its jurisdiction for ensuring fair and most expeditious basis for the resolution of two claims, has a clear understanding of the current facts.

57. The following are some of the key events that have occurred in the FM1 and FM2 proceedings:

a. **February 29, 2024:** The FM1 Tribunal issued Procedural Order No. 6 (**PO 6**), suspending its proceeding, including the calendar for the filing of pleadings by the Claimant and the Respondent on April 1, 2024 and October 1, 2024, respectively. A copy of its suspension order is attached as an exhibit.[40]

b. **June 24, 2024:** The Claimant made a request to the FM1 Tribunal seeking leave to add as ancillary claims, which are the very same claims that were advanced in the FM2 proceedings (**Request for Admission of Ancillary Claims**).[41]

c. **July 15, 2024:** The Claimant advised the Consolidation Tribunal of the FM1 Tribunal's decision to grant the Claimant leave to add ancillary claims to its proceedings. The Claimant informed the Consolidation Tribunal that it will be taking the necessary steps to discontinue FM2.

d. **Offer # 1:** On July 31, 2024, the Claimant sent the Respondent a letter requesting its agreement to discontinue FM2 based on the willingness of the FM1 Tribunal to hear the FM2 claim as an ancillary claim, thereby achieving the goal of "fair and efficient resolution" of all the claims before a single tribunal.[42] This letter included an offer to reimburse the Respondent for reasonable costs. On August 5, 2024, the Respondent simply acknowledged the Claimant's letter and informed the Claimant that the Respondent does not consent to the discontinuance of FM2—no reason was given for the Respondent's decision.[43]

e. **Offer # 2:** On August 26, 2024, the Claimant sent the Respondent its second offer to settle the FM2 proceeding, requesting the Respondent to reconsider its refusal to

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[40] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Procedural Order No. 6, dated February 29, 2024, (**PO 6**), **RM-0019**.

[41] *First Majestic Silver Corp. v. Government of United Mexican States (I),* ICSID Case No. ARB/21/14, Claimant's Request for Ancillary Claims, dated June 24, 2024, (**Request for Admission of Ancillary Claims**), **RM-0031**.

[42] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated July 31, 2024, **RM-0053**.

[43] Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 5, 2024, **CM-0025**.

consent to dissolve FM2.[44] On August 28, 2024, the Respondent sent a short reply, stating, "The Respondent reaffirms that it does not consent to the discontinuation of ICSID arbitration No. ARB/23/28."[45]

f. **Offer # 3:** On October 14, 2024, the Claimant sent the Respondent another letter offering to discontinue FM2 in the interests of fairness and efficiency and again offered to pay the Respondent its reasonable costs for the discontinuation of FM2.[46] On October 17, 2024, the Respondent indicated that it would not agree to discontinue the FM2 proceeding because the matter is now before the Consolidation Tribunal.[47]

g. **October 1, 2024:** The Claimant requested the ICSID Secretariat to discontinue the FM2 proceeding.[48]

h. **October 2, 2024:** The ICSID Secretariat confirmed receipt of the Claimant's request to discontinue FM2 and invited the Respondent to respond by October 11, 2024— indicating that if no objection is made in writing by that time, the Respondent's silence will be treated as acquiescence; if the Respondent objects within the time limit, the proceeding shall continue.[49]

i. **October 7, 2024:** The Respondent replied to the ICSID Secretariat, refusing to discontinue the FM2 proceeding, stating that it will explain its reasoning in its Consolidation Memorial to be filed that day.[50] On the same day, the ICSID

[44] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 26, 2024, **RM-0054**.

[45] Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 28, 2024, **CM-0026**.

[46] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated October 14, 2024, (**Letter Request #6 and Offer #3**), **CM-0027**.

[47] Correspondence from Alan Bonfiglio to Riyaz Dattu, dated October 18, 2024, **CM-0029**.

[48] *See 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, dated October 1, 2024, **RM-0059**.

[49] *See First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from ICSID to the Parties, dated October 2, 2024, **RM-0060**.

[50] *See First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from the Respondent to ICSID, dated October 7, 2024, **RM-0061**.

Secretariat confirmed receipt of the Respondent's objection to the discontinuance and therefore stated that the FM2 proceeding shall continue.[51]

58. There is no doubt that the Claimant has been extremely clear and transparent about its intention to discontinue the FM2 proceeding. The FM2 claim was commenced in part to meet the deadline for filing NAFTA claims under the legacy provisions of the USMCA.[52]

59. The FM2 claim was also filed as a separate claim in order to avoid the Respondent's penchant (or repeated tendency) for litigating and relitigating the ambit of NAFTA Article 1134.

60. In other words, the purpose in filing a new claim was so that the two separate claims and proceedings would avoid providing the Respondent's basis for arguing the existence of a claimed breach of NAFTA Article 1134. The Respondent had already argued in its Response to the Claimant's Request for Provisional Measures that NAFTA Article 1134 would be breached if the VAT refunds claim was, in the future, consolidated or added as ancillary claims to the FM1 claims.[53]

61. However, even after the Claimant initiated a separate VAT refunds proceeding on June 29, 2023[54]—for a number of good faith reasons—the Respondent brought yet another challenge, seeking to have the FM1 Tribunal declare that it had lost its jurisdiction once the Claimant filed a second claim limited to the issue of VAT refunds. The Respondent's Preliminary Objection to Jurisdiction asserted that by filing its claim in the FM2 proceeding, the Claimant and PEM had breached their waivers required to be provided pursuant to NAFTA Article 1121 by bringing a second proceeding. The FM1 Tribunal ruled against the Respondent in its decision dated

[51] *See First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Communication from ICSID to the Parties, dated October 7, 2024, **RM-0062**.

[52] The Claimant had to file its FM2 claim after the FM1 Tribunal's Decision on May 26, 2023 but before the deadline on July 1, 2023 for filing NAFTA legacy claims.

[53] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023, **CM-0002**.

[54] *See First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Request for Arbitration, dated June 29, 2023, **RM-0063**.

December 20, 2023, holding that the FM2 claim and the FM1 claims were separate claims based on different facts and legal issues.[55]

62. It was therefore shocking to have the Respondent bring yet another proceeding, namely its Consolidation Request on February 12, 2024, because it had previously argued against the Claimant pursuing consolidation based on violation of NAFTA Article 1134.

63. The Claimant, under these circumstances, decided that the most fair, efficient, and least costly means to proceed forward was to have the FM1 Tribunal proceed with both claims—, *i.e.*, for the FM1 and FM2 claims to be heard together before the FM1 Tribunal, which has been involved in adjudicating the dispute between the parties for approximately three years.

64. The legal submissions that follow address the Claimant's entitlement to decide whether it wishes to discontinue a claim that it initiated, particularly when it has offered numerous times to pay the Respondent's reasonable costs. The Claimant's goal is to avoid additional costs and delays by having a single tribunal adjudicate both claims.

65. It is the Claimant's position that it is fully entitled, once it had determined that the FM2 proceeding serves no purpose, to seek to discontinue that proceeding.

### B. Procedural Background for Case No. ARB/21/14 and Case No. ARB/23/28

66. The facts set out in the remainder of this section relate to the Claimant's alternative arguments that the requirements of NAFTA Article 1126 have not been met by the Respondent's Consolidation Request and the Consolidation Memorial. Notably, to even approach the test under Article 1126, the Tribunal must proceed with the assumption that two claims continue to exist in two separate arbitrations, which is obviously not the case at this time.

67. Nevertheless, the Claimant in the following sub-sections seeks to very clearly establish for the Consolidation Tribunal, beyond what has been set out in the Overview, that the factual underpinnings of the case before the FM1 Tribunal (Case No. ARB/21/14) are very different than those that are relevant for the second claim concerning the VAT refunds in the FM2

[55] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, **RM-0014**.

proceeding (Case No. ARB/23/28). As the Consolidation Tribunal is aware, the FM2 Tribunal has not been fully constituted.

68. Indeed, as previously stated, these are entirely different claims based not only on a different set of facts, but very different measures under challenge and raise very different questions of law. We explain this in some detail below.

### C. Background of Case No. ARB/21/14

#### 1. Description of Proceeding

69. On May 13, 2020, First Majestic filed its Notice of Intent (**NOI**) on its behalf and on behalf of PEM for the Respondent's violations of NAFTA Chapter 11, including Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment), Article 1105 (Minimum Standard of Treatment), Article 1109 (Transfers), Article 1110 (Expropriation and Compensation), and Section B (Settlement of Disputes), as well as other applicable international law principles.[56]

70. On March 1, 2021, the Claimant filed its Request for Arbitration (**RFA**).[57] The measures giving rise to the dispute included the following: 1) the illegal repudiation of an Advance Pricing Agreement (**APA**); 2) illegal tax reassessments of PEM while the APA is still valid; 3) barring PEM from challenging the reassessments to the local courts with jurisdiction to resolve taxation disputes; 4) the unlawful and unprecedented rejection by the SAT of PEM's requests for resolution of disputes pursuant to the universally accepted process set out in the avoidance of double taxation treaties known as the Mutual Agreement Procedure (**MAP**); and 5) unlawful and egregious enforcement so as to harass, intimidate and threaten the Claimant, including an [redacted] (which was found to be unwarranted) and seizing and freezing PEM's bank accounts and other assets.[58] The enforcement actions were undertaken during the period in April 2020 when the COVID-19 virus was rampant, no vaccines were yet available, businesses including mining operations were ordered by the government to be closed, and the

[56] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, FM1 Notice of Intent, dated May 13, 2020, **RM-0004**.

[57] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's FM1 Request for Arbitration, dated March 1, 2021, (**FM1 RFA**), **RM-0005**.

[58] *See* Claimant's Memorial, dated April 25, 2022, **RM-0007**.

courts were also closed.[59] Furthermore, the enforcement actions were undertaken in the face of a court injunction against any enforcement. Due to the COVID-19 pandemic, the Claimant was unable to have the courts intervene and enforce the injunction.

71. The measures taken by the Respondent referenced above were some of the several measures set out in the Claimant's Memorial[60] and Request for Arbitration,[61] that are in violation of provisions contained in Chapter 11 of NAFTA. Some of these measures are described below.

*a) Measures Concerning the Revocation of APA*

72. In 2015, the Respondent began an illegal and forceful campaign aimed at retroactively repudiating an APA that the Respondent entered into with PEM in 2012. In the Claimant's Memorial submitted to the FM1 Tribunal, the Claimant summarizes Respondent's illegal measure as:

> The unprecedented repudiation by the Servicio de Administración Tributaria (**SAT**), the Government's tax authority, of a legally binding advance pricing agreement (**APA**), entered by PEM in 2012 with the SAT, which provided the legal framework for certainty and stability for investments made in Mexico by PEM and First Majestic.[62]

73. In 2012, the SAT freely entered into a legally binding APA to confirm that PEM could declare as its revenue for tax purposes the actual realized revenue set out in a streaming agreement for the sale of silver, and not a deemed amount based on "spot prices."

74. Then, in 2015, the Respondent attempted to unilaterally repudiate the APA by initiating a *Lesividad* proceeding.[63] The Respondent used the *Lesividad* proceeding to renew its efforts to compel PEM to pay amounts allegedly owed as taxes. Settlement negotiations were underway, which appeared to be heading towards a resolution, when the Respondent unilaterally abandoned the discussions. The negotiations ended because it became evident that the national

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[59] *See* Witness Statement of [redacted], dated April 25, 2022, ¶ 132(c)-(d), **CM-0001**; *see also* Claimant's Memorial, dated April 25, 2022, ¶¶ 137-139, **RM-0007**.

[60] *See* Claimant's Memorial, dated April 25, 2022, **RM-0007**.

[61] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's FM1 Request for Arbitration, dated March 1, 2021, (**FM1 RFA**), **RM-0005**.

[62] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(a), **RM-0007**.

[63] *See* Claimant's Memorial, dated April 25, 2022, ¶ 295, **RM-0007**.

elections would result in the election of President Andrés Manuel López Obrador (**AMLO**) as the President of Mexico.

75. After AMLO's inauguration on December 1, 2018, he appointed Ms. Raquel Buenorostro as the new head of the SAT. The Respondent, thereafter, with direction from Ms. Buenorostro, unlawfully issued exorbitant tax reassessments for the years covered in the APA, despite the APA still being valid. That is, even under its own laws, the Respondent's actions were unlawful.

76. As part of the Claimant's acquisition of PMC and the San Dimas mine, which occurred in January 2018 with a closing date of May 2018, the Claimant had to assume binding obligations related to the silver stream agreement for production from the San Dimas Mine. Simply put, a "stream agreement" is a well-established and important mechanism to help mining companies offset the volatility of commodity prices and rising production costs. Several mining companies operating in Mexico have entered into stream agreements.

77. While there are many kinds of stream agreements, the basic concept of a stream agreement is that the mining company agrees to sell all or part of its mineral (in this case, silver), over a long period of time, to another company at an agreed fixed price. In return, the mining company can establish a steady source of capital for its operations, or the agreement may require that the streaming company provide upfront financing for the mining company's operational needs. While stream agreements vary based on the circumstances, their fundamental purpose is the same: stream agreements provide for long-term fixed price, spanning years, to generate a stream of revenues to the mining company (*e.g.*, for the sale of silver), and the revenues from the stream can be used for financing of mining companies, both Canadian-owned and foreign-owned.

78. As we explain in the Claimant's Memorial:

> The revenue from the stream agreement for the sale of silver by PEM to an affiliate, Silver Trading Barbados (**STB**), was subject to an APA issued in 2012 by the SAT. The APA applied for a five-year period between 2010 and 2015 *[sic]* taxation years of PEM.
>
> The APA confirmed that the selling price for silver between PEM and [its affiliate] STB, could be used to declare revenues (actual realized price) for tax purposes rather than on the basis for prevailing "spot price" on the day of the sale. Effectively, the APA confirmed that the SAT was agreeable to PEM declaring as its revenue for

> tax purposes the *actual realized revenue* set out in the stream agreement, and not a deemed amount based on "spot prices" which it could have realized in the absence of a stream agreement.
>
> The silver was sold further by STB to Wheaton Precious Metals, a globally known and respected streaming company headquartered in Canada. It is important to note that the onward price, that is, the price between STB as the seller and Wheaton as the buyer of the silver, was at arm's length, at the same fixed price. In this manner, the parties established a comparable arm's length sale price that the SAT could reference.[64]

79. On the basis of these facts (summarized from the Claimant's Memorial), one of the critical issues in the FM1 proceeding is whether the APA issued in 2012 can be unilaterally repudiated by the SAT, contrary to its earlier legal agreement that confirmed the price realized by PEM on its sale to STB could be used for reporting PEM's revenues for tax purposes.

