

UNOFFICIAL TRANSLATION

(Or.Mor. 03)  
(Sender's Information)

Notice of Administrative Court Warrant / Order Via Facsimile  
(Necessary or Urgent Circumstances)

From: Warrant Section, Office of the Central Administrative Court  
Telephone: 02 1411111 Ext. 10290-93 Facsimile: 02 1439847  
Address: Office of the Central Administrative Court, 120 Mooban 3, Chaengwatana Rd., Thung Songhong, Lak Si, Bangkok 10210

Date Sent 23 Month August Year 2013 Time 1635 hours  
Document Sent Notice of Court Orders (Thor. 23 and Tor. 20) Total of 18 pages, excluding cover sheet.

Black Case Number 1324 / 20 13 Red Case Number -- / 20

Versus { Philip Morris (Thailand) Limited, No. 1, et al, a total of 2 persons Plaintiff  
Ministry of Public Health, No. 1, et al, a total of 2 persons Defendant

Order to Ministry of Public Health, No. 1, Minister of Public Health, No. 2

Telephone Number 02 - 580 9307

Sign: [signature] Sender  
( Mr. Tanet [illegible] )

(Addressee's Information)

To: x

Address: Building Ministry of Public Health Mooban Road Tiwanon Lane

Sub-district Talat Khwan District Muang Nonthaburi Province Nonthaburi

Telephone  Facsimile 02 - 980 9307

Received Date 23 Month August Year 2013 Time x hours

Sign: x Sender  
(  )

\*\*Please enter addressee's information and return to Central Administrative Court at the number above.\*\*

[Identical to preceding page.]

[Garuda Emblem]

Black Case No. 1324 /2556

Red Case No.        /25       

Office of the Central Administrative Court

Date 23 Month August Year 2013

Versus { Philip Morris (Thailand) Limited, No. 1, et al, a total of 2 persons Plaintiff

Ministry of Public Health, No. 1, et al, a total of 2 persons Defendant

Order to Ministry of Public Health, No. 1, Minister of Public Health, No. 2 Defendant:

Whereas, in this case, the Court orders temporary suspension of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013 until the Court renders a decision or issues orders to the contrary.

Details appear in the attached copy of the order;

Therefore Notice is given for your information and implementation.

Further The Court orders that the date and time of transmission of this communication shall be considered the date and time that you are informed of this order.

[signature]

(Miss Vipajaree Vutti)

Special Administrative Case Officer, Acting for  
Director, Office of the Central Administrative Court

Office of the Central Administrative Court  
120 Chaengwatana Rd., Thung Songhong, Lak Si  
Bangkok 10210  
Telephone 0-2141-1111, Ext. 10220-1  
Express Line "1355"

To Ministry of Public Health, Minister of Public Health  
Address Ministry of Public Health Mooban -  
Road Tiwanon Alley / Lane - Sub-district Talat Khwan  
District Muang Nonthaburi Province Nonthaburi 11000 Telephone -

### Notes

Note 1. A Court order denying suspension of administrative rules or orders may not be appealed by parties to the suit until a final decision is rendered.

Note 2. A Court order revoking suspension of administrative rules or orders is final and may not be appealed by parties to the suit.

Note 3. Interested parties may appeal Court orders suspending administrative rules or orders within 30 days of receipt of notice or information of such orders.

Such appeals shall be submitted to The Central Administrative Court that issued the order by submission at the Court or by registered mail.

Note 4. A Court order denying or revoking suspension of administrative rules or orders shall not affect the plaintiff's suit, which the Court shall proceed to consider and decide according to the laws and regulations.

COPY

Order Suspending  
Rules

(Tor. 20)

[Garuda Emblem]

**Black Case No.** 1324 /2556

**Red Case No.** /25

**In the Name of His Majesty**

**Central Administrative Court**

Date 23 Month August Year 2013

Versus	{	JT International Company (Thailand), Ltd. JT International, SA	Plaintiff
		The Minister of Public Health The Ministry of Public Health	Defendant

Subject: Case of a dispute about whether an administrative agency or an officer of the state has acted unlawfully.

