

(69 Occurrences)

**CONTENTIOUS ADMINISTRATIVE ACTION FOR ANNULMENT, BROUGHT BY THE LAW FIRM RIVERA, BOLÍVAR AND CASTAÑEDAS, ACTING IN THE NAME OF AND REPRESENTING BRITISH AMERICAN TOBACCO PANAMA, S.A., FOR THE PURPOSE OF DECLARING VOID FOR BEING ILLEGAL, SEVERAL SENTENCES OF ARTICLE 3, THE LAST PARAGRAPH OF ARTICLE 6, SOME SENTENCES OF ARTICLE 18, SOME SENTENCES OF ARTICLE 20, SOME SENTENCES OF ARTICLE 22, AND NUMBER 1 OF ARTICLE 23, ALL FROM EXECUTIVE DECREE NO. 230 OF MAY 6, 2008, ISSUED BY THE MINISTRY OF HEALTH. - REPORTING JUDGE: WINSTON SPADAFORA F. - PANAMA, THURSDAY, JUNE 3, 2010**

Tribunal: Supreme Court of Justice,

PanamaChamber: Third of the Contentious

AdministrativeReporting Judge: Winston

Spadafora Franco

Date: Thursday, June 3, 2010

Matter: Contentious administrative action forannulment

File: 618-08 APPROVED:

The law firm Rivera, Bolívar and Castañedas, acting in the name of and representing BRITISH AMERICAN TOBACCO PANAMA, S.A., has put before this Third Chamber a Contentious Administrative Action for Annulment, for the purpose of declaring void for being illegal, some sentences of Article 3, the last paragraph of Article 6, some sentences of Article 18, some sentences of Article 20, some sentences of Article 22, and Number 1 of Article 23, all from Executive Decree No. 230 of May 6, 2008, issued by the Ministry of Health.

#### I. THE ACTION DEMANDED

Executive Decree No. 230 of May 6, 2008.

“Article 3. The formulation, execution and evaluation of the policies and five-year plans to which Article 2 of this Decree refers, are developed with social participation. The Ministry of Health shall consolidate strategic alliances with the Ministry of Education, the Social Security Fund and non-governmental organizations connected with the issue of tobacco control, as provided in Number 3 of Article 5 of Law 40 of July 7, 2004.”

“Article 6. The public offices comprise the entities of the central government, the local governments, the autonomous and semi-autonomous institutions, diplomatic missions, consulates and/or embassies of the Panamanian State. They may be located in rented or leased facilities, or property of the Panamanian State, whereby in all their interior spaces the consumption of tobacco and its derivatives is prohibited.

When these offices are in facilities that are assets of the Panamanian State, included in the non-smoking areas are the parking lots, gardens, interiors and any other open space within the perimeter of the institution.

“Article 8. The prohibitions established in Article 5 of Law 13 of 2008, with regard to enclosed places with public access where there are assemblages of people, shall be applied to the following establishments, among others:

1. Movie houses, theaters and museums

2. Restaurants, cafeterias, food outlets and similar venues
3. Bars, wineries, canteens and similar venues
4. Brothels and similar venues
5. Event sites
6. Discotheques, gardens, tents and other dance centers
7. Hotels, hostels and temporary lodging sites
8. Casinos, bingo halls, galletas [?] and other centers where games of chance are played
9. Commercial centers and warehouses
10. Supermarkets, shops, kiosks, grocery stores and others
11. Virtual video game centers and similar venues
12. Internet cafes
13. Beauty salons, hair-dressers and the like
14. Massage and aesthetic centers
15. Churches, chapels and other prayer centers
16. Locales meant for celebration of events, such as concerts, parties and others
17. Circuses and other places in which cultural or recreation activities take place
18. Convention centers and auditoriums."

"Article 9. The prohibitions established in Article 5 of Law 13 of 2008, with regard to public and private environments, open and enclosed, meant for sports activities, shall be applied to facilities or play fields where sports activities are practiced, whether outdoors or not, within which are included, among others:

...

#### 6. Equestrian Activity

...."

"Article 11. The managers and/or owners of the establishments that have spaces with natural ventilation must guarantee to not contaminate the enclosed work environments with second-hand tobacco smoke. These spaces must not constitute required passages for people seeking services in enclosed work environments of such establishments or in any other area where it is prohibited to smoke."

