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REPUBLIC OF PANAMA
SUPREME COURT OF JUSTICE

REPUBLIC OF PANAMA
JUDICIAL BODY
SUPREME COURT OF JUSTICE – PLENARY SESSION

PANAMA, MAY TWENTY-EIGHTH (28TH) TWO THOUSAND AND FOURTEEN (2014)

Docket No. 192-11 – ACTION OF UNCONSTITUTIONALITY BROUGHT BY RODRÍGUEZ ROBLES & ESPINOSA ON BEHALF OF BRITISH AMERICAN TOBACCO PANAMA, S.A., AGAINST AN ARTICLE IN EXECUTIVE DECREE NO. 611 OF JUNE 3, 2010 OF THE MINISTRY OF HEALTH.

Whereas:

The Supreme Court of Justice is hearing in plenary session the Action of Unconstitutionality brought by the law firm of Rodríguez, Robles & Espinosa on behalf of BRITISH AMERICAN TOBACCO S.A., against Article 1 of Executive Decree No. 611 of June 3, 2010.

Provision claimed to be unconstitutional:

> Article 1. Amending Article 18 of Executive Decree 230 of May 2008, which shall read as follows:
> Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008 does not permit the display of tobacco products and derivatives in dispensers, on racks or any other shelving located at points of sale. It is not permitted to participate in any way in the marketing, advertising, promotion or sponsorship of tobacco. This also includes anything that is inserted inside cartons or packs of any tobacco products or that is sent to consumers by mail, internet or using any other form of communication available in the national or international market.
> The only thing permitted is placement of a sign containing a written list of products and their respective prices, without promotional elements. The sign shall have a white background, with a maximum size of 8.5 by 11 inches, and the texts are to be written in typeface Arial 14, in black, closed capitals, emphasized in bold face. Signs are to be placed in the specific areas of the establishment where distribution of products takes place, and their content is to be validated by the General Administration of Public Health of the Ministry of Health, and by the Authority for Consumer Protection and Defense of Competition.
> The giving out or distribution of samples, regardless of whether or not they are for free, of any tobacco product or tobacco derivative is prohibited.

Constitutional Provisions Infringed and the Type of Infraction:

The petitioner states that the Article in question contravenes five Constitutional provisions, notably, Articles 37, 47, 49, 184 (item 14) and 298. The types of infraction of these provisions are summed up as follows:

Article 1 … infringes… the right of freedom of expression enshrined in Article 37… when the regulation impedes expressive conduct both for the manufacturer of the product as well as the proprietor of the point of sale, that is to say, the right they both have to display or show a legal product on the market, since it is intensely regulated by the State, and contains all the health warnings that tobacco products and derivatives are supposed to display, as required by the law; and as an extension of this, the right of adult consumers to receive and perceive the aforesaid message … Decree No. 611… causes interference with the freedom of commercial expression in its broad sense, since it harms both the legal tobacco industry from the point of view of the manufacturer, distributors, as well as wholesale and retail merchants, and consumers as final recipients, that is to say, the entire commercial chain, which culminates in the consumer as the recipient of the message.

… the bilateral nature of freedom of expression is made up of the right to receive truthful and impartial information. This is a collective public right required of the communications media, and naturally of the government itself, for the sake of ensuring the free informing of public opinion that can be undermined by disproportionate and irrational disruptions.

The aforesaid Article (1 of Executive Decree No. 611 of June 3, 2014) violates Article 37 of the Constitution, for it not only construes as advertising the display of the product on shelves where products are stored to make them available for sale; but it only permits the owner of the establishment engaged in selling cigarettes to place a sign of a particular dimension, type and size of print to indicate the various brands thereof and their respective prices. It leaves aside or impedes any relevant information concerning the quality of the products, characteristics of the pack or box, design, etc., thereby infringing the freedom to transmit information that is also protected by our Constitution.

In other terms, an absolute prohibition of freedom of commercial expression, as in this case, not only affects the rights of consumers and the principles that uphold a free market economy such as ours.

… the State can regulate a particular conduct or commercial expression without actually prohibiting it, since prohibitions of such conduct not only make it difficult for consumers to make decisions, but also prevent their knowledge. In this case such knowledge would give rise to informed consent on the harmful effects of the product and the expected debate on facts that are, specifically, among others, the actual health warnings established on the products, and the composition or ingredients of the product; thereby affecting the actual right to health that it is sought to shield by hiding information that is highly relevant.

It is an ironic contradiction that cigarette packs must by legal requirement contain mandatory health warnings and graphic images of their products (pictograms); whereas Decree No. 611 of June 3, 2010, … requires that such products be kept out of sight of the public. The contradiction is more apparent, because to prevent the display of a product would seem to put it on the same level as that of a product whose sale is illegal, and the right to information regarding this item is therefore impeded.

…

… To prohibit totally the display of tobacco and its derivatives compels the seller to hide a product whose sale is not prohibited, and this not only does not ensure the right to health but also gives rise to a serious distortion of the market, such that to all appearances the measure established in the regulatory decree in question shows itself to be unreasonable and disproportionate.