80. Furthermore, the other fundamental legal question in the FM1 Tribunal proceeding is whether the SAT was lawfully entitled to issue its reassessment, in the face of a valid APA. The reassessments are based on the SAT's position that PEM should have declared its revenues for the sale of silver based on prevailing "spot prices" (*i.e.*, on the basis of revenues **never** actually received by PEM).

81. The SAT has as much admitted that PEM did not mislead or provide false information to the SAT in the years 2011 and 2012 when seeking the APA, and that PEM has in all respects complied with the annual reporting obligation contained in the APA.[65]

82. Despite this, the SAT has issued reassessments for the four fiscal years, 2010 to 2013, and with the reassessment for 2014 being finalized. These reassessments total approximately [redacted], notwithstanding PEM's many requests for the SAT to abide by the APA.[66]

83. The Respondent has failed to advance lawfully permissible grounds for issuing the inflated tax reassessments (without regard to the actual revenues earned by PEM) while a binding APA remains valid.

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[64] Claimant's Memorial, dated April 25, 2022, ¶¶ 43-45 (emphasis added), **RM-0007**.

[65] *See* Claimant's Memorial, dated April 25, 2022, ¶ 46, **RM-0007**.

[66] *See* Claimant's Memorial, dated April 25, 2022, ¶ 47, **RM-0007**.

84. In summary, the Claimant's predecessor properly applied for the APA,[67] expended time and resources over several months, provided the necessary economic studies and expert opinions, responded to all the questions from the SAT, and fully complied with the requirements of the APA.[68] Furthermore, the limited conditions under which an APA can be retroactively cancelled under Mexican law have not been met; APAs can only be retroactively cancelled when there is proof of fraud or misrepresentation in the information provided during the APA negotiation, or if the taxpayer fails to comply with the APA's terms[69]—neither apply here.

85. The Claimant explains the details for the APA and related claims in further detail in paragraphs 41 to 47 of the Claimant's Memorial.[70]

*b) Denial of Access to Remedies & Violations of Mexican and International Law*

86. In addition to illegally attempting to repudiate the APA, the Respondent has also denied the Claimant access to the usually available remedies under Mexican law for disputing tax reassessments. In the Claimant's Memorial, the Claimant sets out these unlawful measures as follows:

a. "Blocking PEM's challenge of SAT's reassessments under the administrative process of amounts purportedly as taxes, penalties, and interest."[71]

b. "Rejection by the SAT of PEM's requests for resolution of the disputes pursuant to the universally accepted process set out in avoidance of double taxation treaties (**DTTs**) known as the Mutual Agreement Procedure (**MAP**), which is binding on Mexico, and provided for in each of the Canada-Mexico Tax Treaty, the Barbados-Mexico Tax Treaty and the Luxembourg-Mexico Tax Treaty."[72]

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[67] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 63-70, **RM-0007**.

[68] *See* Claimant's Memorial, dated April 25, 2022, ¶ 71, **RM-0007**.

[69] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 72-74, **RM-0007**.

[70] *See* Claimant's Memorial, dated April 25, 2022, ¶¶ 41-47, **RM-0007**.

[71] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(b), **RM-0007**.

[72] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(c), **RM-0007**.

c. "Violating the Mexican Federal Court on Administrative Matters injunctions ordered in January 2020, for the 2010 and 2012 taxation years of PEM, prohibiting SAT from engaging in collections while the MAP requests were pending."[73]

87. By engaging in this obstructive and illegal conduct, the Respondent's actions amount to denial of justice and other violations of the relevant provisions of NAFTA.

*c) Mexico's Illegal Enforcement Measures*

88. The Respondent engaged in overzealous and shocking conduct in attempting to coerce the Claimant to acquiesce to the illegal and retroactive repudiation of the APA. These unlawful measures are detailed in the Claimant's Memorial in the FM1 Tribunal's proceedings:[74]

a. "Unlawful interference with the operation of PEM's business, and the management activities of its executives and its personnel (including during the exceedingly difficult circumstances at the start of the COVID-19 pandemic)."[75]

b. "Unjustifiably encumbering, attaching, and freezing of PEM bank accounts and other assets."[76]

c. "Seizing and encumbering of over 100 parcels of land and 33 valuable mineral concessions."[77]

d. "Using collateral powers of the Government of Mexico including [redacted] provisions to interfere with the core business activities of PEM and to create conditions of coercion."[78]

e. "Interference with contractual agreements of PEM with its workforce and suppliers by limiting PEM's ability to meet its legal obligations, critical for generating

[73] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(d), **RM-0007**.

[74] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5, **RM-0007**.

[75] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(e), **RM-0007**.

[76] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(f), **RM-0007**.

[77] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(g), **RM-0007**.

[78] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(h), **RM-0007**.

revenues from its mining activities and for maintaining the health and welfare of its workforce."[79]

f. "Impeding First Majestic's ability to further invest and expand in PEM and in Mexico."[80]

g. "Restricting First Majestic's ownership rights as the exclusive shareholder of PEM, including in its ability to transfer the ownership of PEM and its assets."[81]

h. "Prohibiting First Majestic from receiving dividends and other returns from PEM."[82]

i. "Targeting, ostracizing and censuring First Majestic and PEM in the Mexican and international media as a Canadian mining company engaged in fraudulent conduct, for failing to pay its taxes, and resorting to an arbitration proceeding before an international tribunal to avoid its legal obligations."[83]

j. "Unlawfully publicizing confidential tax related information of First Majestic and PEM and asserting that [redacted] are owed by PEM to the SAT, while there are ongoing legal proceedings relating to the claims of the SAT."[84]

k. "[V]iolating the protections and the constitutional due process rights afforded to PEM, its executives and workforce by the Federal Constitution of the United Mexican States and Mexican domestic law."[85]

[79] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(i), **RM-0007**.

[80] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(j), **RM-0007**.

[81] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(k), **RM-0007**.

[82] *See First* Claimant's Memorial, dated April 25, 2022, ¶ 5(l), **RM-0007**.

[83] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(m), **RM-0007**.

[84] *See* Claimant's Memorial, dated April 25, 2022, dated April 25, 2022, ¶ 5(n), **RM-0007**.

[85] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(o), **RM-0007**.

l. "Various other additional egregious and unlawful measures and activities, and harsh enforcement and intimidation tactics."[86]

89. In summary, the Claimant's predecessor entered into the APA with the Respondent in order to obtain the Respondent's consent concerning the legal framework for certainty and stability for the investments made in Mexico. After attempting and failing to invalidate the APA pursuant to its own laws, the Respondent resorted to harassment and intimidation to degrade the Claimant's (and the predecessor's) financial position, public reputation, and ability to run its business.

*d) Provisional Measures Request*

90. On January 4, 2023, the Claimant filed its Request for Provisional Measures to obtain interim relief pending the making of the final award.[87] Among the requested provisional relief measures, the Claimant sought access to its VAT refunds.

91. The VAT refunds were indisputably owed to PEM. The SAT has been depositing an estimated [redacted] of VAT refunds [redacted] into blocked bank accounts.

92. The Claimant carefully explained the following in its Request for Provisional Measures so as to ensure that the FM1 Tribunal could exercise its jurisdiction in providing the remedies sought:

> To be clear, the Claimant is not seeking to have the freezing of PEM's bank accounts undone including the funds that were on deposit at the time of the seizure, which could be viewed as directed at a measure being challenged in this arbitration.
>
> Rather, it is seeking to ensure that its entitlement to the VAT refunds, which has not been the subject of a challenge under the ongoing NAFTA dispute, should not be gutted by the unauthorized deposit of the refunds by the SAT. Such unauthorized deposits of VAT refunds owing to PEM were made after the filing of the Request for Arbitration to the present date.[88]
>
> [The Claimant] has limited its request to payment of VAT refunds owed to PEM by SAT that have been deposited into its bank accounts without the authorization

[86] *See* Claimant's Memorial, dated April 25, 2022, ¶ 5(p), **RM-0007**.

[87] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Request for Provisional Measures, dated January 4, 2023, (**Request for Provisional Measures**), **RM-0055**.

[88] Request for Provisional Measures, dated January 4, 2023, ¶¶ 80-81, **RM-0055**.

of PEM and future VAT refunds that have not been deposited into a frozen bank account.[89]

93. On February 10, 2023, the Respondent filed its Response to the Claimant's Request for Provisional Measures.[90]

94. On March 13, 2023, a hearing was held concerning the Request for Provisional Measures.[91] During the hearing, the Respondent agreed that PEM is entitled to its VAT refunds and that the Claimant "would only need to identify the details of that account in their refund request. This clearly, in our opinion, does not require the intervention of the Arbitral Tribunal."[92] The Respondent also confirmed during the hearing that its freeze measures did not preclude recovery of VAT refunds by the Claimant.[93]

95. On March 31, 2023, the Claimant submitted a second NOI for the eventual constitution of the FM2 Tribunal and to preserve its rights to PEM's VAT refunds pending the FM1 Tribunal's Decision on the Request for Provisional Measures.[94] In order to pursue its claim under the legacy provisions of the USMCA, the NAFTA NOI was required to be filed no later than March 31, 2023. Additional details concerning the USMCA legacy provisions concerning NAFTA claims will be discussed further in the next section.

96. On May 26, 2023, the FM1 Tribunal issued its Decision on Provisional Measures with an Order for the Respondent to make VAT refunds accessible to PEM that had accumulated from January 4, 2023, and those accumulating in the future. The FM1 Tribunal found "if SAT were to block further payments of future VAT refunds owed to PEM, this would aggravate the dispute and affect the *status quo*."[95] The Order reads as follows:

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[89] Request for Provisional Measures, dated January 4, 2023, ¶ 144, **RM-0055**.

[90] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023, **CM-0002**.

[91] *See generally* Hearing Transcripts, dated March 13, 2023, **CM-0003**.

[92] Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[93] *See* Hearing Transcripts, dated March 13, 2023, p. 57, **CM-0003**.

[94] *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Notice of Intent to Submit Claim – NAFTA Chapter 11, dated March 31, 2023, **RM-0010.**

[95] Decision on Provisional Measures, dated May 26, 2023, ¶ 133, **RM-0009**.

> [The Tribunal] RECOMMENDS as provisional measure pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and Article 1134 of the NAFTA that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.[96]

97. It is important to highlight that even though the FM1 Tribunal issued this Order on May 26, 2023, the Respondent has failed to comply with the Order consistently and fully and instead has chosen to resort to extreme measures to try to overturn or delay its obligation to pay PEM its VAT refunds.

*e) Respondent has consistently challenged Claimant's VAT entitlement*

98. The Respondent has, and continues to make, every attempt to avoid its internationally binding obligations to the Claimant. The next few paragraphs describe the various attempts that have been made by the Respondent to challenge the Order providing for the VAT refunds, followed by a closer examination in the subsequent paragraphs of these failed attempts.

99. The Respondent's lack of compliance began by simply ignoring the existence of the Order,[97] followed by challenges to the Order, even though this is not contemplated by the rules related to provisional measures unless there has been a change in circumstances.

100. Having failed to overturn the Order through its Request for Revocation of the Decision on Provisional Measures (**Revocation Request**),[98] the Respondent sought to challenge the FM1 Tribunal's jurisdiction by filing a Preliminary Objection to Jurisdiction (**Preliminary**

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[96] Decision on Provisional Measures, dated May 26, 2023, ¶ 143(1), **RM-0009**.

[97] *See infra* ¶ 105.

[98] The Respondent filed a request to revoke the Order on June 19, 2023. *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Request for Revocation of Recommendation for Provisional Measure, dated June 19, 2023, (**Revocation Request**), **RM-0011**. The FM1 Tribunal issued a decision to dismiss the Respondent's Request on September 1, 2023. *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Respondent's Request for Revocation of Provisional Measures, dated September 1, 2023, (**Decision on Revocation Request**), **RM-0013**.

**Objection to Jurisdiction**) on July 28, 2023.[99] The Respondent thereafter asked the FM1 Tribunal to provide an additional round of submissions (which was not contemplated by the schedule).[100]

101. The Respondent's Preliminary Objection to Jurisdiction was based on the argument that the bringing of the FM2 claim concerning VAT refunds (in the amount of [redacted]) for the years 2020 to 2022 (*i.e.*, prior to the date covered by the Order), amounted to a breach of the waiver under NAFTA Article 1121 provided by the Claimant. That is, the Respondent argued that the initiation of the proceedings leading to the intended formation of the FM2 Tribunal had resulted in the Claimant and PEM breaching their undertakings against commencing parallel proceedings.

102. The FM1 Tribunal dismissed all of the Respondent's arguments both in relation to the Revocation Request and the Preliminary Objection to Jurisdiction.

103. Now in a last-ditch effort, the Respondent has submitted its Consolidation Request in yet another attempt to avoid compliance with the FM1 Tribunal's Order and indeed seeking to remove the involvement of the FM1 Tribunal in the future adjudication of the two claims under dispute.

104. That is, the Consolidation Request is effectively an attempt to make the FM1 Tribunal's jurisdiction ousted through this process when a previous direct challenge to its jurisdiction failed.

105. The details concerning the Respondent's intransigence in relation to its obligation to comply with the Order has been set out below:

a. First, as previously stated, the Respondent simply ignored the existence of the Order and brazenly refused to comply.

b. On June 15, 2023, within days of the Order, the Claimant sent the Respondent a letter providing a new bank account number for the Respondent to deposit the VAT refunds, as well as the name of the bank manager, in case the Respondent needed

[99] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Preliminary Objection to Jurisdiction, dated July 28, 2023, (**Preliminary Objection to Jurisdiction**), **RM-0056**.

[100] *See* Correspondence from Sara Marzal to the Parties, dated September 13, 2023, **CM-0031**.

to communicate with the bank manager to facilitate the deposit into a new bank account of the VAT refunds as of January 4, 2023.[101]

c. The Respondent ignored this letter dated June 15, 2023, despite the fact that even before the FM1 Tribunal had issued its Decision on Provisional Measures, the Respondent had claimed during the oral hearing that all the Claimant needed to do (instead of seeking a provisional remedy decision from the FM1 Tribunal) in order to receive its VAT refunds was to designate the correct newly-opened bank account to the SAT[102] —the Respondent immediately attempted to backtrack on its statement when the Claimant asked for assurances on this statement.[103]

d. The Claimant's numerous attempts to have the Respondent to cooperate and comply with the FM1 Tribunal's Order are listed below:

   i. **Letter Request #1 - Letter from Riyaz Dattu to Alan Bonfiglio, dated June 15, 2023:** Within days of the Order, the Claimant sent the Respondent a letter providing the account number of a new bank account for the Respondent to deposit the amounts related to VAT refunds, as well as the name of the bank manager for the Respondent to ensure that instructions were provided that the new bank account is not to be blocked and to facilitate the deposit of the VAT refunds as of January 4, 2023. The Claimant has never received a response to this letter.[104]

   ii. **Letter Request #2 - Letter from Riyaz Dattu to Alan Bonfiglio, dated August 11, 2023:** The second letter reminded the Respondent of its legal obligations pursuant to the Order and requested a response no later than August 18, 2023. The Claimant has to date not received a response to this letter.[105]

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[101] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated June 15, 2023. (**Letter Request #1**), **CM-0004**.