"Article 13. In compliance with Article 5 of Law 13 of 2008 requires with regard to the prohibition of the consumption of tobacco and its products, that the Ministry of Health shall also develop the following actions:

...

6. Supply the health inspectors regularly with self-adhesive citations that shall be located on the front of establishments that are not complying with Law 13 of 2008 and/or this Decree. These citations are a notification mechanism for the population that the establishment is not complying with current norms with regard to tobacco control, which could constitute a health risk. The same forms must be signed by the relevant local health authorities and only can be removed with prior consent of the competent health authorities. The violation of this provision shall be subject to appropriate sanctions specified in the Health Code and related laws.

“Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008 only allows placement of tobacco products and their derivatives in dispensers and shelves at points of sale, which shall contain additional health warnings with their respective pictures. Participating in any way in the marketing, advertising, promotion or sponsorship of tobacco shall not be allowed. This includes what is inserted into the interior of the cartons and packets of all tobacco products and what is sent to consumers through the mail, internet and any other form of communication available in the national and international market.

“Article 20. Delivery of only clear, true and adequate information about the contents and characteristics shall be permitted, to which all adults who consume tobacco products and their derivatives have a right. That information shall only be conveyed by including it in the interior of the packet, with prior authorization of the contents by the General Directorate of Public Health of the Ministry of Health.”

“Article 22. The Ministry of Health and the Social Security Fund shall guarantee coordination across sectors. In the formulation of smoking-cessation policies, it shall consolidate strategic alliances to join forces and resources with non-governmental organizations connected with the issue of tobacco control, as provided in Number 3 of Article 5 of Law 40 of July 7, 2004, for the development of the Comprehensive Program for Abandonment of the Consumption of Tobacco.”

“Article 23. The agents in the marketing chain of all tobacco products and their derivatives shall have the following obligations:

1. Have the appropriate license that allows marketing of tobacco products and their derivatives issued by the competent authority.”

## II. ARGUMENTS OF THE PLAINTIFF

The legal representative on behalf of the plaintiff disputes the violation of Article 3 of Law 13 of January 24, 2008, Adopt Measures for the Control of Tobacco and its Harmful Effects on Health, which establishes that, “The State, with the participation of civil society, shall create appropriate policies to prevent, control and reduce consumption of tobacco, and shall do what is necessary to effectively implement those public health policies.”

The plaintiff points out that despite the clarity of the rule quoted, and highlighting the bias with which Executive Decree No. 230 has been issued, attacked as illegal an addition that is completely strange and foreign to Law 13 of 2008 that has been introduced and that in its place establishes that the Ministry of Education, the Social Security Fund and non-governmental organizations connected with the issue of tobacco control, to which Article 5, Number 3 of Law 40 of July 7, 2004 alludes (and which in passing does not contain any express mention of non-governmental organizations), modified the clear content and mandate of the text of Article 3 of Law 13 of 2008 that provides for development of these policies that the State shall implement in association with the civil society.

“Article 4. For purposes of this Law, the following terms are understood as:

1. Enclosed labor environment. An area in which there is no natural ventilation and where one or more workers perform production activities that involve exposure to chemical, physical, biological, hygienic and psychosocial risks.

“Article 5. Consumption of tobacco and its products is prohibited in:

1. National, provincial, county, and local offices, both public and private.

...

3. Enclosed places with public access where there are assemblages of people.

...”

The second paragraph of Article 6 of the Executive Decree violates, through incorrect interpretation, Articles 4, Number 1, as well as Numbers 1 and 3 of Article 5 of Law 13 of January 24, 2008, since it gives it a meaning and scope different from those contained in the legal provisions mentioned previously that it intends to regulate.

The plaintiff points out that what Law 13 of 2008 prohibits is consuming tobacco products in enclosed work environments where there is no natural ventilation. Nor can these products be consumed in public offices or in enclosed places with public access where there are assemblages of people.

Notwithstanding the previous, Article 6 of Executive Decree 230 of 2008, in its second paragraph goes beyond that and incorrectly interprets Article 4, Number 1, Article 5, Number 1 and 3 of Law 13 of 2008, when it regulates that smoking is not allowed in parking areas, interior gardens and any other open space within the institutional perimeter.

