

PCA Case No. 2020-11

**IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES – PERU TRADE  
PROMOTION AGREEMENT, ENTERED INTO FORCE ON FEBRUARY 1, 2009**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW, AS REVISED IN 2013 (the “UNCITRAL Rules”)**

- between -

**BACILIO AMORRORTU (USA)**

**(the “Claimant”)**

- and -

**THE REPUBLIC OF PERU**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

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**PROCEDURAL ORDER NO. 3**

**Decision on Bifurcation**

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*Tribunal*

Judge Ian Binnie, CC, QC (Presiding Arbitrator)  
Prof. Bernard Hanotiau  
Mr. Toby Landau, QC

*Registry*

Permanent Court of Arbitration

**January 21, 2021**

## I. Background

1. In its Procedural Order No. 1, dated June 29, 2020, the Tribunal established the Procedural Calendar of the arbitration. In this respect, Section 3.3 of Procedural Order No. 1 provides:

No later than in its Statement of Defense, the Respondent may submit a request that the Tribunal rule on certain matters pertaining to jurisdiction and / or liability in a preliminary phase, setting forth in full the grounds for such request.

2. On December 9, 2020, the Respondent submitted a Notice of Intent to Submit Preliminary Objections (the “**Respondent’s Application**”), whereby it requested that the Tribunal suspend the proceedings on the merits and consider the following objections to the Tribunal’s jurisdiction as preliminary questions:

1. One (1) objection under Article 10.20.4 of the Treaty []:
  - a. Objection 1: Assuming all of his allegations of fact as true, Mr. Amorrortu does not possess any rights to either a direct negotiation or to a contract protected under the Treaty;
2. Five (5) jurisdictional objections under Article 23(3) of the UNCITRAL Arbitration Rules []:
  - a. Objection 2: Mr. Amorrortu is not a protected investor under the Treaty;
  - b. Objection 3: Mr. Amorrortu does not have a protected investment under the Treaty;
  - c. Objection 4: Mr. Amorrortu did not submit a valid waiver;
  - d. Objection 5: Mr. Amorrortu’s claims were not brought within the mandatory period provided in Article 10.18.1 of the Treaty and are thus time-barred; and
  - e. Objection 6: The alleged measures which allegedly violated the Treaty are not attributable to Peru under international law.

3. On December 10, 2020, the Tribunal (i) invited the Claimant’s comments on the Respondent’s Application; and (ii) ordered the suspension of the deadline for the filing of the Respondent’s Statement of Defense due December 21, 2020, as well as all subsequent deadlines set out in the Procedural Calendar.
4. On December 22, 2020, the Claimant (i) submitted a Motion for Leave to Amend his Notice of Arbitration “to provide the purportedly defective waiver that Peru claims Article 10.18.2(b) requires”; and (ii) requested that the Tribunal adjudicate such motion “before proceeding with the other jurisdictional objections raised by Peru and the merits of Amorrortu’s claims” (the “**Claimant’s Application**”).
5. On January 15, 2021, the Respondent requested the Tribunal “(1) to reject Claimant’s Application, or (2) in the alternative, [to] reserve decision on the Application until it has heard Peru’s Article 10.20.4 objections and Rule 23(3) jurisdictional objections, and (3) to proceed with establishing a procedural calendar to hear all of Peru’s preliminary objections on a concurrent basis.”

6. On January 17, 2021, the Claimant requested leave to reply to the Respondent's communication of January 15, 2021.

## **II. Analysis**

7. As set out above, the Respondent requests that the Tribunal suspend the proceedings on the merits and consider its six jurisdictional objections as an ensemble in a preliminary phase. The Claimant does not object to have Objection 4 ("Mr. Amorrortu did not submit a valid waiver") adjudicated in a preliminary fashion, but requests that the adjudication of the Respondent's remaining jurisdictional objections and the merits of the case be deferred until a later stage.
8. The governing rule is Article 10.20.4 of the Treaty, which reads:

Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.1.
9. The Tribunal is of the view that Objection 1, as described above, is clearly an "objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made" for the purposes of Article 10.20.4 of the Treaty. As such, the Tribunal does not enjoy discretion to defer consideration of Objection 1 or join it to the merits. Accordingly, the Tribunal determines that Objection 1 shall be addressed and decided as a preliminary question.
10. Article 10.20.4 of the Treaty, however, is "[w]ithout prejudice to the tribunal's authority to address other objections as a preliminary question". In this regard, the Tribunal observes that the Respondent's remaining jurisdictional objections (numbered 2 through 6) are brought pursuant to Article 23(3) of the UNCITRAL Rules, under which the Tribunal enjoys discretion to rule on a plea as to its jurisdiction either as a preliminary question or in an award on the merits. Thus, the question before the Tribunal is whether Objections 2 through 6 should be heard in a preliminary phase together with Objection 1.
11. It is undisputed that Objection 4, concerning the Claimant's allegedly defective waiver, is capable of being decided in a preliminary fashion. The Tribunal also recalls that the Claimant has foreshadowed his intention to file an amended notice of arbitration should the Tribunal uphold Objection 4, while the Respondent has already advanced the position that the Claimant's claims are time-barred. In such circumstances, the Tribunal considers that Objection 4 should be decided as expeditiously as possible. Therefore, the Tribunal decides that Objection 4 shall also be decided as a preliminary question.
12. Objections 2, 3, 5 and 6 merit a separate analysis. The Tribunal considers that such objections, as pleaded by the Respondent, potentially raise mixed issues of fact and law and would thus require a more fact-intensive inquiry than Objections 1 and 4, which are concerned with discreet legal issues. Deciding Objections 2, 3, 5 and 6 together with Objections 1 and 2 will necessarily create delay, potentially impacting whatever time-limited rights the Claimant may wish to assert in a new proceeding in the event that Objection 4 is upheld. In the Tribunal's view, this consideration outweighs the Respondent's concerns about procedural efficiency. For these reasons, the Tribunal joins Objections 2, 3, 5 and 6 to the merits of the case.

13. In the circumstances, the Tribunal requests the Parties to confer and attempt to agree on a schedule for submissions on Objections 1 and 4, and to inform the Tribunal of the outcome of their discussions no later than **Monday, February 1, 2021**. The Parties' respective applications are otherwise dismissed.

**Place of Arbitration: Paris, France**



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Judge Ian Binnie, CC, QC  
(Presiding Arbitrator)

On behalf of the Tribunal