[102] *See* Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[103] *See* Hearing Transcripts, dated March 13, 2023, pp. 107-109, **CM-0003**.

[104] *See* Letter Request #1, dated June 15, 2023, **CM-0004**.

[105] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 11, 2023, (**Letter Request #2**), **CM-0007**.

iii. **Letter Request #3 - Letter from Riyaz Dattu to Alan Bonfiglio, dated September 12, 2023:** Because the Respondent had still not complied with the Order, the Claimant sent a third letter to remind the Respondent of its legal obligation to comply with the Tribunal's Decision on Provisional Measures. The Claimant asked for a response by September 14, 2023, because the Order was based on the grounds of "necessity, urgency, and irreparable harm, and also in order to avoid aggravation of the dispute and to maintain the *status quo*."[106] On September 14, 2023, the Respondent sent a letter making vague promises concerning its best efforts to gather necessary information in order to comply with the Order.[107] There was no follow-up from the Respondent.

iv. **Letter Request #4 - Letter from Riyaz Dattu to Alan Bonfiglio, dated October 18, 2023:** The Claimant sent yet another letter asking when the Respondent intended to comply with the Order. The Claimant also informed the Respondent that it would be submitting its nomination for a member to the FM2 Tribunal but remained open to settlement discussions.[108]

v. **Letter Request #5 - Letter from Riyaz Dattu to Alan Bonfiglio, dated May 23, 2024:** The Claimant requested an update from the Respondent concerning its progress with complying with the Order after the Respondent reported in its letter dated April 30, 2024[109] that it will consult the SAT to fully comply.[110]

vi. **Letter #6 - Letter from Riyaz Dattu to Alan Bonfiglio, dated October 14, 2024:** The Claimant again reminded the Respondent of its obligation to comply with the Order and requested that it do so. This letter is also the

[106] Letter from Riyaz Dattu to Alan Bonfiglio, dated September 12, 2023, (**Letter Request #3**), **CM-0014**.

[107] Letter from Alan Bonfiglio to Riyaz Dattu, dated September 14, 2023, **CM-0015**.

[108] Letter from Riyaz Dattu to Alan Bonfiglio, dated October 18, 2023, (**Letter Request #4**), **CM-0016**.

[109] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated April 30, 2024, **CM-0023**.

[110] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated May 23, 2024, (**Letter Request #5**), **CM-0024**.

> third offer the Claimant made to the Respondent for the fair and efficient resolution of the two claims before the FM1 Tribunal and reimbursing the Respondent's reasonable costs concerning the discontinuance of FM2 (so that all claims would be heard by the FM1 Tribunal).[111]

106. Instead of complying with the Order, as of August 29, 2024, the SAT took the egregious step of imposing a freeze on the newly opened bank account.[112]

107. PEM specifically opened the new bank account for the Respondent to deposit VAT refunds, following the Decision on Provisional Measures.[113] **This time, the Respondent's excuse for violating the Order is that the matter is now before the Consolidation Tribunal**.[114] This confirms that the Respondent is using the Consolidation Tribunal's proceeding to avoid compliance with the Order, even though it has been advised by the FM1 Tribunal that it has a continuing obligation to comply with the Order even during the period that the Consolidation Tribunal is carrying out its proceeding.

108. In summary, the Respondent's willful refusal to pay the Claimant the VAT refunds it is owed, notwithstanding consistent urging by the FM1 Tribunal for the Respondent to comply, should not be cast aside as being irrelevant to the Consolidation Request. On the contrary, the Consolidation Tribunal should take the Respondent's egregious conduct, disregard of its international obligation, and lack of appropriate respect towards the FM1 Tribunal and the rules-based system for resolution of dispute, as being the ultimate reason for the Respondent's refusal to have the proceedings continue before the FM1 Tribunal.

109. The Claimant respectfully requests that the Consolidation Tribunal not countenance such behavior or permit this insolence directed at the FM1 Tribunal. Plainly stated, the Consolidation Tribunal has the authority to not reward the Respondent for its conduct by facilitating its plan to side-step the jurisdiction of the FM1 Tribunal to adjudicate both claims. The

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[111] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated October 14, 2024, (**Letter Request #6 and Offer #3**), **CM-0027**.

[112] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated September 3, 2024, **CM-0011**; *see also* Letter from Riyaz Dattu to Sara Marzal, dated October 7, 2024, **CM-0032**.

[113] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated September 3, 2024, **CM-0011.**

[114] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated September 4, 2024, **CM-0012**.

Respondent's refusal to proceed with both claims before the FM1 Tribunal should be ruled to be unacceptable.

*f) Respondent challenged the Provisional Measures Order when there were no new circumstances*

110. As we explain here, the Respondent's conduct has been fixated on not complying with the Order.

111. On June 19, 2023, while it was in default of the required compliance with the Order, the Respondent filed its Revocation Request for the FM1 Tribunal to set aside its Decision on Provisional Measures, arguing that the Order would prejudice the new arbitration, alleging that the FM2 claim concerns the same facts as those in FM1.[115]

112. On July 21, 2023, the Claimant filed its Reply to the Revocation Request.[116]

113. On August 2, 2023, the FM1 Tribunal issued instructions via email that its Order for the Respondent to pay PEM its VAT refunds remains in effect pending its Decision on the Revocation Request.[117]

114. On September 1, 2023, the FM1 Tribunal affirmed its Order with its Decision on the Revocation Request (**Decision on Revocation Request**).[118] The FM1 Tribunal found that the Respondent's measures that were being challenged in the two claims were distinct:

> In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.

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[115] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Request for Revocation of Recommendation for Provisional Measure, dated June 19, 2023, (**Revocation Request**), **RM-0011**.

[116] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Reply to Respondent's Request for Revocation, dated July 21, 2023, (**Reply to Revocation Request**), **CM-0005**.

[117] *See* Email from Sara Marzal to the Parties, dated August 2, 2023, **CM-0006**.

[118] *See* Decision on Revocation Request, dated September 1, 2023, ¶¶ 44-45 ("Accordingly, the provisional measure was limited to VAT refunds to be paid after the date of the Claimant's PM Request . . . . In the new ICSID Case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal."), **RM-0013**.

> The introduction of the new ICSID Case No. ARB/23/28 and the fact that it is pending do not remove the situation of aggravation of the dispute in the present ICSID Case No. ARB/21/14 nor of the prejudice to the *status quo* represented by the unavailability of the VAT refunds for PEM.[119]

115. Despite the FM1 Tribunal's affirmation that its Order is valid and the facts of the FM2 claims are **not the same** as addressed in the Order, the Respondent to this day continues to disregard the FM1 Tribunal's Order.

116. In summary, the Respondent asked for and received an opportunity to present two rounds of submissions, even though this was not initially contemplated.[120] The Respondent's jurisdictional challenge failed.[121] As we demonstrate further below, the Respondent is nevertheless dead set against complying with the Order and wants to use and misuse as many avenues of challenge as possible, hoping one of them will be successful.

*g) Respondent challenged the FM1 Tribunal's Jurisdiction based on commencement of ARB/23/21*

117. On July 28, 2023, the Respondent filed its Preliminary Objection to Jurisdiction,[122] arguing that the FM2 claim filed on June 29, 2023 was based on the same measures as were before the FM1 Tribunal. Furthermore, the Respondent argued that the Claimant had violated the waiver required by NAFTA, whereby a claimant is required to waive 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 […]."[123]

118. On September 1, 2023, the Claimant filed its Response to Respondent's Preliminary Objection to Jurisdiction.[124]

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[119] *See* Decision on Revocation Request, dated September 1, 2023, ¶¶ 45-46, **RM-0013**.

[120] *See* Correspondence from Sara Marzal to the Parties, dated September 13, 2023, **CM-0031**.

[121] *See* Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, **RM-0014**.

[122] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Preliminary Objection to Jurisdiction, dated July 28, 2023, (**Preliminary Objection to Jurisdiction**), **RM-0056**.

[123] Art. 1121(1)(b), NAFTA, dated January 1, 1994, (emphasis added), **RML-0001**.

[124] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Response to the Preliminary Objection to Jurisdiction, dated September 1, 2023, **CM-0010**.

119. On September 9, 2023, the Respondent submitted its second round of pleadings concerning its Objection to Jurisdiction (**Rebuttal on Jurisdiction**).[125]

120. On November 6, 2023, the Claimant filed its Rejoinder on the Preliminary Objection to Jurisdiction (**Rejoinder to Preliminary Objection to Jurisdiction**).[126]

121. On December 20, 2023, the FM1 Tribunal issued its Decision on the Preliminary Objection to Jurisdiction (**Decision on Preliminary Objection to Jurisdiction**), dismissing the Respondent's claims and noting that the SAT had yet to comply with the FM1 Tribunal's Order.

122. The FM1 Tribunal noted, "[t]he substantive issue to be decided is therefore whether the Second Arbitration is a proceeding with respect to the [same] measure(s) which the Claimant has alleged to be in breach of Mexico's obligations towards the Claimant in the present arbitration."[127]

123. The FM1 Tribunal concluded in the negative, while confirming its conclusion in its Decision on Provisional Measures, that "the payment of VAT refunds to PEM into blocked bank 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."[128]

124. Thus, after another two rounds of pleadings, the Respondent failed a second time to have the FM1 Tribunal revoke its Order or hold that it had lost jurisdiction based on the commencement of the second claims to be heard by the FM2 Tribunal (once constituted). In both cases, the Respondent's position was that the measures at issue in the FM1 and the FM2 proceedings were the same. It failed to establish this before the FM1 Tribunal. After unsuccessful

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[125] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Rebuttal for Respondent's Preliminary Objection to Jurisdiction, dated September 9, 2023, (**Rebuttal on Jurisdiction**), **CM-0013.**

[126] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Rejoinder on Preliminary Objection to Jurisdiction, dated November 6, 2023, (**Rejoinder to Preliminary Objection to Jurisdiction**), **CM-0018**.

[127] *See* Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, ¶ 63, **RM-0014**.

[128] *See* Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, ¶ 80 (emphasis added), **RM-0014**.

attempts to revoke and avoid the application of the Order, the Respondent commenced the Consolidation Tribunal proceedings in a further effort to avoid its obligations pursuant to the Order.

125. In summary, after trying and failing to overturn the FM1 Tribunal's Order for most of 2023 by first challenging the Order and thereafter seeking to set aside or oust the jurisdiction of the FM1 Tribunal, the Respondent has not given up. It continues to engage in repeated procedural challenges.

126. It is now attempting yet another strategy, before this Consolidation Tribunal, to avoid its obligations to the Claimant pursuant to the Order by filing its Consolidation Request on February 12, 2024. In so doing, the Respondent is refusing to accept the FM1 Tribunal's decisions that the two proceedings are not based on the same facts.

127. As is evident from the lengthy timeline described in the preceding section, the FM1 Tribunal is already well advanced in the proceedings. The FM1 Tribunal has reviewed complicated factual and legal matters which are not the same in both the proceedings and issued multiple decisions over the course of three years.

128. As will be explained below, the FM2 Tribunal has not even been constituted yet, and the only claim before it concerns the VAT refunds prior to January 4, 2023. With the FM1 Tribunal in possession of such a large breadth of experience and knowledge, the fair and effective resolution of all claims will be most efficiently (and with the least amount of cost) adjudicated by the FM1 Tribunal.

### D. Background of Case No. ARB/23/28

129. On March 31, 2023, the Claimant filed its NOI[129] for the Respondent's violation of NAFTA Chapter 11 by restricting access to [redacted] of VAT refunds owed to the Claimant.[130]

[129] *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Notice of Intent to Submit Claim – NAFTA Chapter 11, dated March 31, 2023, **RM-0010.**

[130] This claim was filed as a "legacy" NAFTA arbitration after the United States-Mexico-Canada Agreement (**USMCA**) replaced NAFTA on July 1, 2020. NAFTA was officially replaced by the USMCA on July 1, 2023.

130. On June 29, 2023, the Claimant filed its RFA for FM2 for the VAT refunds owed to the Claimant accrued between April 2020 and January 4, 2023.[131] Contrary to the Respondent's claim,[132] the factual circumstances and violations **are not** the same as those in FM1.

131. First, the Claimant only filed the RFA for FM2 after it had requested a settlement conference with the Respondent and offered Guarantees for each of the applicable tax years where the SAT had claimed tax deficiencies pursuant to Mexican law.[133] The Respondent rejected the Claimant's request for a settlement meeting.[134]

132. Even after the Claimant filed its RFA for FM2, the Claimant attempted again to try to work with the Respondent to resolve the FM2 claims by expressing its openness to continue good faith negotiations.[135] The Claimant sent a letter reminding the Respondent that it had already submitted Guarantees that satisfy all the requirements imposed by the SAT for the years 2010 to 2012.[136] It was the Claimant's understanding that the Respondent remained open to lifting the freeze on PEM's bank account and releasing the VAT refunds to PEM once the Respondent received Guarantees for each of the applicable tax years where the SAT claimed tax deficiencies.

133. The Claimant resubmitted its Guarantees along with its letter so that the Respondent would be able to lift the bank freeze and release the VAT refunds that are the subject of FM2—then the parties could jointly discontinue the FM2 proceeding. Despite there being no justification for rejection of the Guarantees under Mexican law, the Respondent simply stated that the SAT's decision concerning the Guarantees must be followed and that the Respondent refuses to meet to discuss settlement of FM2.[137]

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[131] *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Request for Arbitration, dated June 29, 2023, **RM-0063**. Note the different timeframes of the claims in the APA Arbitration and the VAT Arbitration as it relates to VAT refunds: the VAT Arbitration claim is for the amount of [redacted] deposited into PEM's blocked bank accounts from **April 2020 to January 4, 2023**; the APA Arbitration Tribunal's Order is for the Respondent to make all future refunds starting from **January 4, 2023 onward** available to PEM.

