

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”)

**PROCEDURAL ORDER NO. 4
Hearing on Preliminary Objections**

Tribunal

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

Registry

Permanent Court of Arbitration

July 20, 2021

I. Background

1. On June 29, 2020, the Tribunal issued Procedural Order No. 1, setting forth the rules of procedure of the arbitration. Section 8.1 of Procedural Order No. 1 provides that “[a]fter consultation with the Parties, the Tribunal shall issue, for each hearing, a procedural order convening the meeting, establishing its format, place, time, agenda, and all other technical and ancillary aspects.”
2. By its Procedural Order No. 3, dated January 21, 2021, the Tribunal decided to bifurcate the proceedings such that two of the preliminary objections raised by the Respondent (referred to as Objections 1 and 4) would be addressed and decided as preliminary questions.
3. Following consultations with the Parties, on February 9, 2021 the Tribunal issued a Procedural Calendar for the Phase on Jurisdictional Objections 1 and 4, leading to an online hearing scheduled for August 9, 2021 (the “**Hearing**”). The Procedural Calendar was amended on May 13, 2021 but the date of the Hearing remained unaltered.
4. On June 24, 2021, the Tribunal circulated a draft of this procedural order and invited the Parties’ comments thereon.
5. In this Procedural Order, the Tribunal convenes the Hearing and establishes its format, place, time, agenda, and all other technical and ancillary aspects.

II. Hearing Date

6. The Hearing will take place on Monday, August 9, 2021.

III. Hearing Date

7. Having consulted with the Parties, the Tribunal determines that the Hearing shall be held by video conference.

IV. Pre-Hearing Preparation

8. As foreseen in the Procedural Calendar, a pre-hearing conference call shall be held on Monday, July 19, 2021 in order to discuss the organization of the Hearing. This call will be held by video conference and will also serve to verify the proper functioning of the video conferencing system. All participants shall strive to replicate the conditions under which they will participate in the Hearing:
 - (i) To the extent possible, at least one participant per device or connection to be used at the Hearing should attend the pre-hearing video conference;
 - (ii) Should testing all connections require witnesses or experts to participate personally in the pre-hearing video conference, the Tribunal initially will limit discussions to introductions and technical matters, with procedural matters to be discussed subsequently after all witnesses and experts have been excused;
 - (iii) Each participant should join the pre-hearing video conference with the same device(s) and internet connection and from the same physical location that they intend to use for the Hearing;

- (iv) Participants will join the pre-hearing video conference through the waiting room function and will follow the same identification procedure as for the Hearing itself (see Sections 24 to 26 below);
 - (v) The pre-hearing video conference shall include a test of each of the functions of the video conferencing platform that is intended to be used during the Hearing (*e.g.*, presentation of evidence via shared screen, simultaneous interpretation, etc.); and
 - (vi) The Parties shall not address the substance of any matter scheduled for discussion at the Hearing, but may raise before the Tribunal any procedural issues pertaining to the organization of the Hearing.
9. In addition to the pre-hearing video conference, the Parties are invited to undertake further test calls with the PCA of different groups of participants, both prior to and following the pre-hearing video conference, in order to facilitate the readiness of all participants for the Hearing.
10. The Tribunal may direct further video conference testing sessions to take place with all or some Hearing participants, as it considers necessary.

V. Hearing Schedule and Time Allocation

11. Having consulted with the Parties, the Tribunal determines that the daily schedule of the Hearing shall be as follows:
- (i) It will commence at 12:00 PM CET (5:00 AM Lima; 6:00 AM Toronto, New York, Miami; 3:00 PM Islamabad; 6:00 PM Singapore);
 - (ii) It will conclude at 6:00 PM CET (11:00 AM Lima, 12:00 PM Toronto, New York, Miami; 9:00 PM Islamabad; 12:00 AM (on August 10) Singapore); and
 - (iii) The total hearing time will be 6 hours, including two 15-minute breaks, for a total of 5.5 effective hearing hours. The hearing time available to each Party is 2.5 hours.
12. The detailed schedule for the Hearing is included in the **Annex** to this order and is subject to any changes that the Tribunal may deem necessary or appropriate to make during the Hearing. In particular, the Tribunal may adjust the schedule of the Hearing as necessary in the event of delays or other interruptions caused by technical problems in the functioning of the video conference.
13. Time shall be allocated equally between the Parties. The PCA will keep a chess clock and advise the Parties of the length of time used.
14. Time spent in discussions concerning a procedural objection raised by a Party shall be counted against such Party's time allocation. Time devoted to procedural questions or to address questions or matters raised by the Tribunal will not be counted against the Parties' time. The Parties should prepare on the basis that one hour will be consumed by Tribunal questions, procedural matters, potential technical interruptions, or other contingencies.