Law 13 of 2008

“Article 5. Consumption of tobacco and its products is prohibited in:

...

2. Enclosed places with public access where there are assemblages of people.”

Civil Code

“Article 9. When the meaning of the law is clear, its literal meaning should not be disregarded on the pretext of honoring its spirit, though one certainly can in order to interpret an obscure expression of the law, turning to its intention or spirit, clearly manifested in it or in the credible history of its establishment.”

The plaintiff alleges that the Ministry of Health--through regulation--not only has intended to bring back to legal life what was eliminated at the time the law was discussed, with regard to the places in which tobacco products could not be consumed, but has even expanded that list excessively, when what it could do, in accordance with its regulatory power to develop, within the framework of the list, was to precisely define what should be understood by enclosed places with public access where there are assemblages of people. However, regardless of that, and far from it, Article 8 simply introduces a list of 18 places where under Decree 230 tobacco products may not be consumed.

“Article 5. Consumption of tobacco and its products is prohibited in:

...

3. Public and private environments, open and closed, intended for sports activities.”

“Article 33. The Gaming Control Board shall control and supervise, through the National Racing Commission, the development of equestrian activity in the Republic of Panama, including the functioning of the Drug Analysis Laboratory and the Department of Sampling, custody of the registry of equine property and the “Stud Book,” for which it shall issue provisions and regulations that guarantee the correct function of these activities.”

The plaintiff states that Article 5, Number 4 of Law 13 of 2008 has been violated by incorrect interpretation through Number 6 of Article 9 of Executive Decree 230 of 2008, since equestrian activity is not a sport, but rather involves a set of activities regulated by the Gaming Control Board, because it involves an activity of luck and chance, where bets are placed. Accordingly, the Ministry of Health has incorrectly interpreted that it can consider “equestrian activity” as a place intended for a sporting activity, and from there makes the incorrect interpretation of Number 4 of Article 5 of Law 13 of 2008.

“Article 4. For purposes of this Law, the following terms are understood as:

1. Enclosed labor environment. An area in which there is no natural ventilation and where one or more workers perform production activities that involve exposure to chemical, physical, biological and psychosocial risks.

"Article 5. Consumption of tobacco and its products is prohibited in:

...

6. Enclosed labor environments

...

The managers and those in charge of the establishments, public or private, shall be responsible to make the general public and their employees comply with what is established in this Law and, if necessary, shall be able to turn to the National Police for assistance.

The plaintiff points out that Article 4 Number 1, as well as Article 5, Number 6 and its last, both from Law 13 of 2008, have been violated as a result of improper application of said Law, by the sentences of Article 11 of Decree 230 of May 6, 2008.

"Article 29. Violations of this Law shall be reported before the competent authorities, by any person, and shall be sanctioned by the Ministry of Health, in accordance with the provisions of the Health Code."

"Article 218. Any person or legal entity that commits an offence or breach of the provisions of this Code or other legal provisions in force with regard to public health shall be sanctioned with:

1. Reprimand. Written warning to the lawbreaker shall be made by the competent Health Authority.
2. Fine. Monetary fine that, in accordance with the seriousness of the offense, varies between a minimum of ten (B/.10.00) and a maximum of a hundred thousand balboas (B/.100,000.00).
3. Temporary suspension of activities. A sanction that impedes the normal exercise of the activities in which the offending person or legal entity works, and that shall last as long as there is an effect on public health.
4. Closing of the establishment. A sanction that may be temporary or permanent, in accordance with the seriousness of the offense.
5. Confiscation. This consists in taking the articles or products that affect public health, in accordance with the health authorities."

In no way is it established that the Ministry of Health may place self-adhesive citations as signs of non-compliance with Law 13 of 2008 or of its regulations.

"Article 14. Any form of advertising, promotion or sponsorship of tobacco and its products is completely prohibited, whether through indirect or subliminal media, directed at minors or adults. Any form of cross-border advertising, promotion or sponsorship of tobacco and its products that penetrates national territory is likewise prohibited."

Currently, the tobacco companies already do not advertise by any communication medium, whether radio, television or in writing, to publicize or promote their products, respecting the restrictions that exist on the matter. However, the Ministry of Health, through Executive Decree 230, intends to take this restriction up to the very point of sale and the merchants cannot use even their brand rights, violating Article 14 of Law 13 of 2008.