In this case both Plaintiffs claim that Plaintiff 1 is engaged in the business of importing and distributing L&M and Marlboro cigarettes in Thailand. Plaintiff 2 has registered the trademarks for the brands L&M and Marlboro, as well as trademarks for numerous other brands of cigarettes, in Thailand. On 6 March 2013, Defendant 1, by the act of Defendant 2, issued Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013. The Notice was published in the Government Gazette on 5 April 2013, and is to take effect on 2 October 2013. The said Notice requires that

[Stamp: Central Administrative  
Court, 23 August 2013]

cigarettes produced in or imported into the Kingdom be labeled with images, warning statements on the hazards of tobacco, and contact channels for smoking cessation on every pack of tobacco products. These labels must occupy 85 percent of the area of both the front and the back of the pack. This leaves the two Plaintiffs with less than 15 percent of the area remaining to display their merchandise brands, an infringement of their trademark rights. As a result, the two defendants cannot use the trademarks in the formats in which they were lawfully registered. The said measure further derogates the rights and intent of trademarks, which are established so that the consumer public can discriminate between products of the same type from disparate manufacturers. At present, Thailand compels the use of warning images of 55 percent, the largest in the world. The said Notice further requires that cigarettes sold in packages of 10 packs, or 1 carton, must have 10 warning images without duplication. In practice, the two plaintiffs cannot guarantee that they can meet this requirement, since the automated packaging machinery will discard any packs that are sub-standard and replace them with other packs automatically. This may cause some cartons not to have the full set of images required by law, making the two Plaintiffs liable to criminal prosecution. The Notice imposes unnecessary procedures and imposes an unreasonable burden upon the two Plaintiffs.

The two Plaintiffs assert that the said Notice is unlawful in that 1) The Notice was issued exceeding the authority of Article 12 of the Tobacco Products Control Act of 1992. The authority of the two Defendants to issue such a Notice is limited by the scope and intent of the said Article. The intent of Article 12 is to give the two Defendants authority to regulate the details of tobacco product labels in order to warn the public and consumers of the hazards of tobacco. More than 97 percent of the population of Thailand is well aware of the dangers of smoking. Further, Ministerial Notices are law of a lower precedence than the Act itself, and cannot contradict a law of higher precedence. The Juridical Council has held that the exercise of authority under Article 12 must not infringe upon rights to the use of trademarks. 2) The process under which the said Notice was issued was not lawful, in that the steps

prescribed by law were not followed. Article 58 of the Constitution of the Kingdom of Thailand of 2007 decrees that individuals have the right to participate in deliberations by administrative officials of the state in matters that affect or that may affect their rights and liberties. This principle is set out in the Royal Decree on Rules and Procedures for Good Governance of 2003, which requires the two Defendants to study the impacts and losses that may occur, and to consult with persons and other agencies of the state that have an interest in the matter before issuing regulations. The two defendants did not investigate the impacts, nor did they heed suggestions and objections from persons having an interest in the matter or from other concerned agencies of the state. As a result, exercise of authority in issuing this Ministry of Public Health Notice is unlawful. 3) This Notice infringes the trademark rights of the two Plaintiffs. First, the Notice renders unusable the trademarks in which the two Plaintiffs have rights and which they have lawfully registered in Thailand. By extension, this can be considered an infringement of the property rights of the two Plaintiffs. Article 63 of the Trademarks Act of 1995 provides that if a registered trademark is not used, the registration can be revoked. Since the disputed Notice renders the two Plaintiffs unable to use their trademarks, the two Plaintiffs are at risk of having the registration for their trademarks revoked. Second, the said Notice negates the purpose of the trademarks. Article 4 of the said Act defines trademark thus: "Trademark shall mean a mark used as a symbol for or in relation to merchandise, to show that the merchandise displaying the mark of the trademark owner is different from merchandise using the trademark of another person." At the same time, a trademark also has the function of creating goodwill and trust in the brand among consumers. Also, Article 7 of the same Act gives the meaning of the phrase "distinctive character" thus: "A trademark that has distinctive character is a trademark that lets the public or users of the merchandise know and understand that merchandise that uses that trademark is different from other merchandise." The said Notice reduces the area for the trademark and product

