

**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. 3

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

November 3, 2023

I. PROCEDURAL BACKGROUND

1. On April 14, 2023, the Tribunal held the First Session of the Tribunal with the disputing parties (“**Disputing Parties**” or “**Parties**”) by video conference.
2. On May 11, 2023, the Tribunal issued Procedural Order No. 1, which fixed the procedural rules and procedural timetable in the arbitration. Procedural Order No. 1 determined the procedural rules and timing for any potential objection by Respondent regarding the Tribunal’s jurisdiction in the arbitration as follows:

*“12.4. In accordance with Article 21(3) of the UNCITRAL Rules, a plea that the Tribunal does not have jurisdiction shall be raised not later than the Statement of Defence. In general, in accordance with Article 21(4) of the UNCITRAL Rules, the Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Tribunal may proceed with the arbitration and rule on such plea in the final Award. Respondent may file a Request for Bifurcation in respect of any objection to jurisdiction together with its Statement of Defence, as set out in the Procedural Timetable of **Annex A**. In the event that a Request for Bifurcation is filed, the Tribunal shall issue a decision after receiving the Parties’ comments.*

12.5. If a Request for Bifurcation is granted, the Tribunal shall establish a procedural timetable for such preliminary phase after consultation with the Parties. If no preliminary stage pursuant to Article 21(4) is requested or decided, the arbitration shall continue with the procedural calendar set out in Annex A.

12.6 If a preliminary stage on the Tribunal’s jurisdiction is requested and decided, and it ends with a decision confirming the Tribunal’s jurisdiction, the procedural calendar for the merits stage or stages of the arbitration will be discussed by the parties and established by the Tribunal shortly after its initial award on jurisdiction.”

3. On August 14, 2023, Claimants filed their Statement of Claim.
4. On October 18, 2023, Respondent filed a Request for Bifurcation (“**Bifurcation Application**”), seeking the following relief:

“81. . . . Respondent respectfully requests that this Tribunal preliminarily hear the jurisdictional objections, at a separate stage from the merits.

82. Furthermore, the Respondent kindly requests the Tribunal to suspend the proceedings on the merits and to establish a procedural timetable for the written phase of the bifurcation and the hearing.”

5. On October 19, 2023, the Tribunal invited Claimants’ comments on Respondent’s Bifurcation Application by October 26, 2023. The Tribunal advised the Parties that, in the meantime, the

Procedural Order No. 3

deadline fixed in Procedural Order No. 1 for the filing of Respondent's Statement of Defence is maintained.

6. On October 19, 2023, Claimants submitted their comments on Respondent's Bifurcation Application. Claimants contended that Respondent's Bifurcation Application was contrary to the procedural timetable established in Procedural Order No. 1 and requested the Tribunal to:

“direct Respondent to comply with Procedural Order No. 1 and to file its Statement of Defense, including its Jurisdiction and Bifurcation Request, if any, on December 14, 2023.”

7. On October 21, 2023, the Tribunal (i) reminded the Parties that the deadline fixed in Procedural Order No. 1 for the filing of Respondent's Statement of Defence is currently maintained; and (ii) invited Claimants to submit their full response to Respondent's Bifurcation Application by October 31, 2023.

8. On October 31, 2023, Claimants filed their Response to Respondent's Bifurcation Application (“**Claimants' Response**”), requesting as follows:

“68. . . . Claimants respectfully request that this Tribunal reject Respondent's bifurcation request and maintain the calendar of proceedings as agreed in Procedural Order No. 1.

69. Claimants further respectfully request an award of costs in relation to Respondent's bifurcation request.”

II. PARTIES' POSITIONS AND THE TRIBUNAL'S CONSIDERATIONS

9. Respondent requests the bifurcation of the proceedings in order for the tribunal to first address its following objections to the Tribunal's jurisdiction:

(i) Respondent contends that the Tribunal lacks *ratione materiae* jurisdiction under NAFTA Article 1139. According to Respondent, Claimants have identified their alleged investment in Mexico as the mortgages on Lots 11 and 16. It is Respondent's case that mortgages do not constitute an investment under NAFTA Article 1139.

(ii) Respondent contends that Claimants' claims are time-barred under NAFTA Article 1116(2) as Claimants filed their Notice of Arbitration beyond the three-year period from having first become aware of Respondent's alleged breaches resulting in alleged losses

to Claimants. Respondent contends that a number of Respondent's acts that Claimants allege were unlawful, were within Claimants' knowledge from January 2015 onwards.

