

**IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE
TRADE AGREEMENT AND THE AGREEMENT BETWEEN THE UNITED STATES OF
AMERICA, THE UNITED MEXICAN STATES, AND CANADA**

-and-

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW (1976)**

-between-

**AMERRA CAPITAL MANAGEMENT, LLC,
AMERRA AGRI FUND, L.P.,
AMERRA AGRI OPPORTUNITY FUND, L.P., AND
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, ON BEHALF OF THE
JPMORGAN CHASE RETIREMENT PLAN
(the “Claimants”)**

and

**THE UNITED MEXICAN STATES
(the “Respondent”)**

ICSID Case No. UNCT/23/1

PROCEDURAL ORDER NO. 5

Members of the Tribunal

Prof. Albert Jan van den Berg, Presiding Arbitrator
Mr. Eduardo Siqueiros T., Arbitrator
Prof. Jorge Viñuales, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski, Legal Counsel, ICSID

Assistant to the Tribunal

Ms. Emily Hay

March 13, 2024

I. PROCEDURAL BACKGROUND

1. On February 29, 2024, in accordance with Section 15.6.4, and the Procedural Timetable attached as Annex A of Procedural Order No. 1 dated May 11, 2023 (“**PO 1**”), as amended by Procedural Order No. 4 dated November 29, 2024, the Parties submitted to the Tribunal their respective requests for production of documents with the supporting Redfern Schedule (“**Requests**”).
2. In their Requests, the Parties reflected: (i) the documents or category of documents requested, with indication of the relevance and materiality according to the requesting party; (ii) the reasoned objections to the document production request (by the objecting party); and (iii) the response to objections to the document production request (by the requesting party).

II. APPLICABLE RULES GOVERNING DOCUMENT PRODUCTION

3. Regarding documentary evidence, Section 14.1 of PO 1 provides:

“For matters concerning the gathering or taking of evidence that are not otherwise covered by a procedural order issued by the Tribunal, the UNCITRAL Rules or NAFTA Chapter 11, the Tribunal may refer to the IBA Rules on the Taking of Evidence in International Arbitration (2020) (the “IBA Rules”) for guidance as to the practices commonly accepted in international arbitration, but it shall not be bound to apply them.”

4. Under Section 15 of PO 1, which is incorporated by reference, the Parties agreed on the terms and conditions that would apply to the production of documents in the present case.
5. In particular, Section 15.6.6 of PO 1 provides:

*“The Tribunal shall rule on any such application. Documents ordered by the Tribunal to be disclosed shall be produced in accordance with the schedule set out in **Annex A** of this Order.”*

6. Article 3(3) of the IBA Rules provides:

“A Request to Produce shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search

terms, individuals or other means of searching for such Documents in an efficient and economical manner;

- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and*
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and*
 - (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.”*

7. Article 9(2) of the IBA Rules provides:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;*
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;*
- (c) unreasonable burden to produce the requested evidence;*
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;*
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;*
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or*
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”*

III. TRIBUNAL’S CONSIDERATIONS AND ORDER

8. The Tribunal adopts the definition of “Document” under the IBA Rules, i.e., *“a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained*

on paper or by electronic, audio, visual or any other means”.

9. With respect to Respondent’s objection that “*text messages, communications by message applications like WhatsApp, Skype, or telegram, audio recordings*” have a private nature, the Tribunal does not consider such communications to be excluded from the definition of Document under the IBA Rules. As such, where relevant to a document production request, responsive documents may include such communications held by an individual who is a representative of a Party (therefore being in the possession, custody or control of that Party), provided that the communication contains content that is responsive to the document request and is therefore relevant to the Parties’ dispute. Should specific privacy considerations arise in relation to a particular communication, the requested Party may seek directions from the Tribunal.
10. The Tribunal has reviewed the Requests under the guidance of the IBA Rules, and after due deliberation, has decided on each request for the reasons and with the limitations set forth under the last column titled “Decision (Tribunal)” of the Redfern Schedules attached as **Annex A** (Decisions on Claimants’ Requests to Produce Documents) and **Annex B** (Decisions on Respondent’s Requests to Produce Documents) to this Procedural Order.
11. Pursuant to Section 15.9 of PO 1, “*Documents shall be made available to the requesting party by the due date using a suitable means of electronic communications, including a secure share site, and shall not be sent to the Tribunal Secretary.*”
12. In accordance with the Procedural Timetable (Annex A to PO 1), as amended by Procedural Order No. 4 dated November 29, 2024, both Parties shall simultaneously produce the documents hereby ordered by the Tribunal on **April 15, 2024**.

On behalf of the Tribunal,

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: March 13, 2024