[132] *See* Consolidation Memorial, dated October 7, 2024, ¶ 9.

[133] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 14, 2023, **CM-0008**.

[134] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 14, 2023, **CM-0008**.

[135] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 14, 2023, **CM-0008**.

[136] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 14, 2023, **CM-0008**.

[137] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated August 23, 2023, **CM-0009**.

134. It is **untrue** that the Claimant filed a second arbitration based on the same measures as those in FM1. Furthermore, the Claimant only filed the NOI and RFA in FM2 in order to preserve its rights, after determining that attempts at negotiations with the Respondent would be fruitless, and in order to meet the impending deadline for filing legacy NAFTA claims.

135. On July 21, 2023, ICSID registered the new claim under case number ARB/23/28.[138]

136. On October 24, 2023, ICSID confirmed the appointment of the Claimant's nominee, Horacio A. Grigera, to the FM2 Tribunal.[139]

137. On March 4, 2024, ICSID confirmed the appointment of the Respondent's nominee, Toby Landau, to the FM2 Tribunal.[140]

138. After the Consolidation Tribunal issued its Procedural Order No. 1 suspending FM1 and FM2, there has been no further activity. The appointment of the President for the FM2 Tribunal is pending.[141]

139. As soon as the FM1 Tribunal agreed to accept the FM2 claim as an ancillary claim against the Respondent's objections (**Expedited Ruling on Ancillary Claims Request**),[142] the Claimant has sent the Respondent three offers to pay reasonable costs concerning FM2 proceeding and the discontinuance of the proceeding. The Respondent has rebuffed[143] the Claimant each time without providing reasons or by claiming that discontinuance is not possible while the Consolidation Tribunal's proceeding is underway.[144] Therefore, it is disingenuous of the

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[138] *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Respondent's Request for the Establishment of a Consolidation Tribunal, dated February 12, 2024, Annex 19, (**Consolidation Request**), **RM-0001**.

[139] *See* Letter from Elisa Méndez Bräutigam to the Parties, dated October 24, 2023, **CM-0017**.

[140] *See* Letter from Elisa Méndez Bräutigam to the Parties, dated March 4, 2024, **CM-0022**.

[141] *See First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 and ICSID Case No. ARB/23/28, Consolidation Tribunal's Procedural Order No. 1, dated August 5, 2024, **RM-0002**.

[142] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, **RM-0040**.

[143] *See* Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 5, 2024, **CM-0025**; *see also* Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 28, 2024, **CM-0026**; Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated October 17, 2024, **CM-0028**.

[144] *See supra* ¶¶ 57(d)-(f).

Respondent to base its Consolidation Memorial on an argument of "fair and efficient" resolution of the proceedings when it has been repeatedly presented an offer to proceed expeditiously with a "single tribunal" to adjudicate both claims and has rejected the offer each time with no genuine explanation or reasons provided for its position. Such conduct does not indicate that the Respondent is acting in good faith.

140. It is also patently false for the Respondent to argue that its refusal is based on costs when the Claimant has made multiple attempts to offer reasonable costs concerning FM2.[145]

### E. The Respondent's Consolidation Request caused the Claimant to join the two claims by seeking a decision from the FM1 Tribunal allowing filing of ancillary claims

141. As explained in the previous section,[146] the Claimant did not at the outset contemplate consolidation or joining the FM2 claim as an ancillary claim to FM1 proceedings.

142. This was because the Respondent had previous argued (in prior proceedings to this one) that the consolidation of the two claims or the adding of the VAT refunds claim to the claims before the FM1 Tribunal, as an ancillary claim, would render the Order on provisional measures to be in violation of NAFTA Article 1134. The Claimant did not agree with this position, but nevertheless decided that keeping the claims before the FM1 Tribunal separate from the VAT refund claim, would avoid yet another round of challenges by the Respondent based on NAFTA Article 1134.

143. However, with the clear change of position of the Respondent, whereby it is seeking a decision consolidating the two claims, the Claimant decided to request the FM1 Tribunal to accept the FM2 claim as an ancillary claim for the fair and efficient resolution of all claims.[147]

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[145] *See* Consolidation Memorial, fn. 97.

[146] *See supra* ¶ 134.

[147] Consolidation Request, dated February 12, 2024, **RM-0001**.

### F. Background of Mexico's Consolidation Request

144. On February 12, 2024, the Respondent submitted its Consolidation Request under NAFTA Article 1126 to the ICSID General-Secretary, Meg Kinnear.[148]

145. On February 15, 2024, the FM1 Tribunal invited the parties to submit their comments on whether the Tribunal should stay the FM1 proceeding by February 22, 2024.[149]

146. On February 22, 2024, ICSID sent the parties a letter on its intention to establish a three-person Consolidation Tribunal, inviting the parties to submit comments on its proposed Tribunal members by February 29, 2024.[150]

147. On February 22, 2024, both parties submitted comments to the FM1 Tribunal agreeing to a stay pending the decision on the Consolidation Request.[151] The Claimant agreed to a stay on the condition that the stay is temporary and will not affect the Claimant's rights beyond suspending the deadlines. The Claimant also requested the FM1 Tribunal to issue instructions to the Respondent requiring it to explain why it has not complied with the FM1 Tribunal's Order and whether it intends to comply, and by when. At the time of the letter, the Respondent owed the Claimant in excess of [redacted] pursuant to the Order, which continues to grow at an estimated [redacted] for [redacted].[152]

148. On February 29, 2024, the FM1 Tribunal issued PO 6, in which it suspended the proceedings pending the Consolidation Request.[153] It also ordered the Respondent to comment on whether it has complied with its Order concerning the [redacted] owed to the Claimant and to supply evidence thereof, or else explain when it intends to comply.[154]

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[148] *See* Consolidation Request, dated February 12, 2024, **RM-0001**.

[149] *See* Letter from Sara Marzal to the Parties, dated February 15, 2024, **CM-0019**.

[150] *See* Letter from Elisa Méndez Bräutigam to the Parties, dated February 22, 2024, **RM-0041**.

[151] *See* Letter from Riyaz Dattu to Sara Marzal, dated February 22, 2024, **CM-0020**; *see also* Letter from the Respondent to Sara Marzal, dated February 22, 2024, **CM-0021**.

[152] *See* Letter from Riyaz Dattu to Sara Marzal, dated February 22, 2024, **CM-0020**.

[153] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Procedural Order No. 6 (**PO 6**), dated February 29, 2024, **RM-0019**.

[154] PO 6, dated February 29, 2024, **RM-0019**.

149. On March 11, 2024, after receiving an extension, the Respondent shockingly submitted a letter to the FM1 Tribunal claiming that the Claimant is responsible for its lack of access to the VAT refunds by failing to indicate the correct bank account for deposits.[155] This is patently false. The Claimant had promptly sent the Respondent its new bank account information shortly after the FM1 Tribunal issued its Decision on Provisional Measures.[156]

150. On March 25, 2024, after receiving an extension, the Claimant responded to the Respondent's bald accusation for its lack of compliance with the Order.[157] The Claimant's letter sets out facts to explain how the Respondent is trying to mislead the FM1 Tribunal while continuing to violate its Order.

151. On March 29, 2024, the FM1 Tribunal affirmed that the Respondent had not fully complied with the Order and urged it to do so.[158] After receiving extensions to comment and attempts to communicate with the Respondent requesting when it intends to fully comply with the Order, on May 1, 2024, the Claimant informed the FM1 Tribunal that the Respondent communicated in its letter dated April 30, 2024[159] that it is consulting with the SAT to fully comply with the Order.[160]

152. On May 6, 2024, the FM1 Tribunal sent the parties correspondence stating:

> *The Tribunal is pleased that Respondent has confirmed in its letter of 25 April 2024 to Claimant its intention to fully comply with the Tribunal's Order* of 26 May 2023 by releasing to PEM the amounts of the VAT refunds pertaining to the months from January to July 2023 still deposited on PEM's blocked accounts. The Tribunal takes note that Respondent is actively proceeding to have these amounts unblocked in favor of PEM.
>
> *The Tribunal urges Respondent to complete the necessary steps to this end with all required speed and invites the Parties to keep the Tribunal informed* of the

[155] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Communication Regarding Compliance with the Provisional Measure, dated March 11, 2024, **RM-0020**.

[156] *See supra* ¶ 105.b).

[157] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Communication Regarding Compliance with the Provisional Measure, dated March 25, 2024, **RM-0021**.

[158] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, ICSID Communication to the Parties, March 29, 2024, **RM-0022**.

[159] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated April 30, 2024, **CM-0023**.

[160] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Communication from the Claimant requesting relief, dated May 1, 2024, **RM-0024**.

> completion of this process, the release of the above funds and thus the full compliance with the Decision.[161]

153. On May 8, 2024, the Consolidation Tribunal was constituted.

154. On May 21, 2024, the Respondent requested clarification form the FM1 Tribunal concerning suspension of the proceedings in light of the Consolidation Proceedings.[162]

155. On June 4, 2024, the FM1 Tribunal again urged the Respondent to comply with the Order, stating:

> Reference is made to the Respondent's clarification request of 21 May 2024, as well as the Claimant's comments of 29 May 2024.
>
> *The Tribunal observes that it does not appear that the Respondent has fully complied with the Tribunal's Decision of 26 May 2023, although it has repeatedly stated that it intends to do so*. This matter is therefore still pending notwithstanding the suspension of the proceedings.
>
> *The Tribunal therefore urges again the Respondent, confirming its message to the Parties of 6 May 2024, to complete the steps needed to release to PEM the amounts of the VAT refunds* pertaining to the months from January to July 2023 in full compliance of the Decision and report promptly to the Tribunal.[163]

156. After this correspondence affirming the validity of the Order despite the suspension of the proceedings, the Respondent continued to blatantly disregard the Order. Seeking to resolve all the issues efficiently and fairly, the Claimant filed its Request for Admission of Ancillary Claims with the FM1 Tribunal.

## III. LEGAL ARGUMENT

157. As explained below, the factual situation warrants the rejection of the Respondent's Consolidation Request based either of these two grounds: (1) the Consolidation Tribunal lacks authority to consolidate because the condition of multiple "claims" before more than a single tribunal no longer exists due to the discontinuance of the FM2 proceedings; and (2) in the

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[161] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, ICSID Communication to the Parties, dated May 6, 2024, (emphasis added), **RM-0025**.

[162] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Communication from Respondent to the Tribunal, dated May 21, 2024, **RM-0026**.

[163] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, ICSID Communication to the Parties, dated June 4, 2024, (emphasis added), **RM-0030**.

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

### A. The Consolidation Tribunal Lacks Authority to Consolidate in Light of Changed Circumstances.

158. As explained, due to the existence of different circumstances from the time of the filing ten months ago of the Consolidation Request, the Claimant is no longer proceeding with multiple claims in two separate proceedings, *i.e.*, in FM1 and FM2. Accordingly, the Consolidation Tribunal no longer possesses the authority to consolidate.

159. Importantly, on July 15, 2024, following the Claimant's request to introduce the VAT refund claim as an ancillary claim in FM1, the FM1 Tribunal granted Claimant's request, finding in relevant part:

> 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.[164]

160. Further, the Claimant has taken since then the necessary steps to discontinue the proceedings in FM2. Specifically, after the Respondent rebuffed the Claimant's multiple requests for the Respondent's consent to discontinue FM2, along with the Claimant's offer to pay the Respondent's reasonable costs, the Claimant requested the ICSID Secretariat to discontinue FM2 on October 1, 2024,[165] stating:

> *The Claimant hereby requests an immediate discontinuance of the proceeding in First Majestic Silver Corp. v. The United Mexican States, ICSID Case No. ARB/23/28*, pursuant to Rule 56 of the *ICSID Arbitration Rules (2022)*, which provides as follows:
>
> > Rule 56
> >
> > (1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the

[164] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, (emphasis added), **RM-0040**.

[165] *See supra* ¶¶ 57.c-57.i.

other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

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

…

We would request that in the circumstances of this case, the Respondent should be provided with no more than seven days to indicate whether it opposes the discontinuance.

In suggesting that the Respondent be provided no more than seven days to respond, we wish to inform the Secretary-General of the following efforts that have been made by the Claimant to obtain the Respondent's agreement for the dissolution of the proceedings:

a) *The Claimant made requests to the Respondent on two separate occasions*, July 31, 2024, and August 26, 2024, for its agreement concerning discontinuance of the proceeding in Case No. ARB-23-28. *The Claimant's offer included an agreement to pay reasonable costs to the Respondent*.

b) *The Respondent summarily rejected these two offers, on August 5, 2024 and August 28, 2024, respectively*.

*The Respondent has therefore been aware for more than two months of the Claimant's intention to discontinue Case No. ARB-23-28 by agreement of the parties*, and as such, the Claimant's present request to the Secretary-General was not unexpected by the Respondent.

*It should be noted that there is urgency in having the Tribunal in ICSID Case No. ARB/21/14 resume its proceedings over all claims. At this time, the Respondent is unlawfully and improperly in breach of that Tribunal's provisional relief measures set out in its Order dated May 23, 2023.*[166] *The Respondent, without any lawful basis, is refusing to comply with the Order while the Consolidation Tribunal's decision is pending. Failure to comply with the Order is causing irreparable harm to the Claimant and is exacerbating the dispute between the parties*.

Finally, the discontinuance of ICSID Case No. ARB/23/28 will avoid any duplication of claims that have been admitted in ICSID Case No. ARB/21/14 as ancillary claims. *In addition, the discontinuance would obviate the need for*

[166] Correction: the date should be listed as May 26, 2023. *See* Decision on Provisional Measures, dated May 26, 2023, **RM-0009**.

> *consolidation of ICSID Case no. ARB/23/28 and ICSID Case No. ARB/21/14, as requested by the Respondent*.[167]

161. As recounted in this letter, the Claimant had requested the Respondent's consent to discontinue FM2 and offered to pay the Respondent's reasonable costs in its correspondence dated July 31, 2024.[168] The Respondent's response dated August 5, 2024 did not provide a reason for its refusal to discontinue FM2, only stating:

> The Respondent has reviewed your letter of July 31, 2024 and wishes to inform you that it does not consent to the discontinuance of the arbitration in ICSID case No. ARB/23/2.[169]

162. The Claimant then sent a second letter on August 26, 2024, asking the Respondent to reconsider its offer in the interests of the "'fair and efficient resolution' of all the claims before a single Tribunal."[170] Similar to its first response, the Respondent's reply dated August 28, 2024, tersely stated, "[t]he Respondent reaffirms that it does not consent to the discontinuation of ICSID arbitration No. ARB/23/28."[171]

163. Even after this, the Claimant attempted yet again to settle the Respondent's reasonable costs so as to allow for a fair and efficient resolution of the claims before a single tribunal.[172] For example, as discussed above,[173] on October 14, 2024, the Claimant made a third attempt to discontinue the FM2 proceedings by sending the Respondent a letter, offering: That the Claimant pay to the Respondent its reasonable costs for the discontinuance of FM2.[174] Again, the Respondent rejected this offer on October 17, 2024.[175]

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[167] *See 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, dated October 1, 2024, (emphasis added), **RM-0059**.