information to less than 15 percent. This will cause confusion among consumers and retailers, who will not be able to distinguish the products of the two Plaintiffs from those of other producers. Producers of premium merchandise like Marlboro and L&M will be deprived of the ability to use their trademarks to communicate to consumers that theirs is premium merchandise. The said Notice makes the cigarette packs of all brands look the same or very similar. The customer will then buy primarily on price, and will turn to cheaper products including loose rolling tobacco, contraband goods, and illegal products, all of which are significant problems in the present-day Thai society. In addition, the said Notice conflicts with Thailand's international obligations under Article 15 (4) of the TRIPS accord, which states that the nature of a product must not pose an obstacle to registration of its trademark. The said Notice creates obstacles to the registration and use of cigarette trademarks. Article 20, which addresses the use of trademarks in normal commerce, must not be obstructed unfairly by any regulation. The Notice further conflicts with Article 10 bis of the Paris Agreement, a treaty to which Thailand is a party and which has the objectives of preventing unfair barriers to trade, consumer protection, and protection of the rights of trademark owners. 4) The said Notice conflicts with rights protected under the Constitution. The two Plaintiffs' inability to enjoy full use of their trademarks in communicating with consumers is a derogation of their rights to engage in business, follow a profession, and to compete freely and fairly under Article 43 of the Constitution of the Kingdom of Thailand of 2007. Trademarks are extremely important, and are an assurance of free and fair commerce. The said Notice also creates a burden for consumers, wholesalers, and retailers nationwide, who must spend time selecting the merchandise desired by the consumer and who may make errors easily. 5) The said Notice does not meet the standards of necessity and proportionality under administrative law. Article 24 of the Constitution of the Kingdom of Thailand of 2007 decrees that limits upon the liberties of persons under the Constitution can be imposed only insofar as necessary and that such limits cannot significantly impact rights and liberties. The current specification

that warnings must occupy 55 percent of the surface area of the product package is the 14<sup>th</sup> largest such requirement in the world, and is already adequate to achieve the purpose and intent of Article 12 of the Tobacco Products Control Act of 1992. This is apparent from the results of the Global Adult Tobacco Survey (GATS) of 2011 for Thailand. This survey of knowledge of the hazards of tobacco found that more than 97 percent of the Thai population is well aware that smoking is a health hazard. Enlarging the area of warning images as required by the said Notice exceeds any necessity and is disproportionate to the damage to rights and liberties that will be suffered by the two Plaintiffs. Having more than 97 percent of the public aware of the dangers from tobacco products is enough. Enlarging the warning images cannot create any additional knowledge or awareness among the population whatsoever. The public benefit from measures taken under the said Notice will be the same as before, but the loss to the private sector, such as the two Plaintiffs, will increase. Issue of this Notice is imposition of an unnecessary regulation that forces compliance with even harsher requirements. Generally, when two measures in administrative law achieve the same end, the state must elect to apply the measure that least encumbers the private sector. Therefore, the two Plaintiffs submit this matter to the Administrative Court.

We ask that the Court issue a decision or an order to nullify Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013.

Plaintiffs submitted a motion on 26 June 2013 asking the Court for a temporary injunction pending a decision in this matter. The motion asks for suspension of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013 until the Court reaches a final decision.

On 8 July 2013, the Court questioned the parties to the suit in order to consider whether to order suspension of the administrative regulations or orders.

In summary, the two Plaintiffs responded to questioning as follows: Plaintiff 1 is an importer of tobacco. Plaintiff 2 is the owner of the trademarks. In the matter of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013, the two Plaintiffs assert that if the said Notice takes effect it will cause harm that will be difficult to remedy later, namely goodwill in commerce. The trademarks Marlboro and L&M are cigarette trademarks that have long been in use to create and maintain consumer goodwill for cigarettes. But when the said Notice takes effect, the space available for communication will decrease. Consumers will become confused and be unable to distinguish among brands, and this goodwill will be lost. The result of issuance of this Notice will be to destroy utterly the mechanisms of the tobacco market. Furthermore, the two Plaintiffs assert that to pack 10 distinct types of cigarette [pack] in 1 carton is utterly impossible in practice. Guidance for implementation within 180 days calls for placing different images on the front and back of cigarette packs by pairing, for example, image 1 with image 6. This is of no help to the two Plaintiffs, but rather increases their burden, since after 180 days, the Plaintiffs must implement the original requirement for 10 types in 1 carton. Plaintiffs are not concerned about additional expense of complying with the said Notice. Rather, they are concerned with the loss of goodwill toward their trademarks which must be rebuilt at unknown expense, and with the cost of fines for their inability to comply with this Notice. The letter the two Plaintiffs sent to the two Defendants on 3 June 2013 contained no statement indicating that the two Plaintiffs would be able to package all 10 images in 1 carton, and experts have affirmed that this would be impossible. The two Defendants have stated that if they discover non-compliance with the requirement to package 10 images in 1 carton of cigarettes, they would have to consider the intent of the noncompliance. The two Plaintiffs assert that to prove such intent would create difficulty for Plaintiffs in criminal cases.