VI. Video conferencing Platform

15. With the agreement of the Parties, the Hearing shall be held by video conference using the *Zoom* video conferencing platform.

16. The PCA will retain the firm *Law in Order* to provide additional technical support through the Hearing and, upon request by either Party, to assist with document management.
17. The log-in details for the video conference will be circulated by the PCA on the day prior to the start of the Hearing.
18. Once admitted to the video conference, and barring technical issues or other exceptional circumstances, counsel and party representatives should remain connected throughout the hearing day.
19. Each Party will make its own separate arrangements for private communication with their respective teams during the Hearing by instant messenger or other appropriate means.
20. The Parties will make use of the breakout room functions within the *Zoom* video conferencing platform to avoid delays associated with admitting Participants to the video conference and to enable the Tribunal promptly to reconvene all Participants following breaks.

VII. Participants

21. The Parties shall provide a provisional indication by **Friday, July 23, 2021** of the location from which each of their Participants (including counsel, party representatives, witnesses and experts) will join the video conference and confirm that adequate connectivity or technology is available at that location or is in the process of being procured. The Parties will confirm the final locations from which each of their Participants will join the video conference by **Friday, July 30, 2021**.
22. Access to the video conference shall be restricted to the Members of the Tribunal, the Parties' representatives, counsel (and support staff), any witnesses or experts, PCA staff, court reporters, interpreters and any further technical support personnel retained by the PCA in connection with the Hearing (the "**Participants**"). All Participants bear an ongoing duty to warn of the presence of any other person on the video conference. Non-participants may follow the video conference through a separate public webcast, as established in Section 59 below.
23. The Parties are each requested to provide a final list of the Participants who will attend the Hearing on their behalf no later than **Friday, July 30, 2021**. The Parties' lists must also include the user names and *Zoom* account details by which Participants will join the video conference. Any person not included in the lists provided by the Parties will not be admitted to the video conference, unless otherwise decided by the Tribunal upon request by any of the Parties.
24. All Participants in the Hearing shall join the video conference at least 30 minutes in advance of the opening of the Hearing. Participants are encouraged to join the video conference earlier to facilitate their identification and avoid any technical contingencies.
25. Participants will join the video conference through a "waiting room" to be managed by the PCA. Each Party shall identify all of its representatives at the opening of the Hearing. In order to facilitate identification of all attendees, Participants must join the video conference showing a username that enables them to be readily identified (*i.e.*, "(C)" for Claimant or "(R)" for Respondent [First Name] [Last Name]¹). Any prospective Participant who cannot be identified shall not be granted access to the video conference, unless otherwise decided by the Tribunal upon request by any of the Parties.

¹ Participants joining collectively from a conference room should be identified by "Conference Room" and the name of relevant Party.

26. After having been identified by the PCA, Participants will be assigned to their corresponding break-out room until the Hearing commences.
27. At the beginning of his / her intervention, each witness / expert must advise, and ideally show, if applicable, who is next to him / her in the room from which he / she is speaking.
28. A witness / expert must intervene and provide evidence seated at an empty chair and table and the face of the witness must be clearly visible on the video. The witness / expert may have at his disposal a white paper and pen to take notes, if necessary, as well as a printed copy of his testimonial statement or expert report, with its annexes (without annotations). In any case, the witnesses / experts may not use any mobile or electronic device during their interventions (except for the direct presentation of the experts, during the which the expert will be able to handle his power point presentation).
29. Webcams should be positioned at face level, relatively close to the witness / expert (e.g., positioning the laptop on a pile of books). Said webcams must remain immobile for the duration of the intervention of each witness / expert.
30. Witnesses / experts may not use “virtual background”. Rather, the place where they are testifying must be visible.
31. Witnesses / experts must speak directly to the camera when testifying.
32. Witnesses / experts should avoid making rapid movements.
33. The experts may be present at all times in the courtroom, before and after their interrogation.
34. Once their questioning has begun, witnesses and experts must be isolated until their questioning has concluded, and they must not have contact with the Parties or their attorneys, or with other witnesses or experts.
35. At any time, the president may request a witness / expert to direct his webcam to a 360-degree view of the place where he is testifying, in order to confirm that no unauthorized person is present.