- (iii) Respondent contends that Claimants' claims, which are based on actions and decisions that took place after the termination of NAFTA are beyond the Tribunal's jurisdiction.
 - (iv) Respondent objects to three out of four of Claimants' claims under NAFTA Article 1105(1) on the grounds that Claimants' allegations concern an alleged breach of Respondent's obligations against Claimants and not against Claimants' investment in Mexico.
 - (v) Respondent contends that the Tribunal lacks *ratione personae* jurisdiction over Amerra Capital Management LLC. Respondent contends that the Amerra Capital Management acted only as a nominee for Amerra Agri Fund LP, Amerra Agri Opportunity Fund LP and JP Morgan Chase Retirement Plan ("**JPMC Plan**") and that it did not contribute any capital to the loans underlying the mortgages. For this reason, Respondent argues that it does not constitute an investor under NAFTA Article 1139.
 - (vi) Respondent contends that Amerra Agri Fund LP and Amerra Agri Opportunity Fund LP did not submit a proper waiver and consent in accordance with NAFTA Article 1121(1). With respect to JPMC Plan, Respondent argues that JPMC Plan has not executed any consent or waiver on its own behalf. Respondent argues that Claimants' failure to perfect the conditions precedent to submitting a claim for arbitration implies a breach of the arbitration agreement, leading to a lack of *ratione voluntatis* jurisdiction.
10. Respondent contends that the aforementioned jurisdictional objections are not frivolous, are distinct from the merits, and if successful would lead to a material reduction or rejection of the next stage of the arbitration and save costs and time. Respondent further submits that there is common practice in favour of bifurcation of jurisdictional objections.
11. Claimants object to the merits of Respondent's jurisdictional objections, contending that they are neither substantial nor serious. They further contend that several of Respondent's jurisdictional objections are closely intertwined with the merits and cannot be separated therefrom. Claimants also contend that bifurcation is the exception rather than norm in investor-

state arbitration practice.

12. The Parties are in agreement, and the Tribunal concurs, that pursuant to Article 21(4) of the UNCITRAL Rules, the Tribunal has the power to bifurcate arbitration proceedings and address jurisdictional objections in a preliminary phase of the proceedings.
13. In determining whether to bifurcate the proceedings, the Tribunal will consider whether
 - (i) Respondent's jurisdictional objections are *prima facie* serious and substantial;
 - (ii) Respondent's jurisdictional objections are so intertwined with the merits that a discussion of the latter is necessary to decide the former; and
 - (iii) bifurcation would materially reduce the time and cost of the proceeding, rather than result in an additional burden by adding another separate phase guided.
14. Having considered the Parties' respective positions in detail, it appears to the Tribunal that several of Respondent's jurisdictional objections may require the Tribunal to delve into matters connected to the merits of Claimants' case.
15. In particular, the Tribunal's *prima facie* view is that, at the least, Respondent's objections to the Tribunal's *ratione materiae*, *ratione temporis* and *ratione personae* jurisdiction may require the Tribunal to delve into matters that would overlap with the merits of Claimants' claims.
16. On a *prima facie* basis, the Tribunal sees merit in Claimants' position that the issue of whether mortgages would qualify as an investment under NAFTA Article 1139(g) and whether Amerra Capital Management qualifies as an investor, may require an examination of the original loan terms, the assignment of the loans, the reasons for extending the loans' repayment terms, and the terms of the mortgages. The Respondent notes in paragraph 29 of the Bifurcation Application that the Tribunal would have to conduct an analysis of the investment as a whole in order to assess whether the mortgages amount to an investment in the terms of Article 1139 of the NAFTA. The Tribunal considers that an examination of the merits would indeed be necessary to determine whether it has jurisdiction.
17. Similarly, the Tribunal considers that a determination of when Claimants first became aware of Respondent's alleged breaches of its obligations under NAFTA may require a detailed

examination into the merits of Claimants' claims in the arbitration.

18. In view of the Tribunal's observations in paragraphs 14 - 17 above, the Tribunal does not consider it necessary to ascertain whether each of Respondent's jurisdictional objections justifies a bifurcation of the arbitration proceedings as requested by Respondent. In the Tribunal's view, a partial bifurcation of the jurisdictional objections would not be in the interests of efficiency. In particular, should the Tribunal ultimately find against Respondent in relation to the jurisdictional objections, referred to in paragraphs 9(i), 9(ii) and 9(v) and discussed in paragraphs 16 and 17 above, the proceedings on merits would have been delayed significantly without the jurisdictional issue having been resolved conclusively. In this regard, the Tribunal is also mindful that several of Respondent's jurisdictional objections are not aimed at disposing of the arbitration in its entirety. These include Respondent's jurisdictional objections set forth in paragraphs 9(iii) and 9(iv) - 9(vi) above.
19. For the above reasons, on balance, the Tribunal considers it appropriate and efficient to address each of Respondent's jurisdictional objections together with the Parties' case on merits.

III. DECISION

20. For the foregoing reasons, the Tribunal hereby dismisses Respondent's Bifurcation Application.

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: November 3, 2023