[Stamp: Central Administrative  
Court, 23 August 2013]

The World Health Organization Framework Convention on Tobacco Control of 2003 (FCTC), only a set of guidelines, recommends requiring images on only 30 percent combined with statements to cover 50 percent [of the package surface.] There is no requirement whatever for any expansion of the images. Thailand now requires an image size of 55 percent, already a large area. As for the recommendations of the Department of Disease Control, the two Plaintiffs have not yet received this document and reserve the right to dispute it.

Mr. Klaus Lanvermann, expert witness on printing for the two Plaintiffs, currently employed as manager of packaging for Philip Morris International Management, Limited, responded in summary that in packaging of cigarettes into cartons as presently done in works in the Philippines, 10 packs or 1 carton is wrapped in printed plastic film. Fifty cartons or bundles are placed in 1 shipping case. The shipping cases are placed on pallets for export. As for placing 10 warning images in 1 carton, the witness responded that it could not be done with 100 percent accuracy. But, if the images on the front and back of each pack were different, the percentage of success would be greater. As for having workers help check on the ordering of images by the machines, the witness responded that in any case where humans must perform multiple tasks continuously, they make more errors than machines. The witness affirmed that machine packing in the Philippines or in Thailand could not comply with the requirements of the said Notice.

In summary, the two Defendants responded to questioning as follows: The World Health Organization, placing emphasis on non-communicable diseases which are a threat to humankind, negotiated the World Health Organization Framework Convention on Tobacco Control of 2003 (FCTC). The Convention is signed by 176 countries which joined together to protect society from the risks engendered by tobacco use, which are risk factors of the first order. Thailand is one of the 176 signatory countries. Of major substance in the convention is a ban on advertising of all types of tobacco products, along with

[Stamp: Central Administrative  
Court, 23 August 2013]

many other measures, including warning images. In fact, certain other countries specify that images and warnings occupy 87.5 percent of the area, leaving only 12.5 percent of the area to display the name of the product. Use of color or trademark symbols is not permitted on the pack to identify the product. The meeting of the National Committee for Control of Tobacco Use (NCCTU) held that the warning images are the most important element in communicating awareness of danger to the consumer. The two Defendants proceeded as follows: 1. Protected children and women from becoming smokers. 2. Gave persons who are already smokers the opportunity to learn about the hazards of smoking and gave them an avenue to stop smoking. 3. Protection of the non-smoking population. The World Health Organization and the results of studies [by others] have made it clear that the warning images best communicate the danger to the public. These measures have reduced tobacco sales. In fact, this Notice grants an expanded period of 180 days, which corresponds to all the previous changes in cigarette pack images. Since the meeting with entities engaged in the business, an additional 180 days has been granted for this process, so that the effective date of the Notice is now 30 March 2014. The Defendants believe that this is sufficient time for entities engaged in the business to comply. At this time, there is information that 3 entities engaged in the business, the Thailand Tobacco Monopoly, NISE, and BAISHA, have made [apparent typo, possibly: plates] and sent them to the Department of Disease Control for inspection.

In the matter of printing all 10 images, the two Defendants reaffirm their intent that all 10 images be used because each image may reach a different, distinct group of people. The Defendants intend that consumers encounter all ten of the images. As for 1 carton having to have all 10 images, the two Defendants have made inquiries with engineers and with entities engaged in the business who say that the process is complex, but none of these entities said that they absolutely could not do it. Further, the two Plaintiffs in their letter dated 3 June 2013 stated that they could do it but that they needed more time for set-up and development in order to meet the deadline. Plaintiffs requested an extension until 2 April 2014, which the two Defendants considered and granted, extending the effective date until 30 March 2014. Experts for the two Plaintiffs affirmed to the Court that they could do it but could not

[Stamp: Central Administrative  
Court, 23 August 2013]

guarantee 100 percent compliance. In case of errors, intent will have be considered, since the two Plaintiffs state that meeting the requirement seems technically feasible. In the matter of copyrights, the two Defendants do not desire to impede their use, and do not forbid the use of trademarks in any way. Entities engaged in the business retain their rights to trademarks as before.

