INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

PHILIP MORRIS BRANDS SÀRL,
PHILIP MORRIS PRODUCTS S.A.
AND
ABAL HERMANOS S.A.

(Claimants)

-and -

ORIENTAL REPUBLIC OF URUGUAY

(Respondent)

ICSID Case No. ARB/10/7

DECISION ON RECTIFICATION

Members of the Tribunal
Prof. Piero Bernardini, President
Mr. Gary Born
Judge James Crawford

Secretary of the Tribunal
Mrs. Mairée Uran Bidegain

Date of dispatch to the Parties: September 26, 2016

REPRESENTATION OF THE PARTIES

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Representing the Respondent:

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and
Dr. Jorge Basso Garrido
Minister of Public Health
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and
Dr. Miguel Ángel Toma
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TABLE OF CONTENTS

I. INTRODUCTION, PROCEDURAL HISTORY AND PARTIES' POSITIONS 1
II. ANALYSIS 3
III. DECISION 13

I. INTRODUCTION, PROCEDURAL HISTORY AND PARTIES' POSITIONS

1. On July 8, 2016, an Arbitral Tribunal composed of Professor Piero Bernardini, Judge James Crawford and Mr. Gary Born, rendered an Award in ICSID Case No. ARB/10/7, brought by Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. against the Oriental Republic of Uruguay (the "**Award**").

2. In the Award, the Tribunal dismissed all claims that Uruguay had breached the 1991 Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments and awarded Uruguay USD 7 million in costs. The Award was accompanied by the Dissenting Opinion of Mr. Gary Born.

3. On August 11, 2016, the Claimants submitted a Request for Rectification of the Award (the "**Request**") pursuant to Article 49(2) of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") and Rule 49 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). In the Request, the Claimants alleged that the Award should be rectified, as it contains the following errors:

   a. Listing in **paragraph 56** two individuals who acted as Claimants' quantum experts under "Party Counsel";[1]

   b. Referring in **paragraph 111** to cigarettes sold, and then withdrew from the Uruguayan market as "*Marlboro Light*" when the proper characterization should have been "*Marlboro Gold*"; [2]

   c. Wrongly stating in **footnote 334** that Switzerland is not a party to the TRIPS Agreement; [3]

   d. Misattributing in **paragraphs 266** and **269**, authorship of a technical report to one of the Claimants' experts, when it was signed by another individual;[4] and

[1] Request, p. 1.

[2] Request, p. 1.

[3] Request, p. 2.

[4] Request, p. 2.

e. Misinterpreting the Claimants' position on two legal arguments as described in paragraphs **197**, **266**, and **268**.[5]

4. Along with a short description of each of these alleged errors, the Claimants included in the Request a proposal regarding the desired corrections.

5. On August 12, 2016, the Acting Secretary-General registered the Request pursuant to Rule 49(2)(a) of the Arbitration Rules. On the same date, the Acting Secretary-General transmitted a copy of the Request and of the Notice of Registration to each Member of the Tribunal.

6. On August 15, 2016, the Tribunal invited Respondent to provide observations regarding the Request by no later than September 2, 2016.

7. On August 19, 2016, the Respondent submitted its observations dated August 18 (the "**Response**"). In the Response, the Respondent stated, *inter alia*, that:

   a. As held by prior ICSID decisions, the rectification remedy under the ICSID Convention is "limited in scope" to correct only clerical, arithmetical or similar errors and its purpose is not to "reconsider the merits of issues already decided," or to reevaluate "the weight or credence accorded by the tribunal […] to the claims, arguments and evidence presented by the parties;"[6]

   b. The Respondent does not object to the Request relating to paragraphs 56, 111, and footnote 334, as they understand those to be "clerical or similar errors" that do not exceed the scope of Art. 49(2);[7]

   c. The Respondent opposes the Claimants' rectification to paragraphs 197, 266, 268 and 269 considering that the alleged "errors" cannot be "characterized as akin to clerical or arithmetical errors" and/or they "accurately summarize the disputing parties' position" or they do not represent the "Claimants' argument in a way that could be misconstrued."[8]

8. In accordance with ICSID Arbitration Rule 49(3), the members of the Tribunal have agreed that it would not be necessary for them to meet in order to consider the Request. The present

[5] Request, pp. 2-3.
[6] Response, ¶¶ 1-2 (citations omitted).
[7] Response, ¶ 3.
[8] Response, ¶¶ 5, 8, 12.