… constitutional protection of freedom of expression and freedom of information establishes that all goods that can be sold legally can also be exhibited or displayed. Some products, such as cigarettes, allow for certain limitations and regulations of such right, but without going so far as to impose an absolute prohibition…"

With regard to Article 47 of the Constitution, it is affirmed that its contravention is due to the following:

> Executive Decree No. 611 … violates the right to private property, for it does not allow the display of registered brands of cigarettes that constitute an intangible asset with a significant economic value for the proprietor or licensee company of such brands…
> … the names, designs, labels, configuration of packs and, finally, any element that serves to distinguish the products of BRITISH AMERICAN TOBACCO with respect to the products of other manufacturers constitutes a right of property that the State is obliged to ensure, respect and make good.
> These Articles, by absolutely prohibiting the display of tobacco products and derivatives at places of sale, prevent the use and exercise of the constitutional right to private property over these assets, insofar as the brands are the means for individualizing a product or service in commerce, their absolute and total prohibition prevents consumers from being able to distinguish one brand from another, at the same time that it absolutely restricts the owner of said brand from being able to use and provide its brand of a product that is legal for consumers."

Set forth below are the criteria that serve as support for considering that Article 49 of the Constitution has been violated:

> Article 1 of Executive Decree No. 611… violates… the constitutional article… in virtue of the fact that it totally prohibits the display of a legal product, such as products that are derivatives of tobacco, which prevents the consumer from having access to the information that is provided on its packages and boxes, with regard to content, quality, composition and all the essential characteristics of the product offered, such as the health warnings that the Ministry of Health has established as necessary knowledge for consumers, and in consequence of such prohibition, the right to freedom of choice is assaulted, which

consumers can make between products of the same class or type, but originating from different companies.
… the market for cigarettes is without advertising, therefore the sole source of knowledge and information available to consumers in this category is the possibility of seeing what they wish to purchase at the point of sale. The purpose of the display is based on informing the adult smoker about the various brands, their properties, categories and characteristics, reinforcing the process they undertake to select a particular brand over its competitors; as well as the health warnings called for by the legislation in force concerning these kinds of products.
…
As a result of the implementation of Article 1 of Executive Decree No. 611… there would be a prevention of the adult public consuming tobacco derivative products, in a fashion that is absolutely at odds with the underlying law, from having access to this flow of information elements that are necessary for a consumer to choose which product he prefers to consume, or even to choose not to buy a product.
… because of the fact that they are smokers, they find themselves in a position of inequality and with their rights restricted nearly to the point of nullification, in comparison to consumers of any other product that can be found on the market. Therefore, this consumer segment *does not have the right to or access to truthful, clear, adequate information regarding the characteristics and content of the goods and services that they acquire, as well as freedom of choice* which they cannot have, since the product of their preference has been put on the level of a product that is nearly illegal, and is hidden from view by the party selling it.
Furthermore, and in a clear contradiction, *they also cannot have access to the information prior to purchase regarding the health warnings* concerning the risks of consuming the product, which is called for by the legislation in force and the Ministry of Health, since the merchandise remains hidden and can only be seen when it is purchased."

The subject of the contravention of item 14 of Article 184 of the National Constitution is also taken up. In this regard, it is stated:

Article 1 of Executive Decree No. 611… infringes… the constitutional provision in question since under the pretext of regulating Law No. 13 of 2008, it goes beyond its text establishing exclusions that the legislation does not allow for.
… our constitutional text did nothing other than to constrain the actions of the Executive Branch to the systems of checks and balances characteristic of any modern constitutional system.
…
The excess of the regulatory power of the Executive, in this case, … unconstitutionally seeks *to make display equivalent to advertising…*
Article 1 of Decree No. 611… imposes a ban on displaying any tobacco derivative product at points of sale, a situation not provided for by Law 13 of 2008, which only prohibits advertising, promotion and sponsorship of tobacco derivative products…
The Executive Branch falls into excess when it extends the concept of advertising so that it can thus prohibit the display of a legal product on the market when such situation does not agree with it, since the display cases that are used for the display of tobacco derivative products do not contain any advertising or promotion for them; all they display is the packs, plain and simple, and they are used for the sole purpose of organizing products for their sale, in order that the consumer can exercise his right of choice and opt for

the product of his preference, pursuant to health warnings called for by the Law, and that the Ministry of Health has determined that the packages containing the products must display.
"The Panamanian Association of Advertising Agencies (*Asociación Panameña de Agencias de Publicidad*), in a statement on the issue that we are now discussing, expressed the following:

1. Decree 611, by making the display of products at points of sale on racks and shelving equivalent to the concept of advertising, disregards the actual meaning of what constitutes 'advertising.' The display of a product is not the same as its advertising.

5. All of these elements converge as defining elements in the concept of advertising: a) it must involve a paid effort (commercial action); b) transmitted by mass media (communicative element or 'announcement'); c) for the purpose of persuading (persuasive or promotional element), and d) where an advertising professional plays a preponderant role.
6. Clearly it can be concluded that advertising is a paid form using the media to send and/or transmit a message to the end consumer. This does not apply to the display of a product itself at a point of sale in racks or display cases, a physical space in which the product is put within reach of consumers for its purchase.
…
11. To sum up, advertising is persuasion in favor of the sale of a particular brand, and display at a point of purchase is the presentation of a product and its brand for sale, which identifies it to the consumer."