[168] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated July 31, 2024, **RM-0053**.

[169] *See* Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated August 5, 2024, **CM-0025**.

[170] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 26, 2024, **RM-0054**.

[171] *See* Geovanni Hernández Salvador to Claimant's Counsel, dated August 28, 2024, **CM-0026**.

[172] *See supra* ¶ 57.f.

[173] *See supra* ¶ 57.f.

[174] *See* Letter Request # 6 and Offer #3, dated October 14, 2024, **CM-0027**.

[175] Correspondence from Geovanni Hernández Salvador to Claimant's Counsel, dated October 17, 2024, **CM-0028**.

164. Consequently, as a matter of factual reality, the Claimant has made it abundantly clear that it is no longer presenting two separate "claims" in different proceedings—the only factual circumstance under NAFTA Article 1126 that gives rise to the Consolidation Tribunal's authority to consolidate. Article 1126(2) clearly sets out the scope of the Consolidation Tribunal's authority as covering only a situation in which "*claims* [plural] have been submitted to arbitration under Article 1120 . . . ."[176]

165. Further, the Respondent's own bad faith attempt to block the discontinuance of FM2 proceeding and the addition of the VAT refund claim to the FM1 Tribunal (which has already accepted the admission of this claim) should be seen for what it is—a refusal to abide by the FM1 Tribunal's Order and to have it assume jurisdiction over the [redacted] claim for the VAT refunds period to the making of its Order.

166. However, the Respondent is responsible for this state of events and the current circumstances. Rather than have the FM1 proceeding continue on a separate track, it filed its Consolidation Request. The Claimant has in turn responded by taking the necessary steps to have all the claims heard by a "single tribunal" thereby making it unnecessary to have a consolidation order issued by this Consolidation Tribunal.

167. When presented on an expedited basis with the opportunity to have the a "single tribunal" (**albeit** FM1 Tribunal) adjudicate both claims, the Respondent now finds itself having to resolve both claims before the FM1 Tribunal with its "broadened" jurisdiction (using the words of the Respondent). It is obvious that the Respondent does not wish to have further involvement of the FM1 Tribunal in deciding both the APA related claims and the VAT related claims.

168. However, the Respondent is not allowed the option to choose if there are no longer two separate claims before two tribunals. Having experienced losses in its determined efforts not to comply with the Order (on a single interim relief request, with three requests being denied by the FM1 Tribunal) it has engaged in every possible procedural tactic available, none of which were successful as they were based on weak premises.

[176] Art. 1126(2), NAFTA, dated January 1, 1994 (emphasis added), **RML-0001**.

169. This Consolidation Tribunal should not allow the Respondent to seek a consolidation based on perpetuating the fiction that "claims" still exist before two separate tribunals.[177] The Respondent's recalcitrance and abuse of process, described in more detail below, clearly aims to propagate a false narrative because the original reality no longer exists.

170. Events have occurred since the Respondent filed its Consolidation Request that simply cannot be ignored. The formation of the Consolidation Tribunal has over the course of the recent events resulted in claims now being before a single tribunal which can provide a fair and equitable process for the resolution of all the claims.

171. In sum, as the factual underpinnings for the application of NAFTA Article 1126 no longer exist, the Consolidation Tribunal lacks the authority to consolidate and may dismiss the Respondent's Consolidation Request on this basis.

### B. In the Alternative, the Consolidation Tribunal Should Not Consolidate on the Basis of Article 1126(2).

172. In the event that the Consolidation Tribunal somehow finds that the FM1 Tribunal has not admitted the VAT refunds claim as an ancillary claim (due to the stay imposed by this Consolidation Tribunal), and that the Claimant is not seeking to discontinue FM2 (which is in reality not the case), the Claimant takes the position that the Respondent has failed to prove that consolidation is appropriate under the circumstances.

173. Article 1126 of NAFTA establishes the test to determine whether to consolidate two or more claims submitted for arbitration under Article 1120:

> 2. 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:

[177] The principle that a State may not benefit from its own wrongdoing is well established in international law. *See, e.g., Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, dated March 3, 2010, ¶ 254 ("The Claimants urge the Tribunal to reject the Respondent's time-bar argument outright for four independent reasons. First, the Claimants reason that principles of equity and good faith, including the ex turpi causa non oritur actio principle, preclude a state from relying on its own wrong (here, delay) to evade jurisdiction. The Claimants also rely upon the Stevenson Case for the proposition that 'it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government.'"), **CML-0008**.

> (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.[178]

174. It is clear therefore that consolidation is to be ordered only if certain pre-conditions set out in NAFTA Article 1126(2) exist, and that the Consolidation Tribunal "is satisfied" that these conditions exist.

175. The onus is on the party requesting consolidation, in this case the Respondent, to convince the Consolidation Tribunal that the conditions for consolidation are satisfied at the time that the Consolidation Tribunal issues its decision, and that it is appropriate to make a consolidation order under the following circumstances:

> two or more 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...[179]

176. Even if the above conditions exist, the Consolidation Tribunal is provided discretion, by the use of the word "may", in deciding on whether it is appropriate to order consolidation.

177. In the present case, assuming *arguendo* that the VAT refund claim has not been admitted to FM1 and remain in FM2, as the factual portion of the submissions amply demonstrate, the claim related to the attempted revocation of the APA (including denial of remedies and enforcement) and the claim related to the VAT refunds do not have questions of law or fact that are in common.[180]

178. Additionally, consolidating these two very different claims is not necessary to ensure the fair and efficient resolution of the claims.[181]

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[178] Art. 1126(2), NAFTA, dated January 1, 1994, **RML-0001**.

[179] *See generally* Art. 1126(2), NAFTA, dated January 1, 1994, **RML-0001**.

[180] *See supra* section I.B)(4).

[181] *See infra* section I.(B)(5).

179. The Claimant also finds strong support for its position, that this is not an appropriate case for consolidation, on the basis of the negotiating history of NAFTA Article 1126(2) and views expressed by eminent scholars and arbitrators in prior cases.

180. The overwhelming view is that this provision is not intended to deal with a consolidation request, where there is a single claimant (with two claims) and a single respondent.

181. The object of this provision understandably relates to ensuring there is no unfairness and inefficiencies when multiple claimants have filed the same or similar claims, pursuant to NAFTA Article 1120, as against a single respondent. In such a situation, the single respondent can seek to pursue consolidation, in order to avoid having to defend against claimants in multiple proceedings concerning the same factual and legal questions requiring adjudication. Simply stated, the provision seeks to avoid inefficiencies and unfairness to the respondent in managing multiple proceedings and also the risk of inconsistent awards.

182. Those are not the circumstances before this Consolidation Tribunal.

183. In the present case, the questions of fact and law in the two distinct claims are not the same. Furthermore, the Respondent is not being put in a position of having to defend as against a multiple number of claimants. Lastly, there does not exist any potential risk of contradictory decisions emerging, as the adjudication does not concern the same factual and legal questions.

184. The U.S. legislation implementing NAFTA provides support for the Claimant's position that the circumstances of this case do not meet the conditions for this Consolidation Tribunal ordering consolidation pursuant to NAFTA Article 1126. The implementing legislation clarifies the purpose of NAFTA Article 1126, and confirms that the consolidation provision should be considered as applicable only in instances where there are a number of claimants each with the same type of claim:

> Article 1126 addresses the possibility that *more than one investor* might submit to arbitration claims *arising out of the same event*. It provides for the appointment by the ICSID Secretary-General of a special three-member tribunal to consider whether such multiple claims have questions of fact or law in common, in which

> case that tribunal may assume jurisdiction over, and decide, all or part of any such claims.[182]

185. The tribunal in *Pope and Talbot v. Canada,* had this to say about NAFTA Article 1126: "consolidation under the NAFTA provision appears to be directed to consolidation of cases involving different investors making similar claims, rather than single investors making different claims."[183]

186. Meg Kinnear, the former ICSID Secretary General, in her article analyzing NAFTA Article 1126 and based on her review of decisions concerning consolidation requests, explains the purpose of this provision as follows:

> Article 1126, [does not] contemplate consolidation of unrelated claims by a single investor. Consolidation relates to numerous claims based on similar fact or law, *and is not a vehicle to join unrelated claims by a single claimant in a consolidated proceeding*.[184]

Referring to the *Pope and Talbot v. Canada* decision on consolidation, she notes that the conclusion in that case that the consolidation provision within NAFTA is directed at "different investors making similar claims, rather than a single investor making different claims" is "*undoubtedly… a correct reading of Article 1126*."[185]

187. Furthermore, the Consolidation Tribunal should take note of the fact that all three consolidation requests under NAFTA have involved multiple claimants with similar claims—as opposed to one claimant with two or more claims:

a. *Corn Products Int'l v. Mexico* & *Archer Daniels Midland Co. et al v. United Mexican States*: Two claimants brought separate cases against Mexico in relation to the same measures: Mexico's imposition of an excise tax on soft drinks containing high fructose corn syrup. The Consolidation Tribunal exercised its

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[182] North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, vol. 1, **CML-0001**.

[183] Art. 1126(2), NAFTA, dated January 1, 1994, **RML-0001**; *see also Pope & Talbot, Inc. (U.S.) v. Canada*, (UNCITRAL), Award Concerning the Motion by the Government of Canada Respecting the Claim based upon Imposition of the "SuperFee", dated August 7, 2000, fn 2, (emphasis added), **CML-0005**.

[184] Meg Kinnear, Article 1126 - Consolidation', Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1, pp. 1126-11 (emphasis added), **CML-0004**.

[185] Meg Kinnear, Article 1126 - Consolidation', Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1, pp. 1126-11 (emphasis added), **CML-0004**.

discretion not to consolidate because of issues related to confidentiality and due to the cases being at different procedural postures.[186]

b. *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America*: Several Canadian softwood lumber producers brought separate claims against the same measures: United States imposition of anti-dumping duties and countervailing duties on imports of softwood lumber from Canada to the United States following the U.S. Department of Commerce and U.S. International Trade Commission affirmative findings.[187] The Consolidation Tribunal exercised its discretion to consolidate the cases as the U.S. had brought the same jurisdiction challenges in each case, the claimants' claims on the merits were the same, and the cases were at a similar procedural standpoint.[188]

c. *Canadian Cattleman Claims*: In this case the Consolidated Request was based on consent of all the relevant parties. The claims were commenced by numerous claimants filing 107 individual notices of intents/arbitrations between March and June 2005. The claims also concerned the same U.S. law banning the importation of live cattle from Canada. All claimants were represented by the same counsel.[189]

188. In this present case, the Respondent is seeking to consolidate two very different claims initiated by the same Claimant two years apart, based on events that occurred in one of the claims starting over a decade ago and in the case of the second claim within the last three years .[190] Furthermore, the claim before the FM1 Tribunal was commenced when the SAT took illegal enforcement measures for amounts it claimed were taxes owing, and that were **not** exigible because the APA remained valid.

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[186] *See generally, Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Order of the Consolidation Tribunal, dated May 20, 2005, **CML-0006**.

[187] *See generally, Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, **RM-0002**.

[188] *See generally, Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶¶ 209-211, **RM-0002**.

[189] *See generally, The Canadian Cattlemen for Fair Trade v. USA*, Procedural Order No. 1, dated October 20, 2006, **CML-0007**.

[190] The FM1 Tribunal has decided numerous times that the claims in FM1 and FM2 are separate claims. *See supra* Section II.C(1)(e)-g).

189. On the other hand, the claim concerning the VAT refunds arose out of the Claimant's Request for Provisional Measures made on January 4, 2023,[191] and admissions made by the Respondent's counsel at the hearing held on March 13, 2024 indicating that the VAT refunds belonged to PEM.[192] Furthermore, according to the Respondent's counsel, the VAT refunds could be accessed simply by PEM opening a new bank account and directing the SAT to deposit VAT refunds into that account.[193]

190. It is understandable that in the case of multiple claimants bringing claims arising out of the same measures, that fairness and efficiency would suggest that consolidation may alleviate the burden that is imposed on the sovereign state, as a respondent, to defend claims arising out of the same measures in multiple proceedings against different claimants. Again, as previously stated, those are not the facts here.

191. In applying the principles emanating from *Canfor* case, which the Respondent references in support of the requested consolidation order, we deal with each of the relevant factors in further detail below to support the Claimant's position that the Respondent's consolidation request should be rejected.

1. The *Canfor* Test Must be Met

192. As the Respondent acknowledges,[194] in *Canfor*, applying NAFTA Article 1126(2), the Consolidation Tribunal found that it had discretionary power to make a consolidation order but only where: 1) the claims were submitted to arbitration under Article 1120; 2) the claims contained "a question of law or fact in common"; 3) the order served the interests of fair and efficient resolution of the claims; and 4) the disputing parties were heard.[195]

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[191] *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's Request for Provisional Measures, dated January 4, 2023, ¶ 144, **RM-0055**.

[192] Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[193] Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[194] *See* Respondent's Consolidation Memorial, dated October 7, 2024, ¶ 63; *see also* Consolidation Request, ¶ 36.

[195] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 89, **RML-0002**.

2. The claims initially be submitted under Article 1120

193. The first element of the *Canfor* test for consolidation is that the claims must have been submitted for adjudication under NAFTA Article 1120.[196] Here, it is undisputed that both FM1 and FM2 proceedings were filed pursuant to NAFTA Article 1120.[197]

194. The Respondent has made arguments in its Consolidation Memorial regarding the Claimant's inability to unilaterally discontinue the FM2 arbitration.[198] This is not a relevant consideration in relation to the "NAFTA Article 1120" prong of the *Canfor* test. However, for the purposes of correcting the record, the Claimant makes clear that it has throughout acted in accordance with the applicable ICSID Arbitration Rules. The Claimant has made numerous good faith attempts to seek the Respondent's agreement to discontinue the FM2 proceedings and has also offered to pay costs.[199] The Respondent has summarily rejected all of the Claimant's offers to discontinue the FM1 proceeding, that the Claimant has determined is no longer necessary, if the same claim is added as an ancillary claim to the FM1 Tribunal's proceedings.[200]

195. As we discuss further below, what is relevant in connection with the Respondent's unwillingness to have the Claimant discontinue the FM2 proceeding, is that this refusal stems out of the attempt to have this Consolidation Tribunal issue a consolidation decision, even when in reality there are no longer two separate claims proceeding before two separate tribunals.