Decision has been deliberated through several exchanges of written communications among the members of the Tribunal.

9. In accordance with Article 49(2) of the ICSID Convention, the present Decision constitutes an integral part of the Award.

II. ANALYSIS

A. Scope of Application of Article 49(2) of the ICSID Convention

10. Article 49(2) of the ICSID Convention provides, in relevant part, as follows:

> *The Tribunal upon the request of a party made within 45 days after the date on which the Award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. ...*

11. In addition, Article 49 of the Arbitration Rules provides, in relevant part, as follows:

> *1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:*
>
> *(a) identify the award to which it relates;*
>
> *(b) indicate the date of the request;*
>
> *(c) state in detail:*
>
> *(i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and*
>
> *(ii) any error in the award which the requesting party seeks to have rectified; and*
>
> *(d) be accompanied by a fee for lodging the request.*

12. The Request was made within the time-frame provided in the aforementioned provisions and contained the necessary formal requirements. This is not in dispute.

13. The Parties disagree, however, as to whether all and each one of the Claimants' individual rectification requests falls within the scope of the rectification remedy envisaged in the ICSID Convention.

14. The Tribunal notes that while the official English language version of Article 49(2) of the ICSID Convention refers to the rectification of "any clerical, arithmetical or similar error in the award," the official Spanish language version provides for the rectification of "*los errores materiales, aritméticos o similares del mismo*." In addition, the third authentic text, this being the French language version of the Convention, refers to "*corriger toute erreur matérielle contenue dans la sentence*."

15. The differences in the various texts of the Convention were not mentioned by either Party. Nevertheless, because both Spanish and English were the procedural languages of this arbitration, and both the Award and this Decision are rendered in both languages, the Tribunal considers appropriate to examine this question, before it goes on to determine the scope of application of ICSID Convention Article 49(2).

16. While the Spanish and French authentic versions referring, respectively, to "*errores materiales*" and "*toute erreur matérielle*," may be considered to include a different rectification standard than does the authentic English language text, which refers to "*clerical errors*," the Tribunal is of the view that its power should not be construed as permitting a reassessment or re-examination of the issues decided in the Award, or of the Tribunal's understanding of the Parties' respective positions on the legal questions submitted to its scrutiny, as discussed below.

17. According to Article 33(4) of the Vienna Convention on the Law of Treaty of 1969, "[e]xcept where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard of the object and purpose of the treaty, shall be adopted."

18. The drafting history of the ICSID Convention confirms the limited and exceptional nature of the remedies available to the parties after an award has been rendered. As held by ICSID itself, "[t]he choice of remedies offered by the ICSID Convention reflects a deliberate election by the drafters of the Convention to ensure finality of awards."[9]

19. Thus, any revisions of the Award, such as the mechanism provided by Article 49(2), should be construed in light of the principle of the finality of the award.

20. Past tribunals have determined that "the power of the Tribunal to rectify the Award is limited"[10], that Article 49(2) envisages the correction of "minor technical error[s]"[11] and that a rectification request should be denied if it constitutes "an inappropriate attempt to revise the wording of the Decision as it concerns the Committee's summary of the parties' allegations, rather than to "rectify" any error within the meaning of Article 49(2)."[12]

21. Against this background, and having considered the Claimants' Request, as well as the Respondent's Response, the Tribunal has reached the present Decision in respect of the matters raised in the Request.

[9] Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 4.
[10] *Railroad Development Corporation (RDC) v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Decision regarding the Claimant's Request for a Supplementary Decision and Rectification of the Award, 18 Jan. 2013, ¶ 46.
[11] *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Claimant's Request for Rectification and/or Supplementary Decision of the Award, 25 Oct. 2007, ¶ 57.
[12] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision concerning Annulment of the Award, 28 May 2003, ¶ 31.