The last constitutional provision under debate is Article 298. On the legal provision above, it is stated:

Article 1 of Decree No. 611… contravenes… Article 298… insofar as said article, which is fundamental to protecting the cardinal principles of the market economy: free economic competition and the free market does not allow radical and absolute interference with freedom of commerce or enterprise, including freedom of access and the presence of legal products on the market.
… the Panamanian State exercises a relative control of the market through which it can regulate the exercise of economic activities, but it cannot dictate regulatory measures that unreasonably and disproportionately tend to paralyze the market by affecting free competition and circulation of brand-company pairings, flagrantly disrupt the release of new products and brands, in this case cigarettes and products derived from tobacco, discourage competition by affecting the factor of entrepreneurial innovation, and foster the replacement in the market of a legal product regulated by law with contraband.
… markets can have imperfections that oblige the State to intervene without distorting the principles of the free market to produce better results. Such imperfections consist of high transaction costs, monopoly positions and practices restricting free competition; the role of the State is to intervene in these situations to get the market to operate as it should in a situation of free completion.
…
In the case before use, through Law No. 13 of 2008, the Panamanian State regulated the market for tobacco derivative products, and in doing so applied strong restrictions, though not absolute prohibitions, particularly with regard to advertising and promotion and

information contained on its packages. On one hand, it is important to emphasize that it cannot by regulatory means, and pursuant to what is established by the constitutional provision in Article 298, determine new procedures and restrictions that affect the economic principles contained in the aforementioned regulatory section…"

Following the foregoing, the action of unconstitutionality was admitted, and as a result, the Prosecutor General of the Nation was served notice thereof, and upon due consideration he found that Article 1 of Executive Decree No 611 of June 3, 2011, issued by the Ministry of Health, is not unconstitutional. The reasons for this finding were as follows:

"12. The display of tobacco products at points of sale is in and of itself a form of advertising and promotion. The display of products is a key means for promoting tobacco products and their consumption, also through the incitement to purchase tobacco products, creating the impression that tobacco consumption is socially acceptable, and making it more difficult for consumers of tobacco to abandon the habit.

13. To ensure that points of sale for tobacco products do not have promotional elements, the Parties should absolutely prohibit any display and visibility of tobacco products at points of sale, including at … fixed points of sale and with street vendors.

…

The display and visibility of tobacco products at points of sale are forms of advertising and promotion, and therefore ought to be prohibited.'

… evidence indicates that the guidelines for the implementation of Article 13 (Advertising, promotion and sponsorship of tobacco), of the Framework Convention on Tobacco Control of the WHO establishes the reason for which the Ministry of Health is deciding to modify our legal system through Executive Decree No. 611 of June 3, 2011, to the extent of not permitting the display of tobacco products and derivatives in display cases, racks or any other shelving located at points of sale of the businesses that sell them.

… on the basis of the aforesaid regulatory modification, the Panamanian State has fulfilled its obligations acquired in an international treaty through the adjustment of our domestic law to such commitments, so that such action harmonizes with the standards deriving from Article 26 of the Vienna Convention on the Law of Treaties.

… In Article 282 of the Constitution… it is discerned that the assorted rights of private individuals in the conduct of their economic activities, yield to the needs of the members of the collective, seeking the welfare of the greatest possible number of persons in the country, and therefore, I reiterate that they are not absolute rights.

… it is feasible to apply to this specific case the test of proportionality… I find the prohibition of the display of tobacco products and their derivatives at points of sale to be a measure with a legitimate purpose, grounded in principles, rights and guarantees established in the Constitution… such as the fundamental rights to life, physical wellbeing and health… as well as the criterion on which, in cases of conflict, public or social interest outweighs private interest…

> … the ends sought of reducing the pandemic levels being reached in the number of people suffering from disease as a consequence of the use and abuse of tobacco derivative products, about which there is, at the present date, a global consensus and subsequent agreement among nations to reduce it, not only are in accordance with tangible reasons, but also coincide with the supreme goals of the Nation, amongst which I underscore human dignity, social justice and the general welfare.
>
> … I believe that freedom of commercial expression, the rights that flow from industrial property, those of free economic competition and the free market suffer moderate effects, owing to the fact that the regulation seeks to replace products by signs on which the various brands and prices are to be stated of the cigarettes offered at the point of sale in stores, and in accordance with this formula, I conclude that the rights in question persist.
>
> With respect to freedom of information and free consumer choice, the disregard for such rights is slight, due to the fact that the act whose unconstitutionality is alleged does not prohibit interested consumers from having access to the product and informing themselves of its characteristics prior to purchasing it, since under the law there is no prohibition of showing the product and the rights of consumers are preserved, insofar as information relating to the products remains on the packages, which will make it susceptible to access at any time, including prior to purchase thereof. It should be emphasized, moreover, that the arrangement of products at points of sale frequently does not allow for transmission of information to consumers.
>
> On the other hand, as I have explained, considering the necessity and appropriateness of the measure, I believe that the benefit sought by the party issuing the Executive Decree is of serious urgency, or importance, and therefore, it prevails over the principles compromised. This implies that the provision adopted justifies the effects on the constitutional principles invoked by the claimant, so that, in this specific instance, the latter are subordinated to the fundamental rights which the party issuing the act sought to protect."