In summary, Miss Saranya Benjakul, witness for the two Defendants, responded that Article 11 of the World Health Organization Framework Convention states in summary that the effectiveness of the warning images increases with the size of the images. Therefore, in 2009, Defendant 1 issued a Notice requiring that the warning image cover 50 percent of the cigarette pack, and in 2011 the area was increased to 55 percent, with the additional area to be used for a telephone number for a smoking cessation contact. Yet during those two years, the smoking rate did not decrease. This is because the images used were too similar, so that the suggestion to stop smoking became less effective, and also because 4 in 10 of the additional smokers were children or youths. The images in 2011 had been in use for more than 2 years. New images were prescribed in 2013, consisting of a set of 10 images, and the area was increased with the expectation that the idea of smoking cessation would be stronger. The enlarged images were to give a stronger warning about the dangers of cigarettes. In studies in the year 2006, it was found that the rate of decrease in smoking was dependent on 5 factors: 1. Taxes, 2. Prohibition of advertising, 3. Use of media to provide knowledge, 4. Smoke-free environment policy, and 5. Regulation of cigarette packaging, which had been in use for about 1 year at that time.

In summary, Miss Sawatree Suksri, witness for the two Defendants, responded that after the Department of Disease Control established implementation guidelines on 12 June 2013, implementation of the Ministerial Notice has been relaxed regarding the requirement for each pack to have two different sides (Paragraph 3 of the Guidelines), but the requirement for cartons was not changed. On 5 July 2013, the Department of Disease Control issued new guidelines containing the following concessions: (1) the cigarette packs in a clear carton are not required to have the same image on both sides (the same as an opaque carton), (2) the warning images on cigarette packs in either clear or opaque cartons are not required to have all 10 images, but there must be at least 2 different images in each carton

during the delay period. In conclusion, the effect of the 2 sets of guidelines is that entities engaged in the business can proceed as before under the previous rules for display of warning images of 2009, except for enlarging the size of the images from 55 percent to 85 percent immediately upon the effective date of the disputed Notice, since the Department of Disease Control has not extended this provision.

The two Defendants assert that if the Court orders this suspension, the effective date of the law will be delayed. Such delay in the effective date of the law will affect smokers, especially women and children, and fewer of those who now smoke will quit. Article 11 of the World Health Organization Framework Convention on Tobacco Control of 2003 (FCTC) states that the effectiveness of the warnings increases as the warnings are made larger. Article 11 calls for countries to make the warning images as large as possible. Consumer purchases do not depend on price, but depend upon the brand that consumers prefer or that they use regularly. In making purchases, most consumers will tell the clerk what cigarettes they want to buy, since cigarettes generally are sold by the retailer from closed cases.

The Court has considered the Plaintiffs' motion requesting the Court to suspend the regulation, and has questioned both the parties to the case, heard the announcement of the judge in the case, and examined other documents in the case file. This case has issues that must be adjudicated to determine if there is sufficient cause to suspend the said Notice.

Upon consideration, we find that Article 72, Paragraph 3 of the Supreme Administrative Court Rules of Procedure of 2000 states that in cases where the Court finds that an administrative rule or order that is the cause of a lawsuit is likely to be unlawful, and that allowing the said administrative rule or order to continue in effect will result in serious damage that will be difficult to remedy after the fact, and when suspension of the said administrative rule or order will not be an obstacle to the functioning of the state or to public service, the Court shall have the power to suspend the said administrative rule or order as the Court sees fit. Under the authority cited above, there are three conditions that must be met for a court to order suspension of an administrative rule or order which is the cause of a lawsuit. The first

condition is that the administrative rule or order is likely to be unlawful. The second condition is that to allow the administrative rule or order to remain in effect while the case is considered will result in serious damage that will be difficult to remedy after the fact. The third condition is that suspension of the administrative rule or order will not be an obstacle to the functioning of the state or to public service.