B. The Claimants' Rectification Requests

22. The Tribunal notes that Uruguay does not oppose the rectifications requested by the Claimants relating to paragraphs 56, 111, and footnote 334.[13] The Respondent objects, however, to the rectifications to paragraphs 197, 266, 268 and 269 as requested by the Claimants.[14] The Tribunal's finding on each of the individual prayers identified in the Request, are discussed individually hereinafter.

a. Paragraph 56 of the Award

23. The Claimants explain that Messrs Dekker and Ailani work for Navigant Consulting and "were acting as two of the 'Claimants' independent quantum experts" and not as 'Party Counsel.'"[15]

24. As requested by the Claimants, and considering the lack of objection by the Respondent, the error in paragraph 56 of the Award is corrected by creating a new category, labelled "Non-testifying Experts", and moving Messrs Stuart Dekker and Dushyant Ailani into the new category.

25. Accordingly, paragraph 56 of the Award is hereby rectified to read as follows:

> For the Claimants:
>
> Party Representative:
> Mr. Marc Firestone
> Ms. María del Carmen Ordóñez López
> Mr. Diego Cibils
> Ms. Tiffany Steckler
> Ms. Luisa Menezes
> Mr. John Bails Simko
> Mr. Steve Reissman
> Mr. Marco Mariotti

[13] Response, ¶ 3.

[14] Response, ¶ 13.

[15] Request, p. 1.

Party Counsel:

Mr. Stanimir A. Alexandrov
Mr. James E. Mendenhall
Ms. Jennifer Haworth McCandless
Ms. Marinn Carlson
Mr. Patrick Childress
Ms. Courtney Hikawa
Ms. María Carolina Durán
Mr. Andrew Blandford
Mr. Michael Krantz
Ms. Samantha Taylor
Ms. Avery Archambo
Mr. Hisham El-Ajluni
Mr. Carlos Brandes
Mr. Ken Reilly
Ms. Madeleine McDonough
Mr. Bill Crampton
Ms. Catherine Holtkamp
Mr. Leland Smith

Non-testifying Experts

Mr. Stuart Dekker
Mr. Dushyant Ailani

For the Respondent:

Party Representative:

Dr. Miguel Toma
Dr. Jorge Basso
Ambassador Carlos Gianelli
Dr. Carlos Mata Prates
Dr. Inés Da Rosa
Dr. Verónica Duarte
Ms. Marianela Bruno

Party Counsel:

Mr. Paul S. Reichler
Mr. Lawrence H. Martin
Ms. Clara E. Brillembourg
Professor Harold Hongju Koh
Mr. Andrew B. Loewenstein
Ms. Melinda Kuritzky
Mr. Nicholas Renzler
Mr. José Rebolledo
Ms. Christina Beharry
Mr. Yuri Parkhomenko
Dr. Constantinos Salonidis
Ms. Analía González
Mr. Eduardo Jiménez de Aréchega
Ms. Francheska Loza
Ms. Gabriela Guillén
Ms. Nancy López
Mr. Oscar Norsworthy
Ms. Anna Aviles-Alfaro

The following persons were examined:

On behalf of the Claimants:

Witnesses

Mr. Chris Dilley
Mr. Nicolás Herrera
Mr. Diego Cibils

Experts

Professor Julián Villanueva
Professor Alexander Chernev
Professor Jacob Jacoby
Professor Gustavo Fischer
Professor Christopher Gibson
Professor Alejandro Abal Oliú
Professor Jan Paulsson
Mr. Brent Kaczmarek
Mr. Kiran P. Sequeira

On behalf of the Respondent:

Witnesses:

Dr. Jorge Basso, Minister of Public Health
Dr. Winston Abascal, Ministry of Public Health
Dr. Ana Lorenzo, Ministry of Public Health
Dr. Eduardo Bianco, Uruguayan Medical Union/Tobacco Epidemic Research Center (CIET Uruguay)

Experts:

Dr. Andrea Barrios Kübler
Dr. Nuno Pires de Carvalho
Professor Nicolas Jan Schrijver
Dr. Santiago Pereira
Dr. Joel B. Cohen
Dr. Timothy Dewhirst
Dr. David Hammond
Mr. Jeffrey A. Cohen

b. Paragraph 111 of the Award

26. The Claimants consider that paragraph 111 should be corrected because following the enactment of the Single Presentation Regulation in 2009, Abal removed from the market the "*Marlboro Gold*" and not the "*Marlboro Light"* variant as indicated in the Award. The Claimants note that the descriptor "*light*" had already been banned since 2005.[16]

27. As requested by the Claimants, and considering the lack of objection by the Respondent, the error in paragraph 111 of the Award is corrected by deleting the word "*Marlboro Light*" and including instead the word "*Marlboro Gold*."

28. Accordingly, paragraph 111 of the Award is hereby rectified to read as follows:

[16] Request, p. 1.

> Based on Ordinance 514, tobacco companies could only market one variant for each family brand. The tobacco companies had the discretion to pick which variant would remain on the market. For example, for the *Marlboro* family brand, Philip Morris chose *Marlboro Red*. Correspondingly, *Marlboro Gold*, *Blue* and *Fresh Mint* were taken off the market.

c. Footnote 334 of the Award

29. As requested by the Claimants, and considering the lack of objection by the Respondent, the error in footnote 334 of the Award is corrected by deletion of the sentence "Switzerland is not a party to this Agreement, which makes its applicability to the present dispute questionable."

30. Accordingly, footnote 334 of the Award is hereby rectified to reads as follows:

> [334] TRIPS Agreement (AB-52), Article 16(1).

d. Paragraph 197 of the Award

31. The Claimants consider that attributing to them the view that "State police power does not constitute a defense against expropriation" is an error because this was not the Claimants' position. They request that this sentence be deleted from the Award.[17]

32. The Tribunal considers that, unlike in the previously mentioned requests, the criteria for rectification are not met in this instance. As the Respondent pointed out in its Response,[18] Section II(B)(4) of the Claimants' Reply on the Merits is unambiguously titled "The Police Powers Doctrine Does Not Excuse Respondent from Liability for Expropriating Claimants' Investment." Moreover, an examination of the Claimants arguments reflects that paragraph 197 is an accurate summary of the essence of the Claimants' position regarding the police powers doctrine.

[17] Request, p. 2.

[18] Response, ¶ 4.

33. As a result, the Tribunal considers, by majority, that there is no need to rectify paragraph 197 of the Award and rejects the Claimants' request in this regard.

e. Paragraphs 266 and 269 of the Award

34. According to the Claimants, in paragraphs 266 and 269, the Award "misattributes authorship" of a report entitled "Report on Trademarks with the Term 'University/Bank" (Exhibit AB-57) to the Claimants' expert Gustavo Fischer. The Claimants further say that the author of the report is Ms. Agustina Fernandez, whose signature appears at the end of the report.[19]

35. The Respondent objects to such rectifications, considering that in neither of these paragraphs the Tribunal attributed authorship of that Report to Mr. Fischer. Instead, according to the Respondent, in paragraph 266, the Tribunal only observed that Professor Fischer "confirmed" the proposition set out in the report[20] that "a trademark confers on its owner only 'the rights to prevent others from using a trademark or trademarks.'" Moreover, the question of whether the report could or could not be attributed to Mr. Fischer was the subject of testimony during the examination of Respondent's expert Prof. Andrea Barrios, and the Tribunal "had ample grounds on which to describe the report in the manner that it did."[21]

36. The Tribunal notes that the Report, while signed by Ms. Agustina Fernandez, was transmitted to Uruguay's National Directorate of Industrial Property *Dirección Nacional de la Propiedad Industrial or* "**DNPI**" for its Spanish acronym) by Prof. Gustavo Fischer and Ms. Victoria Fox, through a cover letter under the letter head of the Uruguayan Association of Industrial Property Agents – (*Asociación Uruguaya de Agentes de la Propiedad Industrial o* "**AUDAPI**" for its Spanish acronym) dated February 15, 2012, with their respective signatures. The Tribunal's intention was not to attribute authorship of this

[19] Request, p. 2.