With the completion of the phase for comments, it was incumbent upon the interested parties to deliver their own comments and arguments regarding the action of unconstitutionality that concerns us. In light of the foregoing, the Chinese Association of Panama (*Asociación China de Panamá*) stated the following through its legal representatives:

> "… we believe that these regulations should not be absolute in such a way that, instead of protecting the heath of all Panamanians, they make it impractical for our community to engage in legal commerce, freedom of commercial expression… and, on the other hand, encourage the illegal sale of cigarettes, that is to say, contraband of this item.
>
> The uncontrolled increase of contraband of cigarettes gives rise, furthermore, to a serious economic injury: for tobacco derivative products of illegal origin have a value in the black market four times greater than the legal product. Retailers are ceasing to sell more than 500 million cigarettes and this represents more than five million dollars ($5 million) in income that retailers are not receiving, a tax contribution that

the government is not receiving, also generating unemployment in the legal chain.

Article 1 of Executive Decree No. 611… prohibits conduct that is clearly at variance with the legal prohibition of advertising contained in Law No. 13 of 2008, for the mere display of products for sale is not a kind of advertising to attract consumers…

Article 1… establishes "total prohibitions" that are not reasonable or proportional in their effect on the fundamental rights of retail merchants, owners of points of sale, by undermining or rendering impractical the core of the essential content of subjective rights that the Constitution guards and guarantees.

…

Society in general, as well as the consumer in particular, have an interest in the flow of commercial information, for the public cannot be kept ignorant of the legitimate terms that companies offer in free competition… the State cannot hinder the placement on the market of articles and information about them where a completely legal and legitimate activity is concerned, and, on the contrary, must additionally respect the right of consumers to choose in accordance with their preference.

Having eliminated the possibility of advertising for cigarettes, the only way that consumers have to obtain information on this kind of product (on health warnings and restrictions, on the various brands offered on the market, on the characteristics that distinguish and individualize them) is that they can buy them and examine them in the moment prior to purchase. In fact, among the obligations of a supplier of products and services, there is that of informing consumers clearly and truthfully on the characteristics of the product offered and on their precautions… with the consumer's entitlement to receive from providers all information on products being thereby established – something that is very different for advertising for a product – and having access to a variety of them, allowing consumers freely to decide on the purchase (or non-purchase) of the products offered.

… this new prohibition… takes away from the consumer the possibility of seeing at the point of sale prior to purchase the actual package of tobacco that bears the health warnings that the Ministry of Health has deemed pertinent.

…

… there is no real, concrete and scientific evidence that the use of a particular font and type size in an informational notice can influence people, promoting or discouraging the consumption of a good. Nor is there any proof whatsoever that one or another kind of communication constitutes an assault, in this specific instance, on the constitutional values involving safety, health or public order.

…

It is of fundamental importance that the consumer should see the package because it is an extension of the product that is being offered for sale. This is the *raison d'être* of the racks or display cases installed at points of sale.

…

Display cases for tobacco products installed at points of sale for small businesses do not have advertising or promotion of any kind for such articles, as we have explained… they are only used to arrange the products available for sale, and to state or announce the health warnings…"

Enrique Fernández, speaking as legal counsel, states that in his opinion, the provision being challenged does violate the National Constitution. His belief is based on the following:

> "… Article 1 of Executive Decree No. 611 of June 3, 2010… departs from the academic and technical concept of what should be construed as advertising…
> … it can be concluded that advertising is a paid form of sending and/or transmitting via the media a message to the end consumer. And this does not apply to display equipment at the point of sale, which is a physical space in which the product is placed within reach of the consumer for his final purchase.
> …
> In no way can a pack by itself be construed, as maintained by Executive Decree 611, as an element that induces or stimulates consumption, that it is advertising *per se*, and much less that it makes clients of a product desist or not from its consumption owing to the sole fact that it is displayed.
> …
> By eliminating the possibility of displaying legal products with registered brands, Decree 611 does nothing other than to put these brands on the same level as others that are not only not duly registered, but often come from the illegal trade, have not paid taxes and are not subject to any sanitary or administrative oversight whatsoever.
> …
> This is due to the fact that the false and mistaken position is being created that the product is not available as a result of its being denied visibility, which, as has been maintained, is aligned with the availability of the product.
> … while there should be (sic) consideration of constitutional rights, it is not possible, legally speaking, via legislative or regulatory provision, to annihilate or curtail some in order to protect others."

The law firm Alemán, Cordero, Galindo & Lee, representing Philip Morris Panamá, takes a similar position. Their brief of final arguments states:

> Article 1 of Executive Decree No. 611… violates … Article 184, item 14 of the Political Constitution… Article 14 of Law 13 of January 24, 2008, contains a total prohibition of advertising, promotion and sponsorship of tobacco, whose letter and spirit at no time prohibits the simple placement or display of tobacco products in their respective display cases and racks at points of sale.
> Article 1 of Executive Decree No. 611… introduces a new prohibition that is not in accordance with the scope and content of Article 14 of Law 13 of 2008.
> … Law 13 … of 2008 establishes as the sole restriction on the placement of tobacco products at the point of sale that such products may not be placed directly within the reach of customers...
> To the extent that the Prosecutor General of the Nation invokes as a foundation some guidelines issued on November 22, 2008 by the Conference of the Parties of the Framework Convention on Tobacco Control concerning

the display of tobacco products at points of sale, it is necessary to point out that these hortatory recommendations have not been formally approved by the Republic of Panama through any international treaty, nor have they gone through the procedures of internalization pertaining to the National Assembly in the form of a formal Law. In fact, these recommendations were issued right after the approval of Law 40 of 2004, whereby the Framework Convention on Tobacco Control was adopted, and subsequently with the approval and entry into force of Law 13 of 2008, whereby the sale of tobacco products was regulated. Therefore, said recommendations cannot alter the scope of Law 13 of 2008, they do not comprise part of the legal system of Panama, and they cannot serve as the foundation for the promulgation of a regulatory administrative act in clear and patent violation of Article 184, item 14 of the Constitution.