VIII. Internet Connection and Devices

36. The Parties are responsible for ensuring that each of their Participants connects to the video conference through a stable internet connection offering sufficient bandwidth and uses a camera, microphone and speaker of adequate quality.
37. Participants should consider using a wired Ethernet connection instead of WiFi. Participants are also encouraged to keep a smartphone or tablet, having at the minimum a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times during the Hearing.
38. A dial-in telephone audio option shall be offered as a backup option for Participants experiencing difficulties with computer audio. Certain key Participants may wish to dial-in by phone in addition to connecting through their computer, so as to be able to switch seamlessly to telephone audio in case they should happen to be disconnected at any point. The telephone number for this purpose will be circulated alongside with the access details for the conference.

39. Each Participant is encouraged to have at least two devices or screens available for use during the Hearing, one to connect to the video conference and another for the transcription. Where possible, using a third device or screen to display evidence and demonstrative exhibits is recommended.

IX. Video conference Etiquette

40. All Participants without an active role at any given moment should mute their own audio and turn off their video in order to preserve internet bandwidth for the active Participants.
41. The Parties shall provide a list of the Participants from each side who will speak to a specific issue or conduct examination of a witness or expert by e-mail to all other Participants (including the other side, the Members of the Tribunal, the PCA, the court reporters, the interpreters and further technical support personnel retained by the PCA) at least one hour prior to the start of each day. Similarly, the Parties should, insofar as possible, circulate any speaking notes to the court reporters and interpreters prior to the start of any relevant session.
42. In order to facilitate the simultaneous interpretation and accurate transcription of the Hearing, speakers shall speak slowly and with pauses between phrases.
43. Participants should join the Hearing from a location without background noise and with adequate lighting. Participants (especially those making oral presentations) should also consider using a complete headset (headphones with integrated microphone) of good quality.
44. The above provisions on etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

X. Interpretation

45. Simultaneous interpretation to and from English and Spanish will be organized by the PCA and made available through the video conferencing platform.
46. In order to facilitate simultaneous interpretation, at the time of providing the list described at Section 41 above, the Parties shall indicate the language(s) that will be used by each intervening Participant.

XI. Transcription

47. In accordance with Section 8.4 of Procedural Order No. 1, live transcripts of the Hearing in English and Spanish will be organized by the PCA and made available on a separate platform. The PCA will circulate the connection details for the transcript on the day prior to the start of the Hearing. Participants are encouraged to use a second device or a second screen for viewing the transcript. Final transcripts will be circulated by e-mail at the end of each day.

XII. Recording

48. The PCA will arrange to record the Hearing in both audio and video. The floor hearing will be recorded by the *Zoom* platform; the Spanish and English channels will be recorded separately by *Law in Order*.
49. No other Participants, other than the court reporters, shall record any part of the Hearing, unless the Tribunal grants express leave to this effect.

XIII. Evidence and demonstrative exhibits

50. In accordance with Sections 8.4 and 8.5 of Procedural Order No. 1, no new evidence may be presented at the Hearing except with leave of the Tribunal. Should the Tribunal grant leave to a Party to present new evidence in the course of the Hearing, it will grant the other Party the opportunity to introduce new evidence to rebut it.
51. As further established in Section 8.4 of Procedural Order No. 1, PowerPoint slides and demonstrative exhibits may be used by any Party during the hearing, provided that those materials reflect evidence on the record and do not introduce new evidence, directly or indirectly, and that the exhibit from which the referred information originates is clearly identified in each presentation.
52. The Party displaying demonstrative exhibits during the Hearing shall provide electronic copies by e-mail and through the online document exchange platform used in this proceeding to all Participants (including the other side, the Members of the Tribunal, the PCA, the court reporters, the interpreters and further technical support personnel retained by the PCA), at least one hour prior to their use during the Hearing. In modification of Section 8.5 of Procedural Order No. 1, hard copies of demonstrative exhibits shall not be required.
53. The presentation of any evidence, authority, or demonstrative exhibit shall be made through the screen-sharing function of the video conferencing platform in order that the speaker and the relevant document can be seen simultaneously at all times. The Parties are encouraged to designate one person on each side who shall be responsible for presentation of evidence, authority or demonstrative exhibit through the screen-sharing function of the video conferencing platform during the Hearing (the “**Document Manager**”). The Parties may also seek assistance from the technical support personnel retained by the PCA in presenting documents during the Hearing. The Parties shall notify the PCA whether they intend to use their own Document Manager for presentation of documents during the Hearing or if they would require assistance in presentation of documents, at the latest by **Friday, July 30, 2021**. Otherwise, each Party will utilize its own document management system to organize and display documents during the Hearing.