[20] Response, ¶ 6. *See also* ¶ 7.

[21] Response, ¶ 8.

report to Prof. Fischer in his personal capacity, but instead to point out that, as President of the AUDAPI and given his role in transmitting the report, he had full knowledge of the Report clearly endorsing its content, as shown by the text of the transmittal letter.

37. After careful consideration of the Claimants' Request and of the Respondent's Response, the Tribunal admits the Claimants' Rectification Requests described in paragraph 34 above limited to paragraph 266.

38. Accordingly, lines 7 and *seq*. of paragraph 266 and footnote 341 are hereby rectified to read as follows:

> Professor Fischer, one of the Claimants' experts, as President of the Uruguayan Association of Industrial Property Agents ("**AUDAPI**"), transmitted to the DNPI without objections, a report in which it was confirmed that a trademark confers on its owner only "the right to prevent others from using a trademark or trademarks that may be confused with their own." [341]
>
> [341] **AUDAPI** Report on Trademarks with the Term "University/Bank," 15 Feb. 2012, (AB-57), p. 3. The Tribunal notes that the report was signed by Ms. Agustina Fernandez on behalf of AUDAPI, and was transmitted to the DNPI under cover of a letter of 15 February 2012 by Prof. Gustavo Fischer in his capacity as President of the AUDAPI and by Ms. Victoria Fox.

39. The request to rectify paragraph 269 is rejected since in this paragraph the Tribunal is only stating what the Respondent is said to rely on.

f. Paragraphs 266 and 268

40. According to the Claimants, paragraphs 266 and 268 of the Award shall be rectified as certain passages of those paragraphs suggest that the Claimants had stated that they "had an 'absolute, inalienable right to use' their trademarks," which was something that they had "never argued."[22]

41. The Respondent objects to this rectification, stating, among others, that how the Claimants' believe that these two passages "could be read" is "immaterial" and it results from "a

[22] Request, p. 3.

strained reading of the statements." It considers moreover, that none of these explanations "constitute a valid reason for rectification of the Award."[23]

42. By majority, the Tribunal agrees with the Respondent's above-statements and considers that there is no need to rectify paragraphs 266 and 268 of the Award. Accordingly, by majority, the Tribunal rejects the Claimants' request to modify paragraphs 266 and 268, as described in paragraph 40 above.

C. Costs of the Proceedings

43. The Tribunal has found merit in part of the Request. Therefore, each Party shall bear the expenses incurred by it in connection with this Decision and one-half of the Tribunal's fees and expenses as well as of ICSID's administrative fees and expenses for the total amount of USD 7,500.00.

[23] Response, ¶ 11.

III. DECISION

44. For all the foregoing reasons, the Tribunal, DECIDES:

a. Paragraph 56 of the Award is rectified by the addition of a category called "Non-testifying Experts" and the inclusion of Messrs Dekker and Ailani in that new category;

b. Paragraph 111 of the Award is rectified by the substitution of the word "*Light*" for the word "*Gold*;"

c. Footnote 334 of the Award is rectified by deletion of the sentence "Switzerland is not a party to this Agreement, which makes its applicability to the present dispute questionable.";

d. By majority, no rectification is required in respect of paragraph 197 of the Award;

e. Paragraph 266 and footnote 341 of the Award are rectified by the incorporation of the new texts included in paragraph 38 of this Decision;

f. By majority, no other rectification is required with respect to paragraph 266;

g. No rectification is required in respect of paragraph 269 of the Award;

h. By majority, no rectification is required in respect of paragraph 268 of the Award;

i. Each party shall bear the expenses incurred by it in connection with the present Decision. The costs, including the fees and expenses of the members of the Tribunal and ICSID administrative fees and expenses, for the total amount of USD 7,500.00, shall be borne by the Parties in equal shares.

[Signed]

Mr. Gary Born
Arbitrator
Date: 09/20/2016

[Signed]

Judge James Crawford
Arbitrator
Date: 12.9.2016

Subject to a partial dissent

[Signed]

Prof. Piero Bernardini
President of the Tribunal
Date: 8/9/2016