…

Article 1 of Executive Decree No. 611… violates Article 298 of the Constitution… The prohibition of display or placement of legal products derived from tobacco in display cases, racks or any other shelving located at points of sale brings as a consequence an artificial and distorted market in which it is not possible to exercise the right to free economic competition, since the prohibition of the display of the product is a hindrance to manufacturers competing for the business of people who are already smokers, an obstacle to existing competitors' releasing new products onto the market, and serves as a barrier to any new competitor who may wish to enter this market.

… If the product is not displayed at retail points of sale, the manufacturer cannot communicate information about improvements or changes in its existing brands to already existing adult smokers.

…

The prohibition of the mere placement of the product on shelving tends to impair customers' capacity to distinguish one brand from another. Granted that the main distinctive characteristic that would remain among tobacco derivative products at points of sale is the price, competition between manufacturers can move away from brands and concentrate more on price, which favors the existing consumer trend of buying cheaper cigarettes and contraband products in the black market, which is already a substantial problem in Panama.

To the extent that it reduces the average price paid for tobacco derivatives, there is a paradoxical corresponding increase in consumption of products of lower quality and contraband that do not meet minimum requirements for consumption."

The proponent of the constitutional action that concerns us spoke along these same lines, and in addition to reiterating the criteria stated in the complaint, said the following:

"In relation to what was stated by the General Prosecutor of the Nation, we can observe that, in contrast to what this official said, the Framework Convention on Tobacco Control of the WHO approved by Law No. 40 of July 7, 2004, does not oblige the State party to impose absolute or radical prohibitions on tobacco advertising, as long as it is believed that the party "that is not able to undertake a total prohibition due to the provisions of the Constitution or its constitutional principles, shall apply restrictions on all kinds of advertising, promotion and sponsorship of tobacco."

> … in the opinion issued by the Prosecutor General of the Nation on the complaint of unconstitutionality brought despite the recognition that the rights of consumers have been disrespected, the error is made that there is no difference between the display of a product for its sale and advertising, and it is assumed that such actions are equal or equivalent. … If we do not make this distinction, we fall into a clear error of interpretation of Articles 37, 47, 49 and 298 of the Constitution among other fundamental provisions, the content of Articles 17, paragraph 2 of the Constitution, and Article 11 of the Civil Code…"

Finally, Jorge Flores, speaking as legal counsel, also believed that the provision subject to appeal is unconstitutional. The statements concerning this assertion are synthesized as follows:

> "… the implementation of the Decree of Executive Decree [*sic*] No. 611 of June 3, 2010, caused an enormous damages [*sic*] for his employment and with the consequent unraveling of his economic conditions… The product that our client sold is a legal, regulated product… With the measure adopted in Executive Decree No. 611 by the Ministry of Health, in an unconstitutional fashion, supposedly for the sake of protecting the right to health, it caused the elimination of a series of jobs, in contradiction of Article 64 of the Panamanian Constitution…
> … the establishment of the regulatory policy for tobacco, instead of ensuring the right to health of all Panamanians brought about major unemployment in this sector and throughout the whole chain of commercialization under this heading.
> … the regulation that we consider unconstitutional is an assault on employment in the sector, and disregards, in consequence, the maintenance of circumstances that allow a worker to have "the necessary conditions to lead a dignified existence."…
> … the State should foresee the economic and labor consequences for the tobacco industry when it hands down such intense regulations. This is a goal that the government should accomplish through a truthful and dispassionate examination of the real effects of Executive Decree No. 611… that did not include remedial measu[r]es [*sic*] in relation to Labor Law…
> With the measure of not allowing the display of tobacco products and derivatives in display cases … there was a failure to take into consideration the establishment of economic policies tending to prevent unemployment in this sector…
> It is not disputed that the State has the obligation to guarantee the Right to Health; however, the authorities should carefully consider the measures to be implemented to ensure said right, in the sense of implementing measures that are less disruptive of other constitutional rights…
> With the execution and putting into practice of Article 1 of Executive Decree No. 611… many merchants decided not to sell legal products derived from tobacco… at their places of business, and state as the reason for such decision that it was not profitable for them, since consumers preferred to acquire them in the street illicitly…
> … as a result of this arbitrary regulation, the company BRITISH AMERICAN TOBACCO PANAMA S.A., found itself compelled to reduce its work force by thirty five percent…"

With the completion of the phase or period of argument, it fell to this Highest Court of Justice to rule on the present constitutional proceeding.

Considerations and decision of the Plenary:

Bearing in mind the criteria that have been set forth in the case before us, it has been undertaken to reach a decision in this case of a constitutional nature.

In the process of resolving the matter, and with the aim of achieving an overall and general panorama of what is being examined, let us refer to the origin and evolution of the provision that is being challenged. To do this, it is appropriate to cite the article of the law that is being regulated through the executive decree now being challenged, as well as the content of the former executive decree that was also issued at the time of said law. These provisions have the following content:

"LAW No. 13 January 24, January, 2008

Which adopts measures concerning tobacco consumption and tobacco's harmful effects on health.