196. The Respondent through its refusal to agree to a discontinuance is attempting to create a façade of two claims with the same factual and legal issues proceeding in parallel before two tribunals, when this is simply not the case.

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[196] Art. 1126(2), NAFTA, dated January 1, 1994, **RML-0001***; see also Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 89, **RML-0002**.

[197] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Request for Arbitration of First Majestic Silver Corp., dated March 1, 2021, **RM-0005**; *see also First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Request for Arbitration, dated June 29, 2023, **RM-0063**.

[198] Consolidation Request, ¶¶ 66-68 ("The Claimant cannot now withdraw its submission to arbitration in FM2. When it filed its RFA, the Claimant consented to the FM2 arbitration…. [T]he Claimant unilaterally discontinue the FM2 arbitration").

[199] See *supra* ¶ 139.

[200] *See supra* ¶¶ 139-140.

3. The claims do not raise a question of law or fact in common

197. Second, under the *Canfor* test, the consolidated claims must have a question of law or fact in common.[201] To this point, *Canfor* Consolidation Tribunal explained that the term "question" in the phrase "a question of law or fact in common" within Article 1126(2) means "*a factual or legal issue that requires a finding to dispose of a claim*."[202]

198. Here, the resolution of the VAT refunds claim will not dispose of the claim before the FM1 Tribunal concerning the attempted revocation of the APA, the denial of remedies both domestic and international, and the enforcement measures taken illegally during the COVID-19 pandemic in the midst of a close down ordered by the Government of Mexico.

199. Further, the FM1 Tribunal has already concluded on multiple occasions, that the two arbitrations are based on very different factual and legal grounds. The FM1 Tribunal has so concluded in response to the repeated challenges that have been launched by the Respondent, and on each occasion the Respondent has received decisions that confirm that the measures at issue, the facts and the legal grounds of the two claims are not the same.

200. Specifically, the FM1 Tribunal has found:

a. **Decision on Provisional Measures**: "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 [in the FM1 Tribunal proceedings]."[203]

b. **Decision on Revocation Request**: "the Tribunal also noted in the PM Decision that, based on statements made by Claimant itself, the effective payment of those VAT refunds was *not a claim that Claimant was making in this arbitration*."[204]

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[201] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 89, **RML-0002**.

[202] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 109 (emphasis added), **RML-0002**.

[203] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Provisional Measures, dated May 26, 2023, ¶ 135, **RM-0009**.

[204] Decision on Revocation Request, dated September 1, 2023, ¶ 43, **RM-0013**.

c. **Decision on Revocation Request**: "In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. *Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal*."[205]

d. **Decision on Respondent's Preliminary Objection to Jurisdiction**: "The Tribunal therefore confirms its 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*."[206]

e. **Decision on Respondent's Preliminary Objection to Jurisdiction**: "By submitting a claim concerning the inaccessibility of the VAT refunds to PEM in the Second Arbitration, *the Claimant could not and has not breached Article 1121 NAFTA nor its waiver since it has not challenged this measure as being in breach of NAFTA nor has it submitted any claim in that respect in the present arbitration*."[207]

f. **Decision on Respondent's Preliminary Objection to Jurisdiction**: "As to the other measure that the Respondent has raised in connection with Article 1121 NAFTA, that is, the blocking of PEM's accounts by SAT since April 2020, there can be no doubt, nor is there any disagreement between the parties, that this is a measure which the Claimant has challenged in this arbitration as being in breach of Mexico's obligations under the NAFTA. On the other hand, the Respondent has not alleged that First Majestic has challenged this measure (also) in the Second Arbitration, nor does it appear from examining First Majestic's Request for Arbitration in the Second Arbitration that any claim related to such measure has been made by the Claimant there. *On the contrary, the Claimant has been explicit*

[205] Decision on Revocation Request, dated September 1, 2023, ¶ 45, **RM-0013**.

[206] *See* Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, ¶ 80, **RM-0014**.

[207] *See* Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, ¶ 81, **RM-0014**.

*there that it is not submitting claims in respect of such measure in the Second Arbitration*."[208]

201. Finally, the Respondent has incorrectly alleged in its Consolidation Memorial that "Claimant itself acknowledges that FM1 and FM2 arbitrations concern common questions of law and fact."[209] To this point, the Respondent makes reference to Claimant's Request for Admission of Ancillary claims where the Claimant argued that the proposed ancillary claims "arise directly from the dispute's subject matter."[210]

202. The Respondent also cites to the FM1 Tribunal's admission of the ancillary claim in which it notes that the "ancillary claims proposed by the Claimant… appear to arise directly from the dispute's subject matter."[211]

203. The fact that the second claim arose out of the ongoing dispute does not render it to be the same claim. As explained previously, the second claim relates to the VAT refunds and arose out of admissions made by the Respondent concerning PEM's entitlement to the VAT refunds, that it may now regret were made.

204. These statements confirmed for the Claimant that notwithstanding the freeze imposed on the bank account, the Respondent acknowledged that PEM had full entitlement to the VAT refunds. The Respondent's counsel indicated to the FM1 Tribunal that all the Claimant should have done, instead of bringing its Request for Provisional Measures in connection with the VAT refunds, was to have opened a new bank account with directions to the SAT to deposit the VAT refunds into that account. As previously noted, the FM1 Tribunal reflected those statements in its Provisional Measures Decision.

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[208] Decision on Revocation Request, dated September 1, 2023, ¶ 82, **RM-0013**.

[209] Consolidation Memorial, dated October 7, 2024, ¶ 71.

[210] Consolidation Memorial, dated October 7, 2024, ¶ 72.

[211] Consolidation Memorial, ¶ 72; *see also* Expedited Ruling on Ancillary Claims Request, **RM-0040**. The Respondent also alleges that the FM1 Tribunal stated that "the ancillary claim is 'identical' to the claim submitted in the FM2 arbitration." (Consolidation Memorial, ¶ 73). **To be clear, the FM1 Tribunal was referring to the identical nature of the FM2 claim and the ancillary claim submitted to FM1. The Tribunal was not opining on the similarity of the claims in FM1 and FM2 generally.** Further as discussed in Section II(C)(1)(e)-(f), the FM1 Tribunal held numerous times that the FM1 and FM2 claims were separate claims.

205. This is therefore a clear mischaracterizing of the statements of both the FM1 Tribunal and the Claimant. At no time has the Claimant stated that the FM1 and FM2 proceedings concern common questions of law and fact. The record will establish that through all the challenges before the FM1 Tribunal and before the Consolidation Tribunal, the Claimant's position has been that the two claims have no common questions of law and fact.

206. The FM1 Tribunal's position, has also been entirely clear. The fact that the VAT refunds claim arose out of the dispute before it, did not make them the same claim and in relation to the same measures:

> In light of the principles recalled above governing the issuance of provisional measures intended to avoid the aggravation of the dispute and maintain the *status quo* while the arbitration is pending, the Tribunal grants the following provisional measure: the Tribunal recommends to the Respondent not to block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.
>
> Finally, the Tribunal considers that the above recommendation is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." *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.* [in connection with the revocation of the APA claim][212]

193. Beyond mischaracterizing the FM1 Tribunal's statements, the Respondent is also ignoring the Claimant's clearly stated position that the "the ancillary claims and the claim related to the freezing of the bank account, have a common subject in dispute *albeit* in relation to different measures of the Respondent (the challenge to the freezing measure of the SAT in April 2020, and the continuing inaccessibility of the VAT refunded amounts which continues to this day)."[213]

207. It is therefore clear that the Respondent cannot establish that there are "common questions of law and fact" necessitating the consolidation of the FM1 and FM2 claims before this Consolidation Tribunal.

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[212] Decision on Provisional Measures, dated May 26, 2023, ¶¶ 134-135, (emphasis added), **RM-0009**.

[213] Request for Admission of Ancillary Claims, dated June 24, 2024, ¶ 71, **RM-0031**.

4. Consolidation is not in the interests of fair and efficient resolution of the claims

208. The third element under the *Canfor* test, requires consolidation to be in the interests of fair and efficient resolution of the claims.[214] Specifically, the *Canfor* Consolidation Tribunal, found that even where "at least one question of law or fact in common may present itself, [..] resolution of that question by an Article 1126 Tribunal *may not serve the fair and efficient resolution of the claims advanced before the Article 1120 Tribunals*. Whether that is so depends entirely on the circumstances of the cases and cannot be answered in the abstract."[215]

*a) It would not be in the interests of fairness to consolidation the proceedings*

209. In what follows, the requirements of the existence of (a) fairness and (b) efficiency justifying consolidation will be addressed.

210. Under the *Canfor* test for consolidation, it must be established that when analyzing the term "fairness" in the context of consolidation, "the *interests of all parties involved should be balanced* in determining what is the procedural economy in the given situation."[216] Further, in *Corn Products v. Mexico,* the consolidation tribunal found that party autonomy, and particularly whether the parties wish for the proceedings to be consolidated is "*a relevant consideration in evaluating the fairness of the proposed consolidation*."[217]

211. In this present case, the Claimant (in both FM1 and FM2) strongly opposes the consolidation of the two claims based on lack of fairness.

212. Specifically, the FM1 tribunal, which has been involved for a considerable amount of time in the adjudication of the claims, including addressing the different legal and factual issues relating to the claims, has already agreed to add the FM2 claim as an ancillary claim. This is **not** because they are the same claims or have common questions of fact and law to be adjudicated, but

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[214] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 121, **RML-0002**.

[215] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 114, (emphasis added), **RML-0002**.

[216] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 125, (emphasis added), **RML-0002**.

[217] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Order of the Consolidation Tribunal, dated May 20, 2005, ¶ 12, (emphasis added), **CML-0006**.

because the FM1 Tribunal can bring efficiencies to bear (having already substantially progressed on the APA related claims and having been exposed to the claims that are subject to the FM2 proceeding).

213. Claimant therefore submits that the fairest and most efficient way forward to resolve both the claims, would be for the FM1 Tribunal to continue hearing the FM1 claims with the claim in the FM2 proceeding added as an ancillary claim.

214. The Claimant is also of the firm view that the goal of fairness will be lost if the Respondent can achieve through its Consolidation Request the very position that has been soundly rejected by the FM1 Tribunal in the multiple number of challenges brought by the Respondent. The FM1 Tribunal has rejected the position that the two claims are concerned with the same issues of fact and law based on sound reasons, which should not now be reversed by this Consolidation Tribunal.

*b) It would not be in the interests of efficiency to consolidate the proceedings*

215. In order for FM1 and FM2 to be consolidated, it must also be established beyond the important consideration of fairness, that consolidation would be in the interests of efficiency. As previously noted, the onus is on the Respondent to establish to the satisfaction of the Consolidation Tribunal that the consolidation will produce both fairness and efficiencies. It is the Claimant's position that the Respondent has failed to meet its evidentiary burden.

216. As explained by the *Canfor* Tribunal, "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."[218]

217. The *Canfor* Consolidation Tribunal also stated that factors to be taken into consideration when determining whether consolidation would be in the interests of efficiency are (i) time; (ii) costs; and (iii) avoidance of conflicting decision.[219]

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[218] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 126, **RML-0002**.

[219] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 126, **RML-0002**. Note the parties agreed that time, costs, and avoidance of conflicting decision are factors to be taken into consideration. *See* Consolidation Memorial, ¶ 80.

*i. The "situation as it exists" is not in favor of consolidation*

218. As explained, the *Canfor* Tribunal found that "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*."[220] To this point, the Respondent has argued:

> 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.[221]

219. The Respondent then provides disingenuous reasons for pursuing its Consolidation Request, even in the face of substantially changed circumstance from mid-February 2024, when it initiated the procedure for consolidation. The Respondent simply states without an explanation, that it is "justified in pursuing consolidation rather than consenting to the discontinuation of FM2 arbitration and to the Claimant's proposed broadened FM1 arbitration."[222] Each of these reasons must be rejected.

220. First, "the situation as it exists," is that the FM1 Tribunal has accepted the FM2 claim as an ancillary claim, and the FM2 Tribunal has yet to be constituted due to the Respondent's refusal to allow the ICSID Secretariat to appoint a Presiding Member.[223]

221. The situation that would continue to exist if this Consolidation Tribunal decides against consolidation, is the lifting of the suspension of FM1 (with the Claimant being allowed to proceed with its ancillary claim), and the resolution of the cost issue in the FM2 arbitration—something which the Claimant has already proposed numerous times to no avail.[224]

222. Therefore, the reality of the changed circumstances since the filing of the Consolidation Request is that, if the consolidation decision is against the combining of the two claims into one proceeding, the situation would therefore not simply revert to "the lifting of

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[220] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 126 (emphasis added), **RML-0002**.

[221] Consolidation Memorial, ¶ 93.

[222] Consolidation Memorial, ¶ 94.

[223] *See supra* ¶ 3.i.

[224] *See supra* ¶¶ 161-164.

suspensions and the continuation of the two arbitrations,"[225] as the Respondent is alleging. Rather, the refusal by this Consolidation Tribunal to consolidate will result in the adjudication of the Claimant's two claims by the FM1 Tribunal, by virtue of the FM1 Tribunal's admission of the FM2 claim as an ancillary claim. This will result in the resolution of the two claims before a single tribunal.[226]

223. The goal of consolidating the FM1 and FM2 claims will be reached far more quickly and efficiently if the Consolidation Tribunal rejects the Respondent's request. The Respondent's refusal to discontinue the FM2 proceeding, and its insistence that these consolidation proceedings be continued, is adding substantial costs and additional delays.

224. The other justifications given by the Respondent for refusing to consent to the discontinuation of the FM2 arbitration (and thereby allowing the FM1 Tribunal to proceed with both claims), must all fail. Specifically:

a. The Respondent will be given a full and fair opportunity to "present its case on all [currently before the FM1 and FM2] issues" if FM1 Tribunal adds the FM2 claim as an ancillary claim.[227]

b. The Respondent has never been denied its fundamental right of due process and equality of treatment.[228] In fact, the Respondent has raised sequential procedural challenges in the FM1 arbitration and has had several opportunities to be heard (including being afforded two rounds of submissions).[229] The fact that the Respondent's challenges have been unsuccessful does not mean that it is being denied fairness, due process, and equality of treatment.

[225] Consolidation Memorial, ¶ 93.