"Article 35. Consumer rights. Consumers shall have the right, among others, to:

...

2. Receive all the information from the suppliers about the characteristics of the product or service offered, in a clear and truthful way, to be able to make a decision at the time of acquiring the product or service, as well as to adequately use or consume it, in accordance with the national laws."

Not a single article of Law 13 of 2008 regulates anything concerning the information that may be given to consumers. Nor in this same direction does it establish as a requirement that MINSA give prior approval of the type of information to be supplied.

Finally, the violation of Article 1 of Law 5 of January 11, 2007 is cited, by which the opening of businesses is streamlined. The plaintiff points out that this has been violated by Number 1 of Article 23 of Decree 230 of 2008, since this regulation establishes that the agents of the marketing chain of all tobacco products and their derivatives have an obligation, "to have an appropriate license that permits the marketing of the tobacco products and its derivatives issued by a competent authority," directly contravening Article 1 of Law No. 5 of January 11, 2007, that regulates the Notice of Operation, formerly a commercial license, that the Panama Emprende System establishes, all of which is administered by the Ministry of Commerce and Industry. Said Article 1 of Law 5 of January 11, 2007, which establishes specifically that no servant shall oppose the operation of a business that has complied with the legal requirements and adds that said notice of operation or commercial license, for those who have already their license issued, it is the sole requirement necessary to start an activity.

### III. REPORT FROM THE ACCUSED OFFICIAL

In pages 315 to 325 is the report of conduct issued by the Ministry of Health in which it indicates that in applying the health legislation, when it comes to tobacco control, it is not done independently, but rather comprehensively, taking into consideration the other legal health provisions.

The defendant also indicates that it there has never been any legal violation pertaining to those indicated by the plaintiff.

### IV. OPINION FROM THE OFFICE OF THE ATTORNEY GENERAL

The opinion issued by the Office of the Attorney General is found on pages 326 to 338 of the dossier, in which it basically points out that no legal violation exists and requests that it would serve this Chamber to declare that none of the sentences are illegal from Article 3, the last paragraph of Article 6, some sentences of Article 8, some sentences of Article 11, Number 6 of Article 13, some sentences of Article 18, some sentences of Article 20, some sentences of Article 22, and Number 1 of Article 23, all from the Executive Decree 230 of May 6, 2008, issued by the Ministry of Health.

### V. DECISION OF THE CHAMBER:

Having been presented with the arguments expressed by the parties in this administrative contentious process, the Chamber proceeds to dictate the elements of judgment that will serve as the basis for unraveling the action raised.

To that end, we have the action promoted by the legal representative on behalf of the plaintiff that seeks to obtain a declaration to void a series of sentences and articles contained in Executive Decree No.230 of May 6, 2008, which regulates Law 13 of January 24, 2008 and makes other provisions.

In that sense, we have the aforementioned Law 13 of January 24, 2008, which adopts measures for the control of tobacco and its harmful effects on health, establishing in its first article the following: "This law has as an objective to adopt measures to protect the health of the Panamanian population from the harmful effect and damage that tobacco has on health, under the Political Constitution."

In addition, Article 109 of the Constitution establishes as an essential function of the State to safeguard the health of the population of the Republic, and the individual as part of the community has the right to the promotion, protection, conservation, restitution and rehabilitation of health and the obligation to conserve it, understood as complete physical, mental and social well-being.

The WHO Framework Convention on Tobacco Control establishes the objective to protect present and future generations against the devastating health, social, environmental and economic consequences of the consumption of tobacco and exposure to tobacco smoke, providing a framework of tobacco control measures to be implemented by the parties at the national, regional and international levels in order to continuously and substantially reduce the prevalence of tobacco consumption and exposure to tobacco smoke.

In view of the foregoing, having reviewed the sentences of the contested articles in Executive Decree No.230, we have noted that the same ones seek to protect those rights to health protected by the

Both the national and international legislation.