The admissible facts at this point are that Defendant 1, by the act of Defendant 2, did issue Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013. This Notice was published in the Government Gazette on 5 April 2013, and is to take effect on 2 October 2013. The said Notice requires cigarettes produced in or imported into the Kingdom to be labeled with images, warning statements on the hazards of tobacco, and contact channels for smoking cessation on every pack of tobacco products. These labels must occupy 85 percent of the area of both the front and the back of the pack. The Notice further requires that cigarettes packaged in boxes or wrappers (cartons) containing not less than 10 packs of cigarettes must display 10 different types of image labels in 1 carton. In cases where less than 10 packs of cigarettes are packaged in a box or wrapper (carton), the images displayed on the packs must not be duplicated within the carton. The two Plaintiffs assert that issue of the said Notice requiring cigarettes produced in or imported into the Kingdom to be labeled with images, warning statements on the hazards of tobacco, and contact channels for smoking cessation on every pack of tobacco products, and requiring that these labels occupy 85 percent of the area of both the front and the back of the pack, leaves less than 15 percent of the area of the front and back of the pack available to display the Plaintiffs' merchandise brands. Plaintiffs assert that this infringes their trademark rights, since the two Plaintiffs are unable to use their trademarks in the form in which the trademarks were registered. They assert that issue of the Notice exceeds the scope of authority under Article 12 of the Tobacco Products Control Act of 1992, and that the Notice does not meet the standards for necessity and proportionality, and that the provision requiring that cigarette packs or containers packaged in a carton or

[Stamp: Central Administrative  
Court, 23 August 2013]

wrapper have all 10 labels is not technologically feasible. The mechanized production process discards any substandard packs and replaces them with others automatically, so that the cigarette packs in a given carton may not have all the labels required by law, placing the two Plaintiffs at continual risk of criminal prosecution. Plaintiffs therefore ask that the Court issue a decision or order to nullify Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013. Plaintiffs move for temporary suspension of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013, pending a final decision or order by the Court. Upon considering the references cited by the parties to the suit and other evidence available at this stage, it appears that Defendant 2 did issue Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013. Article 3 of the said Notice states that producers or importers of tobacco must print labels bearing warning images and statements about the hazards of cigarettes, and contacts for smoking cessation as specified in Article 2 on packs of cigarettes. These labels must occupy an area of not less than 85 percent of at least two of the largest faces of the pack, and must be positioned along the uppermost and left edges of the cigarette pack or container. Article 6 (3) of the said Notice requires that cigarettes packaged in boxes or wrappers (cartons) containing not less than 10 packs of cigarettes must display 10 different types of warning images and statements about the hazards of cigarettes, and contacts for smoking cessation in 1 carton. We note that the said Notice was issued under the authority of Article 12 of the Tobacco Products Control Act of 1992. This

[Stamp: Central Administrative  
Court, 23 August 2013]

Act states that producers and importers of tobacco products must affix labels on packaging before removing the products from the production site or before importing the products into the Kingdom, as may apply. Paragraph Two states that the rules, procedures, and conditions for display of labels, as well as the content of the labels, shall conform to announcements by the Minister in the Government Gazette. According to the provisions of this law, Defendant 2 has the authority to specify rules, procedures, and conditions for the display of labels and the content of labels. Whether the setting of these rules exceeded the lawful scope of authority, whether the rules conformed to the principles of necessity and proportionality, and whether the rules infringe rights in trademarks are matters which the Court must decide later. At this stage, we note that the requirements have problems with legality in several areas, such as expansion of the images from an area of 55 percent of the front and back of the pack to 85 percent. The two Defendants claim that the expansion is on the authority of World Health Organization Framework Convention on Tobacco Control of 2003 (FCTC) without regard to impacts or damages that may occur, without regard to whether the said requirements are an excessive burden upon the two Plaintiffs, without regard to whether the requirements will actually achieve their goals or confer benefits on consumers commensurate with the damage suffered by the two Plaintiffs. Also at issue is the process by which the said Notice was issued. The two Plaintiffs claim that they were not notified to participate and that their suggestions and objections were not heeded, and that the trademark rights of Plaintiff 2 were impacted. The requirement that cartons of cigarettes contain 10 different labels bearing images, warning statements on the hazards of tobacco, and contacts for smoking cessation is said by the Plaintiffs to be beyond the capabilities of current technology since the mechanized production process will discard any packs that are sub-standard and replace them with other packs automatically, so that the cigarette packs in a given carton may not have all the labels required by law. Mr. Klaus Lanvermann, expert witness on printing for the two

[Stamp: Central Administrative  
Court, 23 August 2013]