Article 14. Any kind of advertising, promotion or sponsorship of tobacco and its products is totally prohibited, whether via indirect or subliminal means, addressed to minors or adults. Any form of cross-border advertising, promotion or sponsorship of tobacco and its products that enters into the national territory is also prohibited.

"EXECUTIVE DECREE 230 (May 6, 2008)

Which regulates Law 13 of January 24, 2008, and issues other provisions.
Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008, only allows the placement of tobacco products and derivatives in display cases at points of sale that are to contain additional health warnings with their respective pictograms. It shall not be permitted to take part in any fashion whatsoever in the marketing, advertising, promotion or sponsorship of tobacco. This also includes materials inserted inside cartons and/or packs of all tobacco products, and that are sent to consumers via mail, internet or using any other form of communication available in the national and international market. It is prohibited to deliver or distribute samples, for free or otherwise, of any tobacco product and its derivatives.

Executive Decree No. 611 of 2010

Article 1. Modifying Article 18 of Executive Decree 230 of May 6, 2006, which shall read as follows:
Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008 does not allow the display of tobacco products and derivatives in display cases, racks or any other kind of shelving located at points of sale. It shall not be permitted to take part in any way whatsoever in the marketing, advertising, promotion or sponsorship of tobacco. This also includes advertising that is inserted inside cartons and/or packs of all tobacco products and that which is sent to consumers via mail, internet, and using

> any other kind of communication available in the national or international market. Only a sign can be posted which contains a written list of products and their respective prices, without promotional elements. The sign shall have a white background, with a maximum size of 8.5 by 11 inches, the texts are to be written in Arial font 14, black, closed capitals, in bold face. The signs are to be placed in specific areas of the establishment where products are sold, and their content is to be validated by the General Administration of Public Health of the Ministry of Health, and by the Authority for Consumer Protection and Defense of Competition.
> The giving out or distribution of samples of any tobacco product or derivative is prohibited, regardless of whether or not they are for free.

This being the case, we should point out that upon undertaking the analysis of this case, it becomes necessary to take into consideration that Law 13 of 2008 was first regulated by Executive Decree No. 230 of 2008, and the latter was subsequently amended by the executive decree now before us, which is identified as 611 of 2010.

Now then, let us refer to the first constitutional provision invoked by the plaintiff, which is Article 37 of the Constitution, in which freedom of expression is recognized.

With respect to this, we observe that it is the very Constitution itself that recognizes this right and at the same time limits it. It recognizes that freedom of expression is not absolute, since it states that *"legal responsibilities exist when through one of these media an assault is committed against the reputation or honor of persons, or against social safety or public order."*

In this regard, this Corporation of Justice has stated as follows:

> Freedom of expression is perhaps one of the most important of all individual guarantees with respect to the State. As the text itself sets forth, it consists of the free expression of thought, stated in any way (orally, in writing, etc.). Ultimately, it also includes freedom of the press in a broad sense, understanding this to encompass the publication of ideas and their circulation.
>
> The prohibition of censorship as stated in Article 37 of the National Constitution, answers to contemporary needs, and was born at the end of the 17th century with the French and Anglo-American revolutions, to allow the free communication of ideas and thought, with no greater restriction than that of not allowing abuses of such liberty.
> …..
> It is a matter of vital importance in this light to distinguish, as the Court has indeed had occasion to do on prior occasions (e.g.,

judgment of August 21, 1992), between the concept of freedom of expression and freedom of opinion. This, because what is being regulated by the legal text subject to challenge is not freedom of opinion of the one presenting the inquiry, but rather, aspects of the manner in which it is exteriorized.

Freedom of expression we understand to be the right to express and freely disseminate thoughts, ideas and opinions via speech, writing or in any other appropriate medium; the manner in which it is exercised is broad, but as with all rights, it also bears implicitly the idea of its own regulation.

In the aforementioned judgment of August 21, 1992, the Plenary of the Court, upon considering the possibility of regulation certain aspects of the freedom of expression, stated as follows:

"It should not be confused with so-called freedom of opinion, since whereas the latter is recognized as an absolute freedom, the freedom of expression constitutes a fundamental limited right, whose regulation the Constitution customarily delegates to the common legislature. In Panama, Article 37 of the Constitution itself tacitly establishes this delegation by pointing out legal responsibilities as limits on its exercise, when it protects situations or rights that are equally owed protection in an unequivocal fashion: "the reputation or honor of persons or against social safety or public order."
Furthermore, the international instruments on human rights ratified by the Republic of Panama also introduce limitations on its exercise which must be considered in putting forward an interpretation.
Thus we see that both the International Covenant on Civil and Political Rights and (Law 14 of October 28, 1976), as well as the American Convention on Human Rights (Law 15 of October 28, 1977) regulate the conditions that allow restriction of the exercise of freedom of expression, in Articles 19 and 13, respectively. The International Covenant provides that restrictions on this freedom must be expressly set by the law and be necessary to … ensure respect for the rights or reputation of others or for the protection of national security, public order or health or public morals."
… At the level of domestic law, the legislature exercising that legal reservation has regulated the constitutional limits of Freedom of Expression…" (emphasis by the Court).