[226] Note the respondent alleges that Claimant's proposed comparison is "only theoretical" as the FM1 and FM2 claims "cannot be withdrawn or discontinued." This is incorrect. The FM1 Tribunal has admitted the FM2 claims as ancillary claims. The Respondent has refused all of the Claimant's attempts to discontinue the FM2 proceedings, including multiple offers by the Claimant pay its reasonable costs. *See* Consolidation Memorial, ¶ 93.

[227] *See* Consolidation Memorial, ¶ 94, bullet point 1, (i).

[228] *See* Consolidation Memorial, ¶ 94, bullet point 1, (ii).

[229] *See supra* ¶¶ 98-102

c. The Claimant denies any allegations of abuse of process[230] on its part, as it has in all instances been at the receiving end of the various applications and challenges initiated by the Respondent.

d. The most efficient resolution and administration of the claims would be for the FM1 Tribunal, which has already accumulated a vast amount of knowledge of the subject matter of the two disputes starting in 2021, to proceed to adjudicate both claims, including by accepting the FM2 claim as an ancillary claim.[231]

225. The Respondent has also made several baseless arguments regarding the "broadened issues in the proceedings and the cross-over issues between the proceedings."[232] Each argument must be dismissed. Specifically:

a. The FM1 tribunal has already rejected the Respondent's arguments that the Claimant breached NAFTA Article 1134 by seeking to add the ancillary claims.[233] In its Decision on Claimant's Request for Admission of Ancillary Claims, the FM1 Tribunal found:

> Regarding the Respondent's contention that NAFTA Article 1134 precludes the submission of additional claims, as they would become part of the ongoing proceedings, *the Tribunal disagrees*. Article 1134 prohibits the issuance of provisional measures concerning a pending claim; *it does not prevent a claimant from subsequently adding such a claim to the proceedings*, provided the conditions of Article 46 of the ICSID Convention are met.[234]

b. If the Respondent were to accept the discontinuation of the FM2 proceeding, there would be no issue of the Claimant's waiver in the FM1 arbitration being breached.[235] Further, this is an argument that the Respondent has already attempted

[230] *See* Consolidation Memorial, ¶ 94, bullet point 1, (iii).

[231] *See supra* ¶¶ 47-49.

[232] *See* Consolidation Memorial, ¶ 94, bullet point 2.

[233] *See* Consolidation Memorial, ¶ 94.

[234] Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, point 3 (emphasis added), **RM-0040**.

[235] *See* Consolidation Memorial, ¶ 94, bullet point 2, (ii).

and failed: the Respondent's arguments with respect to the violation of the waiver provision of NAFTA Article 1121 in FM1 were rejected by the FM1 Tribunal.[236]

c. The arguments made by the Respondent, that the Claimant's cases "lacks clarity" should be rejected, and if the Respondent persists in making that argument, it can be addressed before the FM1 Tribunal.[237] Further, the Respondent has already made similar arguments regarding the apparent lack of clarity in Claimant's submissions, in its Request for Revocation of the Provisional Measures Order and its Request for Revocation—all of these arguments were rejected by the FM1 Tribunal.[238]

d. Respondent's argument that it is justified in seeking consolidation due to the "imposition of unnecessary costs on the Respondent" is disingenuous.[239] The Claimant has offered to pay the Respondent's reasonable costs in the FM2 proceeding.[240]

e. The Respondent has not demonstrated that it has suffered any prejudice in the "presentation of its case."[241] The Respondent has been granted an opportunity to present its case fully, and with two rounds of pleadings, through every challenge it has brought before the FM1 Tribunal. The fact that the FM1 Tribunal dismissed all of the Respondent's challenges thus far does not mean that the Respondent was treated unfairly or denied due process.[242] Most importantly, the Respondent has not alleged unfairness or that it has been denied due process. Again, if the Respondent raises any due process arguments, and if they are made in a timely manner, they can be addressed by the FM1 Tribunal.

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[236] *See supra* ¶¶ 60-61;198-199.b.

[237] *See* Consolidation Memorial, ¶ 94, bullet point 2, (iii).

[238] *See* Consolidation Memorial, ¶ 94, bullet point 2, (iv).

[239] *See* Consolidation Memorial, ¶ 94, bullet point 2, (iv).

[240] *See* Consolidation Memorial, ¶ 94, bullet point 2, (iv).

[241] *See* Consolidation Memorial, ¶ 94, bullet point 2, (v).

[242] *See supra* ¶¶ 100-103.

226. Respondent's strawman argument that the "situation that exists" favors the consolidation of the FM1 and FM2 arbitrations must therefore be rejected. The "situation that exists" has changed from the time of the filing of the Consolidation Request, and absent a consolidation, the two claims will be heard by a single tribunal that is most knowledgeable at this time on the factual and legal issues to be resolved in relation to both the existing claims and the ancillary claim.

*ii. The Factors Outlined in Canfor for Determining Whether Consolidation Would be in the Interests of Efficiency Support Claimant's Arguments*

227. As mentioned above, the *Canfor* Tribunal found that (i) time, (ii) costs; and (iii) the avoidance of conflicting decisions should be considered when determining whether it would be in the interests of efficiency to consolidate two arbitrations[243] To this point, the Canfor Consolidation Tribunal elaborated:

> Factor (i), time, includes consideration of the status of the Article 1120 arbitrations for which a party seeks consolidation and of the delay, if any, that might result in the resolution of the claims. *In that connection, the differences in stages in the Article 1120 proceedings may constitute a relevant aspect.*
>
> Factor (ii), costs, involves an assessment of the costs to all parties involved.
>
> Factor (iii), avoidance of conflicting decisions, requires a consideration of whether conflicting decisions on common questions of law or fact, that are before the 1120 Tribunals, can arise.[244]

228. In this case, all three elements dictate that it would be in the interests of efficiency **not** to consolidate FM1 and FM2. Specifically:

a. **Time:** FM1 and FM2 are at very different procedural stages. FM1 has already had one round of written pleadings (including production of documents) and the Claimant was on the verge of filing its Reply on the merits; the FM2 proceeding was just at the early stages of proceeding with only the Request for Arbitration

[243] *See Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 126, **RML-0002**.

[244] *See Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 126, **RML-0002**.

having been filed.[245] If the claims are consolidated, and the Consolidation Tribunal would need to fully assess in some detail what has transpired over the three years of proceedings, and would likely encounter a need to determine whether one or more steps were or were not conducted in a satisfactory manner, and the parties may seek to have certain decisions including concerning document production revisited. The mere making of the request for review on procedural grounds, of what has previously occurred whether or not reviewed by the FM1 Tribunal, would be time consuming and costly even if the requests are turned down. It is also entirely within the realm of being probable (and not only possible) that the Respondent will seek to have the Order made by the FM1 Tribunal declared as no longer extant or have it rescinded, which will be extremely time consuming.[246] If instead, the consolidation request is denied, the proceedings could continue immediately to the second round of pleadings on the merits, with the incorporation of the ancillary claim at that stage of the proceedings. The FM1 Tribunal would not need to entertain any reviews or further challenges from the Respondent, that it has already considered previously and dismissed. These repeated challenges could be dealt with more easily by the FM1 Tribunal by way of summary decisions, on the grounds that they are frivolous and vexatious.

b. ***Costs:*** Claimant has already incurred substantial costs in opposing the various challenges brought (unsuccessfully) by the Respondent in FM1 (i.*e.* Revocation Request; Preliminary Objection to Jurisdictional based on assertion of breach of waiver due to the existence of the second claim, and Consolidation Request).[247] Given that the FM1 tribunal has already agreed to add the FM2 claim as an ancillary claim, the Respondent's unwillingness to proceed before the FM1 Tribunal and to agree to discontinue the FM2 proceeding have already resulted in the Claimant incurring further unnecessary and substantial costs. An order consolidating the two claims such that the Consolidation Tribunal would assume jurisdiction over all the

[245] *See supra* ¶¶ 57.a; 124.

[246] *See supra* Section II.C(1)(e)- (g).

[247] *See supra* Section II.C(1)(e)- (g).

claims will (as mentioned previously) in all likelihood lead to further challenges from the Respondent, in relation to the Order and the obligation of the Respondent to pay VAT refunds of close to [redacted] on a monthly basis.

c. **Avoidance of conflicting decisions:** As explained, the FM1 Tribunal has repeatedly held that the claims in FM1 and FM2 are distinct independent claims.[248] Further, the FM1 tribunal has already agreed to add the FM2 claim as an ancillary claim and the Claimant has made numerous efforts to discontinue the FM2 proceeding.[249] As a result, there is no risk of conflicting decisions if the claims are not consolidated and that the FM1 becomes the "single tribunal" to adjudicate all the claims.

229. As a result, with respect to the efficiency of the proceedings. All three factors (*i.e.,* time, costs, and avoidance of conflicting decisions) require that it would be in the interest of fairness as well as efficiency not to consolidate the FM1 and FM2 proceedings before this Consolidation Tribunal.

5. The disputing parties must be heard on the possibility of consolidation.

230. After the parties are heard, "Article 1126 demands a decision on a consolidation request."[250] Pursuant to NAFTA Article 1126(2), only if the Consolidation Tribunal finds, based on the circumstances existing at the time of the decision, that all the requirements of the provision have been met, can it elect to order consolidation. The fourth part of the *Canfor* test will be met when this Consolidation Tribunal renders a decision. That decision can be and should be to fully reject the Respondent's Consolidation Request either because of the change in the circumstances between the time of the filing of the Consolidation Request and the Consolidation Tribunal's hearing—or in the alternative—based on the several additional grounds set out in this submission, including that the Respondent has failed to meet the requirements for the application of NAFTA Article 1126.

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[248] *See supra* ¶¶ 123-125.

[249] *See supra* ¶¶ 57.c-57.f.

[250] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 151, **RML-0002**.

### C. Even if the Canfor Test elements are met, the Tribunal still can and should reject consolidation based on these additional considerations

231. Even if the Consolidation Tribunal determines that the elements of the *Canfor* test are met, consolidation should nonetheless be rejected as (1) Respondent is seeking to avoid its obligation to comply with the FM1 Tribunal's Order on Provisional Measures; (2) Respondent has engaged in an "abuse of process"; and (3) Respondent's asserted objection to the discontinuation of FM2 based on costs, is disingenuous.

#### 1. Respondent is seeking to Avoid its Obligation to Comply with the FM1 Tribunal's Order on Provisional Measures

232. The Respondent's conduct in refusing to comply with the Provisional Measures Decision, and the repeated challenges of the decision, is a strong indicator that the Consolidation Request has nothing to do with "fairness and efficiency," and has everything to do with providing an excuse for refusing to comply with the Order. Such conduct amounts to acting in "bad faith."

233. This is the Respondent's third attempt at revoking the Provisional Measures Decision (*i.e.*, Revocation Request; Preliminary Objection to Jurisdiction Challenge; Consolidation Request).[251] Indeed, each new challenge has followed the previous one within weeks, once it was apparent that the prior challenge had been ruled to be unsuccessful.

234. The allegation of "bad faith" conduct should never be made lightly unless there is sufficient evidence in support. Here, there is ample evidence that the Respondent, by filing this Consolidation Request, is seeking to justify its position that it is no longer required to comply with the Provisional Measures Decision.[252] The FM1 Tribunal has at the request of the Claimant, confirmed several times that its Order still stands, including most recently on October 22, 2024.[253] Yet, the Respondent is unwilling to comply. Importantly, the Respondent has never indicated that it intends to comply with the Provisional Measures Decision regardless of the decision from this

[251] *See supra,* ¶¶ 100-103.

[252] *See* Correspondence from Geovanni Hernández Salvador to Sara Marzal, dated October 21, 2024, **CM-0029**.

[253] *See* Correspondence from Sara Marzal to the Parties, dated October 22, 2024, **CM-0030**; *see also First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Communication to the Parties, dated June 4, 2024, **RM-0030**; *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Procedural Order No. 6, dated February 29, 2024, (**PO 6**), **RM-0019**.

Consolidation Tribunal. It is clear therefore that the Consolidation Request is being used as a means to avoid compliance with the Provisional Measures Decision, while these proceedings are ongoing, and particularly if the jurisdiction of the FM1 Tribunal is assumed by the Consolidation Tribunal.

235. By granting the Respondent's Consolidation Request the Tribunal would be condoning the Respondent's bad faith conduct, to avoid a legal obligation that is causing serious harm to the Claimant. The FM1 Tribunal granted the interim relief so as to maintain the "status quo" as between the parties and to avoid exacerbating the dispute. In the case of the Respondent, it is clear that its actions, demonstrated amply through its behavior throughout the past more than 1.5 years, are being undertaken to do the opposite. It has chosen to exacerbate the differences that exist between the parties, and to achieve an upper hand in the dispute by refusing to pay [redacted] in VAT refunds that it is obligated to do.

236. Such behavior should not be countenanced, particularly when it is clear that the goal of efficiency and fairness is achievable immediately (and indeed several months ago), by having both claims adjudicated by the FM1 Tribunal. The FM1 Tribunal can, if its proceedings are no longer suspended, proceed far more quickly, than is possible for the Consolidation Tribunal, which will render its decision on consolidation sometime in 2025.

2. The Respondent has Engaged in an "Abuse of Process"

237. The Respondent's Consolidation Request does not have the hallmarks of "good faith" conduct, but very much the opposite. The evidence and the Respondent's own conduct is demonstrative of lack of "good faith," or indeed "bad faith" behavior.

238. Put together, the Respondent's many challenges spanning now more than 18 months, speak to what should be seen as "abuse of process" or "abuse of rights."[254]

239. As explained by the *Canfor* Consolidation Tribunal:

> 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

[254] *See* supra Section II.C(1)(e))-(g)).

shopping, are equally irrelevant, *unless a party can show that the party requesting consolidation is guilty of an abuse of right under international law*.[255]

240. Under international law, an abuse of right, as explained by the legal scholar Bin Cheng, is "[t]he exercise of a right … for the sole purpose of causing injury to another [and] is thus prohibited."[256] He goes on to state that "[a]n alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law."[257]

241. When considering what constitutes an abuse of right, commentators have stated that the tribunal "must consider whether the subject had a good-faith basis for exercising the right as it did when applying abuse principles."[258] Further, the tribunal in *Cementownia v. Turkey,* also referenced by the Respondent as an authority, found that an abuse of rights may exist where there is "dilatory or otherwise improper conduct in the proceedings."[259]

242. In this case, the Claimant has always been at the receiving end of procedural challenges and delays, including in connection with the compliance with the Decision on Provisional Measures. Multiple challenges have been brought by the Respondent against the Order requiring the payment of VAT refunds,[260] and multiple unfounded excuses have been provided to avoid legal obligations, including claims of essentially "we are working on it,"[261] "[we are putting our] best efforts to gather necessary information,"[262] that Mexican law does not permit compliance (even in the face of direction from the FM1 Tribunal that domestic law does not provide

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[255] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 137 (emphasis added), **RML-0002**.