Plaintiffs, currently employed as manager of packaging for Philip Morris International Management, Limited, responded in summary that in the process of printing packs, both soft packs and hard packs, by Amcor Tobacco Packaging Rizal, Ltd. of the Philippines, a contractor, adjustments have been made to the printing and packaging processes to accommodate the requirements imposed by the two Defendants, and that the requirements can be met to a certain extent. The unavoidable fact remains that if the products are damaged at certain points in the printing and packaging process, the machinery will extract the damaged packs at irregular intervals. In the case of hard packs, 4.57 percent of the packs were discarded for the year 2012, while the discard rate for soft packs in 2012 was 2.69 percent. To insert 10 separate images in regular rotation using this process would result in stoppages, and some of the images would be lost. Then, as the machinery automatically packed each set of 500 packs into sets of 50 cartons, some of the cartons would have less than 10 different images. From these facts, it is apparent that the measure requiring no repetition of images in cartons of cigarettes containing 10 packs is problematic as a practical matter due to the nature of the printing and production processes. In addition, after the two Defendants issued the said Notice, the Office for Control of Tobacco Use held a meeting on 14 May 2013 with entities engaged in the business to set out guidelines for implementing the said Notice. It appears that there were several issues that obstructed implementation. The Department of Disease Control, under the authority of Article 10 of the said Notice, set out guidelines for implementation of the Notice by entities engaged in the business. According to Department of Disease Control letter no. ST 0442.4/W 832, dated 12 June 2013, the period set in the instructions for Article 3 for compliance with the requirement to display the same

[Stamp: Central Administrative  
Court, 23 August 2013]

image on the front and back of each carton was extended by 180 days from the effective date of the Notice. Subsequently, the Department of Disease Control observed that there were still some entities engaged in the business who were unable to comply with certain provisions of the guidelines. Under the authority of Article 10 of the Notice, the Department of Disease Control then issued additional guidelines for paragraph 2 for entities engaged in the business, extending the time to comply with the requirements to display label images under Article 6 (3) of the Notice for an additional 180 days from the effective date of the Notice. Even so, it was still required to display at least 2 different images in each box or wrapper for packs or containers of cigarettes (carton). This change appeared in Department of Disease Control letter number 0442.4/W 852, dated 5 July 2013. From these facts, it is apparent that there will be problems in the practical implementation of these requirements. The Department of Disease Control has extended the time to implement the requirement to have 10 different images in each carton of cigarettes by 180 days from the effective date of the Notice. Therefore, the provisions of Article 3 and Article 6 (3) of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013, dated 6 March 2013, are likely to have problems with legality. If the said Notice is allowed to take effect, it will create an unnecessary burden on the two Plaintiffs. The printing process for label images and statements will require entirely new plates. If problems in the production process cause errors in placing cigarette packs or containers into boxes or wrappers (cartons) having 10 images without repetition, the two Plaintiffs may be subject to criminal prosecution and penalties of one hundred thousand baht, which will affect their business operations. These are damages which will be difficult to remedy after the fact. If the Court should order suspension of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on

[Stamp: Central Administrative  
Court, 23 August 2013]

Cigarette Labels of 2013, dated 6 March 2013, prior to the effective date, there will be no obstacle to the conduct of government operations or to public service whatsoever. Even if the entire Notice, which contains other provisions than those cited by the two Plaintiffs, were suspended, there would be no effect on the control of tobacco by the two Defendants. Producers and importers, including the two Plaintiffs, would still have to comply with Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display and Content of Cigarette Labels of 2009, dated 25 August 2009, which require the printing of ten types of images and warning statement about the hazards of tobacco on an area of not less than 55 percent of the largest surfaces of cigarette packs or containers, and on boxes or wrappers (cartons). At least 2 different such labels must be placed in each carton. Cigarettes produced or imported into the Kingdom must continue to comply with the existing rules.

For the reasons cited above, the Court orders temporary suspension of Ministry of Public Health Notice of Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013 pending a final decision or order by the Court

Mr. Wutichai Sengsamran [signature]  
Judge, Central Administrative Court

Presiding Judge for the Case

[signature]

**[Seal: Central**

Mr. Chaidech Tantiwes **Administrative Court]**

Chief Judge, Administrative Court Panel of the First Instance, Assigned to the Supreme Administrative Court  
Assisting Temporarily in the Central Administrative Court  
Acting as the Chief [obscured by seal]

Mr. Chachiwat Srikaew [signature]  
Judge, Central Administrative Court

CERTIFIED COPY

[signature]

(Miss Areewan Jeehu)

Professional Administrative Case Clerk

[Stamp: Central Administrative  
Court, 23 August 2013]