From the foregoing it follows that constitutional protection shields the right of freedom of opinion, but it is possible in certain circumstances to regulate the way in which certain ideas are expressed or stated, without their being thereby suppressed. As observed by José Dolores Moscote, Esq.: "In general, the guarantee that is enshrined here is inspired by the best legal theory concerning individual freedom of thought in harmony with the restrictions of a social nature that its use necessarily imposes" (our emphasis). (Action of Unconstitutionality, December 8, 1998. Hon. Edgardo Molino Mola).

From the foregoing it is deduced that both the National Constitution, as well as the findings of the Supreme Court of Justice, are clear in indicating that one of the two aspects of freedom enshrined in the article under consideration is not absolute, and therefore, it is subject to restriction.

Now then, following the exposition of these general considerations on the constitutional article under consideration, let us focus on the petition of unconstitutionality filed by British American Tobacco Panama, S.A.

The examination and comparison of the provision being challenged as unconstitutional with respect to the constitutional provision invoked, as well as the other regulations that have a bearing on this matter, enable us to identify that there is no infringement of Article 37 of the National Constitution.

The first thing we should point out to sustain our assertion is that there is a distinction between freedom of expression and freedom of opinion. The latter is ascribed an absolute character, but not so for freedom of expression.

Bearing in mind this premise, it is clearly concluded that the right that the plaintiff considers to be infringed, that is, freedom of expression, has limitations on its exercise, therefore, it is possible to establish reasons of singular and specific importance to be able to restrict its exercise.

It is here that the matter of public health comes into play, and in consequence, the life of all citizens as a constitutional element that enables the State to establish limitations and restrictions in the exercise of certain rights, which even when they are equally recognized by the National Constitution, must yield before the common wellbeing.

This being the case, it must be placed in perspective whether the expression of an idea should prevail or come first, or whether, on the contrary, it is necessary to preserve and safeguard the health of the citizens. To clarify the foregoing, we must avail ourselves of the contents of other constitutional provisions, such as Articles 17, 50 and 109 of the Constitution. The first of these obliges the national authorities to protect the life of those who are under its jurisdiction. In this regard, there is no doubt that one of these forms of protection is through health, since it is an essential issue for human beings. Accordingly, any provisions established with regard to

this take precedence over others containing rights that are not necessarily indispensable to the life of citizens.

Along these same lines, Article 109 of the Constitution of the Republic establishes a fundamental point for the inquiry in progress, since it considers it to be an "essential" (indispensable) function of the State to look out for the health of the public.

All of these factors come together to legitimate the measure under challenge, that seeks to preserve and protect health, which is a matter of social interest and, in turn, enable national and international authorities to limit certain recognized liberties.

Therefore, the fact that a provision may have served to limit freedom of expression does not automatically entail an infringement of the National Constitution, precisely because this very body of law allows it, as long as it is for reasons such as public utility or the public interest, the latter encompassing the matter of health.

If all restrictions of freedom were unconstitutional, we would live in a social disorder, there would be no rules and the peaceful co-existence of the citizenry would be rendered impossible. It is important in this light for there to be a clear identification of what can affect particular interests (as may occur in this case) in light of overarching situations such as national health, and even world health, as long as the provision subject to challenge complies with treaties and provisions handed down in consensus with the other nations of the world.

Therefore, such limitations as may be established must be scaled to the appropriate measure, since, for example, it cannot be claimed that for the sake of preserving the freedom of movement, measures restricting such liberty cannot be imposed on criminals and subjects of investigation. By the same token, there are innumerable restrictions on liberties such as traffic laws and others, that by the mere fact of being promulgated do not entail any unconstitutionality.

So we see that freedom of expression, like other freedoms, can be limited under the **fair** parameters that the Constitution itself recognizes. Therefore, and as has been established, what must be demonstrated in this case is that one of the elements occurs whereby a particular freedom can be restricted.

The duty of the State to safeguard the public requires the adoption of measures that evidently affect others, but this does not therefore automatically convert them into a contravention of a particular constitutional right.

We believed that the central point for determining whether or not Article 37 of the Constitution had been infringed, was whether freedom of expression could or could not be limited owing to factors of a public nature such as health. And indeed it has been determined that there are grounds for this, in keeping with what is set forth in other legal provisions cited above, wherefore it behooves us to state that the alleged unconstitutionality has not been established.

In light of what has been analyzed, it is concluded that we find ourselves faced with the issuance of a provision that complies with international commitments to preserve world health, which evidently becomes one of those exceptional reasons for which it is permitted to establish limitations on certain freedoms recognized in the Constitution. And we must add that according to what is set forth in the National Constitution concerning laws of social interest, they do incorporate this exceptional element that requires that private interests, in this case tobacco companies and the like, must yield in favor of the wellbeing of all the inhabitants in the national territory and the world. When the social interest (collective wellbeing) is invoked and pursued, the adoption of a particular decision or act on the part of State authorities is justified. In this case, it is sought to preserve and guarantee a need and right of all persons, which is the case of health, through a direct intervention by the State through the promulgation of a law such as the one before us.

The other constitutional provision that is thought to have been infringed is Article 47 of the Panamanian Constitution, which recognizes private property. In relation to this provision, it has been indicated that its interpretation goes hand in hand with the content of Article 337 of the Civil Code. The ensemble of these provisions has given rise to the consideration that:

> "… the Constitution protects private property acquired in accordance with the law; once acquired we can enjoy it subject to the limitations of this, the principal limitation on property being social benefit that must be achieved…" (Ruling of December 31, 1993).