[256] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, dated 1987, p. 122, **CML-0002**.

[257] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, dated 1987, p. 122, **CML-0002**.

[258] Menalco J. Solis, Good-Faith Rule against Abusing Process by Multiplying Action', in, ICSID Review - Foreign Investment Law Journal, Vol. 36 (1), p. 86, **CML-0003**.

[259] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, dated September 17, 2009, ¶ 158, **RML-0017**.

[260] *See supra* Sections II.C(1)(e)-(g).

[261] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated April 30, 2024, **CM-0023**.

[262] Letter from Alan Bonfiglio to Riyaz Dattu, dated September 14, 2023, **CM-0015**.

justification for non-compliance), etc.[263] All these excuses and justifications can on an objective basis, easily be seen as dilatory tactics. Furthermore, procedural challenges have been brought which on their face have been lacking in any merit and in many cases have been reworked so as to provide justification to relitigate prior unsuccessful challenges.[264]

243. There is no polite way of stating what is obviously motivating the Respondent's conduct: an intention to maliciously injure the Claimant and PEM, by refusing to comply over a long period of time with the Provisional Measures Decision. Instead, the Respondent has provided excuses that it knows will have no sway (*e.g.*, that it cannot comply with the decision of the FM1 Tribunal as to do so will result in violation of Mexican law), and continues to find avenues of challenge, one following quickly after the previous has failed, to delay the resolution of the dispute (by now over a year and a half attributable to the Respondent's various challenges).

244. Specifically, it does not take much to recognize the Respondent's conduct for what it is: an attempt to subvert the stated goals of the Provisional Measures Decision, which was to maintain the "status quo" and to avoid exacerbation of the dispute between the parties.[265]

245. The fact that the conduct of the Respondent has extended beyond being vexatious, to being shocking and malicious, was made evident recently when the Respondent froze (on August 29, 2024) the Claimant's newly opened bank account.[266] This bank account was opened with the express protection provided by the Provisional Measures Order against any interference by the Respondent.[267] This bad faith behavior has now reached new highs. It is disrespectful to the system of international resolution of disputes based on "rule of law" and compliance with decisions and orders of international tribunals (*i.e.*, FM1 Tribunal's Order), even if adverse to one's position, and particularly after bringing several challenges and having failed. Such conduct should not be tolerated.

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[263] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Respondent's Communication Regarding Compliance with the Provisional Measure, dated March 11, 2024, **RM-0020**.

[264] *See supra* Sections II.(C)(1)(e))-(g)).

[265] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Provisional Measures, dated May 26, 2023, ¶ 133, **RM-0009**.

[266] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated September 3, 2024, **CM-0011**; *see also* Letter from Riyaz Dattu to Sara Marzal, dated October 7, 2024, **CM-0032**.

[267] *See supra* ¶ 105.d)(1.a.i); *see also* Letter Request #1, dated June 15, 2023, **CM-0004**

246. As a result, considering the 18 months delay coupled with the significant costs incurred by the Claimant as a result of Respondent's challenges, and ever-increasing VAT refunds that remain frozen, the Claimant has been seriously prejudiced and been subject to harm at the hands of Respondent's based on its abuse of process.

247. The Tribunal should therefore find that the Respondent has forfeited any right to seek a decision from this Consolidation Tribunal that is discretionary. The Respondent has not come before this Consolidation Tribunal with "clean hands." It has in fact engaged in avoidance, delays and abuse of rights when launching its Consolidation Request on February 12, 2024, just after failing in its challenge to oust the jurisdiction of the FM1 Tribunal which resulted in an adverse decision on December 20, 2023.

248. Its most recent conduct in imposing a freeze on the newly opened account (that was mandated to be left unrestricted pursuant to the Order), is distinctly a frontal attack to the authority of the FM1 Tribunal (which the Respondent had decided can simply be ignored as its proceedings have been suspended).[268]

249. Furthermore, it is clear that the FM1 Tribunal rendered the Order to avoid an escalation of the dispute and to maintain the *status quo.* The FM1 Tribunal even sent multiple reminders to the Respondent of its obligation to comply with the Order, even while its calendar has been suspended.[269] The FM1 Tribunal has expressly also reminded that while its proceedings are suspended, it continues to have jurisdiction in relation to the dispute that is currently before it for adjudication.[270]

250. This most recent freezing a newly opened bank account when directed otherwise by the FM1 Tribunal is emblematic of the Respondent's malicious conduct.

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[268] *See supra* ¶ 106; *see also* Letter from Riyaz Dattu to Alan Bonfiglio, dated September 3, 2024, **CM-0011**; Letter from Riyaz Dattu to Sara Marzal, dated October 7, 2024, **CM-0032**.

[269] *See* Correspondence from Sara Marzal to the parties, dated October 22, 2024, **CM-0030**; *see also First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Communication to the Parties, dated June 4, 2024, **RM-0030**; *First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Procedural Order No. 6, dated February 29, 2024, (**PO 6**), **RM-0019**.

[270] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, point 1, **RM-0040**.

251. Furthermore, the taking of this extraordinary measure in defiance of an Order issued by the FM1 Tribunal, while the Respondent is before another international tribunal seeking a decision that it considers advantageous to its position, suggests that the Respondent believes that it can get away with its brazen conduct without any adverse repercussions. This conduct should be regarded as shocking.

### D. Respondent's Abuse of Process Argument must be Rejected

252. In its Consolidation Memorial, the Respondent has argued that the Claimant's "abuse of process" claims should be rejected by the Consolidation Tribunal. On the other hand, it has put forward its own claims concerning "abuse of process" attributing this type of conduct to the Claimant's actions.

253. As explained in Section III(C)(2), when determining whether an abuse of process or right has occurred, a tribunal "must consider whether the subject had a good-faith basis for exercising the right as it did when applying abuse principles."[271]

254. The Respondent has raised several allegations with respect to the "abuse of process" of the Claimant throughout its Consolidation Memorial. The Claimant will respond to each allegation in this section. Specifically:

a. Respondent has argued without basis that "actions oriented towards the sole purpose of circumventing a treaty's provisions," amounts to an abuse of process.[272] The FM1 Tribunal has already dismissed the Respondent's arguments regarding the Claimant's alleged "circumventing of [NAFTA's] provisions" [273] under NAFTA Articles 1134 and 1121.[274] The FM1 Tribunal found no basis for this allegation and dismissed them.

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[271] Menalco J. Solis, Good-Faith Rule against Abusing Process by Multiplying Action', in ICSID Review - Foreign Investment Law Journal, Vol. 36 (1), dated 2021, p. 86, **CML-0003**.

[272] Consolidation Memorial, ¶ 88.

[273] Consolidation Memorial, ¶ 88.

[274] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, point 3, **RM-0040**; *see also First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Decision on Preliminary Objection to Jurisdiction, dated December 20, 2023, ¶¶ 19, 77-82, **RM-0014**; Decision on Provisional Measures, dated May 26, 2023, ¶ 15, **RM-0009**.

b. Respond alleges that the "choice to exclude the FM2 claims in the FM1 arbitration…prejudiced the Respondent in the presentation of its case," and therefore amounts to an abuse of process.[275] A simple explanation for not adding the claims, at the outset when commencing the FM1 proceeding, is that the amount of VAT refunds in the frozen bank account was not initially as high an amount as more than three years later (with the addition of approximately USD [redacted] of VAT refunds) when the total increased to [redacted]. The Claimant initially excluded the VAT refund claims from the FM1 proceeding because it sought to resolve the issue of the frozen bank account, through the domestic remedies available and engaged in discussions and negotiations with the SAT, including offering guarantees.[276] Simply put, the claim for the VAT refund was not necessary when the FM1 proceeding was initiated with the NOI being issued in 2020 (*i.e.*, three years before the June 29, 2023, commencement of the FM2 claims). It was only after the SAT rejected repeatedly Claimant's guarantee application—despite having no justification for such rejection under Mexican law—and the making of the statements by the Respondent's counsel admitting that the VAT refunds belonged to PEM,[277] that the Claimant filed its March 31, 2023 Notice of Intent in FM2 to protect its legal rights.[278] Thereafter, the Claimant again repeatedly sought to achieve settlement with the Respondent before filing its claim. Finally, due to the end of the legacy period under NAFTA and the FM1 Tribunal's Decision on Provisional Measures that provided for VAT refunds to be payable only for the period as of January 4, 2023 (instead of the beginning of 2020 as requested)[279], the Claimant was forced to protect its legal rights by filing the FM2 claim[280] with respect to the [redacted] that had accumulated before the

[275] Consolidation Memorial, ¶ 100.

[276] *See supra* ¶ 253.b.

[277] Hearing Transcripts, dated March 13, 2023, pp. 56-57, **CM-0003**.

[278] *See supra* ¶¶ 27, 95.

[279] *See* Decision on Provisional Measures, dated May 26, 2023, **RM-0009**.

[280] *First Majestic Silver Corp. v. United Mexican States (II)*, ICSID Case No. ARB/23/28, Request for Arbitration, dated June 29, 2023, **RM-0063**.

commencement of the FM1 Tribunal's proceeding with the NOI[281] and the Decision on Provisional Measures, which provided relief only for future VAT refunds[282]. It is clear therefore, that the Claimant's course of conduct was dictated by the evolving circumstances that led to the filing of the FM2 claims on June 29, 2023 (three years after the commencement of the FM1 Tribunal's proceedings). Considering the good faith basis of Claimant's course of conduct, the Respondent's abuse of process argument must therefore fail.

c. The Respondent claims that there was a "manifest abuse of process that involved FM1 and FM2 arbitrations, the provisional measures and the ancillary claim."[283] The Respondent is referring to its allegation that through the addition of the ancillary claims, the Claimant has "circumvent[ed] the Article 1134 prohibition."[284] However, the FM1 Tribunal has already rejected this argument, finding that "Article 1134 prohibits the issuance of provisional measures concerning a pending claim; *it does not prevent a claimant from subsequently adding such a claim to the proceedings*."[285] The Respondent is therefore simply repeating an argument that has already been rejected by another NAFTA tribunal. The Respondent's abuse of process argument must therefore fail.

255. Considering all of the above, there is no merit to Respondent's abuse of process arguments.

### E. If FM1 and FM2 are Consolidated the Proceedings Should Resume Where FM1 Was Suspended

256. In the event that the Consolidation Tribunal determines that FM1 and FM2 should be consolidated, it has the discretion to determine at what stage the consolidation proceedings will begin. Specifically, the Consolidation Tribunal in *Canfor*, found that "it has discretionary power

[281] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, FM1 Notice of Intent, dated May 13, 2020, **RM-0004.**

[282] *See* Decision on Provisional Measures, dated May 26, 2023, **RM-0009**.

[283] Consolidation Memorial, ¶ 121.

[284] Consolidation Memorial, ¶ 120.

[285] *See* Expedited Ruling on Ancillary Claims Request, dated July 15, 2024, point 3, **RM-0040**.

to determine where consolidation proceedings are to begin."[286] Further, the tribunal found that when exercising its discretion to determine the "conduct and sequence of the consolidated proceedings, [it] will naturally exercise that discretion in consultation with the parties."[287]

257. Here, it is in the interests of fairness and equity that if FM1 and FM2 are consolidated, the new proceedings should resume where FM1 was suspended (*i.e.,* at the second round of written pleadings with Claimant's Reply). The Request for Arbitration in the FM1 proceedings was filed on March 1, 2021—over 3.5 years ago.[288] Since then, the Parties have each filed one round of pleadings on the merits; the Claimant filed its Memorial on April 25, 2022 and Respondent filed its Counter-Memorial on November 25, 2022.[289] Additionally, the Claimant filed a Request for Provisional Measures on January 4, 2023—which after a hearing was partially granted on May 26, 2023. Since then, the Respondent has engaged in multiple attempts to overturn the FM1 Tribunal's Order on Provisional Measures including but not limited to (1) filing a Request to Revoke the Decision on Provisional Measures on June 19, 2023; (2) filing a Preliminary Objection to Jurisdiction on July 28, 2023; and (3) filing a Consolidation Request on February 12, 2024.[290] As a result, the proceedings have been stalled since June 19, 2023—over 18 months ago.

258. If the proceedings were to be consolidated and restarted, the Claimant and its counsel would be forced to expend time and resources to produce a new Memorial (which is what has been requested by the Respondent). Further, the hearing on the merits would be further delayed.

259. As a result, if the Consolidation Tribunal decides to join FM1 and FM2, the Claimant respectfully requests that the Consolidation Tribunal consult with the parties so as to avoid delays in the progress achieved to date in the FM1 proceeding. The Respondent should not be able to reverse the progress by having the Consolidation Tribunal revisit procedures and

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[286] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 153, **RML-0002**.

[287] *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Order of the Consolidation Tribunal, dated September 7, 2005, ¶ 153, **RML-0002**.

[288] *See First Majestic Silver Corp. v. United Mexican States (I)*, ICSID Case No. ARB/21/14, Claimant's FM1 Request for Arbitration, dated March 1, 2021, (**FM1 RFA**), **RM-0005**.

[289] *See* Claimant's Memorial, dated April 25, 2022, **RM-0007**; *see also* Respondent's Counter-Memorial, dated November 25, 2022, **RM-0008**.

[290] *See supra* Section II.C(1)(e))-(g)).

decisions made by the FM1 Tribunal. Furthermore, a separate parallel expedited schedule should be established for the claims related to the VAT refunds. The relevant issues in the VAT refunds claim can be briefed on a separate track as the issues of facts and law are substantially different from the APA related claims.

## IV. REQUEST FOR RELIEF

260. The Claimant respectfully requests that the Consolidation Tribunal to issue an Order:

a. Dismissing the Consolidation Request as the circumstances before the Consolidation Tribunal have changed substantially from what is reflected in the Request, thereby depriving the Consolidation Tribunal of its authority to consolidate.

b. Alternatively, dismissing the Respondent's Consolidation Request for failing to meet the requirements of NAFTA Article 1126.

c. Order costs to be payable to the Claimant in the Consolidation Proceeding to be payable immediately by the Respondent.

261. The Claimant reserves its right to respond as necessary to the Respondent's claims for relief, to supplement its request for relief, and to add such other relief as is appropriate in connection with the resolution of this Consolidation Request.

Date: December 6, 2024

Respectfully submitted,

[Signed]

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