First, the plaintiff claimed that Articles 3 and 22 of Executive Decree 230 of May 6, 2008, which the plaintiff claims have violated Article 3 of Law 13 of 2008, since in their opinion they introduced a strange wording to establish that "the Ministry of Education, Social Security Fund and non-governmental organizations connected with the issue of tobacco control," and that, "the Ministry of Health and the Social Security Fund shall consolidate strategic alliances for the formulation of smoking cessation policies," when the legal text that is said to be violated states that "the State, with the participation of civil society, shall develop appropriate policies to prevent, control and reduce consumption of tobacco, addiction to nicotine and exposure to tobacco smoke, and shall adopt what is necessary to effectively implement such public health policies."

Contrary to the allegations made by the plaintiff, we must point out that Article 3 of Law 13 of 2008 establishes, in a general way, the designation of the State, according to Guillermo Cabanellas' Encyclopedic Dictionary of Common Law, as "a set of public authorities; meaning in which government is understood," so that by not specifying which public institutions are competent, the regulatory article could determine this.

The claimant also maintains that the last paragraph of Article 6 of Executive Decree 230 of May 6, 2008, incurs an excess of regulation in indicating that "when these offices are located in facilities that are assets of the Panamanian State, parking lots, indoor gardens and any other open space within the perimeter of the institution are included as non-smoking areas."

Contrary to what the plaintiff points out, Article 5 of Law 13 of 2008 prohibits the consumption of tobacco and its products, among other places, in national, provincial, county and local public offices, an interpretation that obviously must extend to the parking lots, interior gardens and any open space of these institutions, since what the rule seeks is to preserve human health, which is affected by consumption of products derived from tobacco, such as cigarettes, etc.

Therefore, when Article 6 of Executive Decree 230 of May 6, 2008, says that "when these offices are located in facilities that are assets of the Panamanian State, included in the no-smoking area are their parking lots, interior gardens and any other open space within the perimeter of the institution are included as non-smoking areas," it does not incur any excess of regulation.

And the WHO Framework Convention on Tobacco Control states in its basic principles the need to take measures to protect all people from exposure to tobacco smoke.

Regarding the prevention of the consumption of tobacco, author Sharon Mantik Lewis, in her book *Surgical Medical Nursing*, stated the following:

" ...

Prevention of the Consumption of Tobacco: The prevention of tobacco consumption by children and adolescents an important objective of the primary and secondary prevention of substance abuse. The majority of current adult smokers began smoking daily at about 16 years of age, and it is estimated that every day 3,000 minors begin smoking in the United States. There has recently been a general decline in the consumption of smokeless tobacco among children over the age of 11, up nearly a third in recent years. Since abuse of nicotine has a strong relationship with the use of illicit drugs and alcohol, especially among adolescents, if the use of tobacco is not started or maintained during childhood and adolescence, it greatly decreases the risk for abuse of other drugs in this age group."

In another instance, some sentences of Article 8 of Executive Decree 230 of May 6, 2008 are considered to violate Number 3 of Article 5 of Law 13 of 2008 and Article 9 of the Civil Code, because it considers places with public access where there is an assemblage of people to include movies, theaters, restaurants, cafeterias, food courts and the like, bars, wine shops, canteens and the like, brothels and the like, event sites, discotheques, hostels and temporary lodging sites, casinos, bingo, etc.

Contrary to what is alleged in the action, Number 3 of Article 5 of Law 13 of 2008, in indicating that the consumption of tobacco and its products are prohibited in enclosed places with public access where there are assemblages of people, it does so in a broad way and without specifying which enclosed places with public access, which is why the rule to seek to safeguard human health should be interpreted broadly, clearly

Without exceeding the limits established by the law and the Constitution.

With regard to the plaintiff's argument that horse racing is not considered a sport, which has repercussions for the violation of Number 4 of Article 5 of Law 13 of 2008, we must point out that contrary to what the plaintiff states, horse riding is a sport, and it is defined as such by the Dictionary of the Royal Spanish Academy, which states that horse riding is a sport consisting of horse racing, jumping competition with obstacles, dressage, training, etc.

The Chamber does not consider that Number 1 of Article 4 and Number 6 of Article 5 of Law 13 of 2008 would be violated, by Article 11 of the Executive Decree 230 of May 6, 2008.

This is due to the fact that Number 6 of Article 5 of Law 13 of 2008 is clear in indicating that the consumption of tobacco and its products is prohibited in the enclosed work environments, and that the managers or those in charge of public or private establishments will be responsible for enforcing what is established in that law upon the general public and its employees, for which it may require the assistance of the police, not constituting any contradiction between the regulation and the law.