XIV. Technical Problems

54. Each Party shall designate, no later than **Friday, July 30, 2021**, one of its representatives to act as video conference contact person (“**VC Emergency Contact Person**”) for purposes of addressing any technical incidents which arise during the video conference. The VC Emergency Contact Person shall be responsible for advising the Tribunal and the PCA on the video conference if an essential Participant from their side is disconnected or otherwise cannot participate, such that the Tribunal is requested to pause the Hearing. Otherwise, the VC Emergency Contact Person shall notify and address technical issues with Luis Popoli of the PCA (tel.: +31 621 631 760; e-mail: lpopoli@pca-cpa.org), without interrupting the Hearing.
55. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the video conferencing system to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. The Parties are asked to bear in mind that full recordings and transcripts will be available, mitigating any prejudice arising from the failure of any given Participant to be able to follow the entire Hearing on the video conferencing platform.

XV. Post-Hearing Matters

56. After consultation with the Parties, the Tribunal shall decide at the conclusion of the Hearing whether the submission of post-hearing briefs is necessary and, if so, shall establish their scope, maximum length and submission dates.

57. The need and process for the review and correction of transcripts will be determined by the Tribunal, following consultations with the Parties, at the conclusion of the Hearing.
58. The Tribunal shall also consider whether and when the Parties shall file submissions on costs.

XVI. Transparency

59. Pursuant to Article 6 of the UNCITRAL Transparency Rules, the Hearing shall be public. Accordingly, as per Section 9.3 of Procedural Order No. 1, the PCA shall arrange for a public webcast of the Hearing.
60. Any Participant who intends to refer to confidential or protected information, or to information that could otherwise affect the integrity of the arbitral process during the Hearing shall so inform the Tribunal prior to making any such reference. The Tribunal shall then direct the PCA to pause the webcast for the period of time that such confidential or protected information is being addressed. Such consultations shall be held in camera and the transcript shall be marked “confidential”.
61. The transcripts of the Hearing and, if appropriate, its recordings, shall be made available to the public following the conclusion of the Hearing as directed by the Tribunal, after consulting with the Parties.

XVII. Costs

62. The costs of the Hearing, including the services of *Law in Order*, court reporting, interpretation and the public webcast, shall be paid from the advance payments deposited by the Parties with the PCA, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs.
63. Each Party shall be responsible for the costs associated with preparation of its Participants (any additional equipment, necessary internet connectivity, etc.), subject to the decision of the Tribunal as to which Party shall ultimately bear those costs.

Place of Arbitration: Paris, France



Judge Ian Binnie, CC, QC
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1 – Detailed Hearing Schedule

HOURL	DURATION²	PROCEDURAL STEP
6:00 am (EST)	15 mins	Housekeeping
6:15 am (EST)	70 mins	Respondent’s Opening Statement
7:20 am (EST)	45 mins	Claimant’s Opening Statement
8:05 am (EST)	15 mins	Break
8:20 am (EST)	1 hour and 20 mins	Examination of Respondent’s Expert (includes: 25 minutes of Expert’s direct presentation, 45 minutes of cross-examination and 10 minutes of re-direct)
9:40 am (EST)	1 hour and 10 mins	Examination of Claimant’s Expert (includes 30 minutes of Expert’s direct presentation, 30 minutes of cross-examination and 10 minutes of re-direct)
10:50 am (EST)	15 mins	Break
11:05 am (EST)	15 mins	Respondent’s Closing Statement
11:20 am (EST)	20 mins	Claimant’s Closing Statement
11:40 am (EST)	20 mins	Housekeeping

² Both Parties reserve the right to use any unused time, in the most appropriate way, or by assigning it to other parts of the hearing. The times listed in this column do not include the Tribunal’s time for questions.