There is also no violation by Number 6 of Article 13 of Executive Decree 230 of 2008 of Article 29 of Law 13 of 2008 and Article 218 of Law 66 of 1947, modified by Law 40 of 2006, because of the fact that it gives the authority the power to supply its inspectors with self-adhesive citations to be placed on the front part of the establishment does not violate the rules indicated, since such a mechanism functions as a warning and protection for the customers, who it is informing that the premises they intend to enter violates the regulations for the control of tobacco, and that if the warning is not placed, they could enter not knowing that their health may be at risk.

On the other hand, Article 18 of Executive Decree No.230 does not violate the rules that the plaintiff says have been violated, since that regulatory article only develops the prohibition imposed by Article 14 of Law 13 of 2008, which legally eliminates any form of advertising, promotion and sponsorship of Tobacco and its products, whether through indirect or subliminal means, aimed at minors or adults, also prohibiting all forms of cross-border advertising, promotion and sponsorship of tobacco and its products, which penetrate the national territory.

Consistent with the above, Article 13 of the WHO Framework Convention on Tobacco Control establishes as far as advertising, promotion and sponsorship of tobacco that, "every party in accordance with its Constitution or constitutional principles will move toward a complete prohibition of all forms of advertising, promotion and sponsorship of tobacco."

Nor is there a legal violation by Article 20 of the executive decree cited, since contrary to what the plaintiff points out in Article 3 of Law 13 of 2008, it establishes that the State (Ministry of Health), is empowered to adopt measures necessary to effectively implement public health policies to prevent, control and reduce consumption of tobacco and its products. Therefore, it could hardly be said that the power granted to the Ministry of Health to provide clear, truthful and sufficient information on the content and characteristics of tobacco and its products is contrary to Number 2 of Article 35 of Law 45 of October 31, 2007.

As to Number 1 of Article 23 of Executive Decree 230 of 2008 violating Article 1 of Law 5 of 2007, which streamlines the process of opening businesses, because the regulatory provision supposedly demands a requirement in addition to those established by the law, this Chamber concludes that there is no legal violation whatsoever and that the regulatory rule, by providing that it is the obligation of the agents of the marketing chain of tobacco products and their derivatives, does not demand that such requirement be fulfilled as part of the process to open the company, but rather establishes it as a requirement that must be met at the time of carrying out such activity by those who proceed to market products derived from Tobacco."

In addition to what has already been stated, we want to clarify that this Chamber cannot go against rules that protect the health of the population, especially in the case of serious, medically-proven health effects from the consumption of products derived from tobacco and the damage caused to the health of third parties, remembering that in accordance with Article 50 of our Magna Carta, the private interest must yield before the public or social interest.

With regard to the effects caused by tobacco smoke as a consequence of environmental exposure, the author Gonzalo Piedrola Gil, in his book, *Preventive Medicine and Public Health*, says the following:

" ...



Tobacco smoke in the environment contains the same carcinogenic compounds as those found in tobacco smoke inhaled by the smoker. Biological samples obtained (as urine or hair) from non-smokers exposed to environmental tobacco smoke show high levels of the compounds and metabolites of tobacco smoke. Those results alone are enough to identify tobacco smoke as an environmental carcinogen. Various epidemiological studies show that environmental exposure to tobacco smoke is weakly but consistently associated with an increase in lung cancer risk. It has also been associated with myelogenous leukemia" (the emphasis is ours).

Hearing the arguments, the Chamber concludes that the reasoning does not support the plaintiff, and so proceeds to declare it.

#### VI. RESOLUTION

On the merits of the foregoing, the Third Chamber for Contentious Administrative cases, of the Supreme Court of Justice, administering justice in the name of the Republic and by authority of the Law, DECLARES AS NOT ILLEGAL some of the sentences of Article 3, the last paragraph of Article 6; some sentences of Article 18, some sentences of Article 20, some sentences of Article 22 and Number 1 of Article 23, all from Executive Decree No. 230 of May 6, 2008, issued by the Ministry of Health.

Let it be so published.

WINSTON SPADAFORA FRANCO

VICTOR L. BENAVIDES P. -- ALEJANDRO MONCADA LUNA

KATIA ROSAS (Secretary)

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