Considering certain positions adopted with respect to the constitutional provision before us, we can state that there is no infringement of the latter as a result of the content of Article 1 of Executive Decree 611 of 2010.

The plaintiff maintains that freedom of expression is limited in an absolute form, precisely because the actual provision challenged so establishes. However, it is necessary to ascertain whether this limitation that is recognized in Article 1 of Executive Decree 611 of 2010 also affects the right of private property in an absolute, direct manner without justification.

In this connection, it is observed that what is established in the provision subject to challenge does not disregard or ignore that the assets relating to the brand or tobacco derivative products have been obtained by British American Tobacco Panama S.A. in compliance with the law. Article 1 of Executive Decree 611 of 2010 does not render without effect the legal purchase of such assets by the aforesaid juridical person. Therefore, British American Tobacco Panama, S.A. can continue to enjoy the fruits that accrue from the commercialization of the legal acquisition of the thing.

The guarantee addressed in Article 47 of the National Constitution also addresses the right to enjoy and dispose of a thing without other limitations than those that may be established by the law. In this light, it also is not observed that Article 1 of Executive Decree 611 of 2010 fails to uphold or contravenes this premise, considering that while it is true that the provision under challenge does establish limitations, it does not follow that by doing so it is disregarding or hindering the enjoyment and total disposal

of the thing. That is to say, it has not been ascertained that these guarantees in particular are being restricted in an absolute manner and without justification.

British American Tobacco Panama, S.A. is able, even faced with the adoption of Article 1 of Executive Decree 611 of 2010 to use, commercialize, contract and engage in other activities with tobacco derivative products. This right exists and remains. And even when it is considered to have been restricted by the content of this legislation, such restriction does not absolutely impede the right to the enjoyment and use of the thing.

We reiterate, then, that that the provision under challenge does not prevent British American Tobacco Panama, S.A. from selling or disposing of the asset (brand and product), nor does it overlook the fact that its proceeds have been obtained in a legal fashion.

On the other hand, the action of unconstitutionality before us also addresses the possible infringement of Article 49 of the Constitution. The aforementioned legal provision establishes guarantees aimed primarily towards consumers and purchasers of goods and services, among other things.

We consider that this provision has not been violated by the content of Article 1 of Executive Decree 611 of 2010.

We state the foregoing because, although the text of the challenged provision does establish limitations, it does not go so far as to eliminate the packs, the logos, identifications, characteristics and health warnings that such products must contain by law, and be so known to consumers who will obtain the product. The specific characteristics of the packages containing tobacco derivative products shall continue to be present in them. The provision subject to challenge is not aimed at eliminating the content of the packages of such products; in this case it is restricting them from being shown, or from their instigating the consumption of such products which are considered harmful to world health. Nonetheless, the consumer, upon obtaining or purchasing the good, shall have the information, characteristics and warnings concerning the product that he is going to consume.

Another of the constitutional provisions that is thought to have been infringed is Article 184, item 14 of the Constitution. This passage establishes two elements. One of them authorizes the President of the Republic and the minister concerned, acting together, to regulate the laws. The second idea contained in this passage is the manner in which regulation is to be carried out, which should not depart from its letter or its spirit. Accordingly, it is understood that the regulatory authority is geared towards respecting the hierarchy of laws. In this case, because an executive decree is involved, it must respect the content and tenor of what the law sets forth on the matter to be regulated.

The analysis of the Plenary of the Supreme Court of Justice is preceded by the citation of three provisions that take on relevance in this action of unconstitutionality. The first of these is the one we consider definitive, to wit, Law 13 of 2008. This law contains Article 14, which is subsequently subject to regulation through Executive Decrees 230 of 2008, and the now challenged 611 of 2010. In this Article 14, any form of advertising, promotion or sponsorship of tobacco and its products is "totally" prohibited. That is to say that the law not only restricts what the experts have defined as advertising, but also other activities that fall within the categories of promotion and sponsorship, which are also included in the aforementioned article. Therefore it is the law that, in addition to advertising, also prohibits promotion ('an assortment of activities whose purpose it is to make something known or increase its sales.' *Diccionario Esencial de la Lengua Española*. 2008, p. 1208), and sponsorship ('Supporting or financing an activity, normally for purposes of publicity.' *ibid*., p. 1113). From this it follows that it is the law that establishes limitations on a series of activities, where, although it does not expressly establish the meaning of 'display' as incorporated in the challenged decree, it does include a series of situations or attributes that are in accordance with what is understood by this concept.

In this light, if we compare the concept of 'promotion' with that of 'display' ('To demonstrate, show in public.' Real Academia Española. *Diccionario Esencial de la Lengua Española,"* Espasa Calpe, 2006, p. 648), we arrive at the conclusion that the challenged provision is not at variance with the law, but rather concepts are involved that address similar situations.

If we take the definition of 'promotion,' which states that it is the ensemble of activities geared towards making something known (in this case, cigarettes), and compare it with the definition of 'display,' which has to do with showing or placing a product in view so the consumer can make a choice (see pp. 26 to 27 of the complaint), the correlation and similarity between the two concepts is easily proven, wherefore evidently the executive decree is not adopting a new and distinct limitation apart from that stipulated by the law, but is rather developing in other terms what is encompassed by and can be construed as 'promotion.'

And in keeping with what has been put forward, we should remember that it is the law that is regulated through the resolution subject to challenge, which does establish a total prohibition, that is to say in general, or universally, for a series of elements, that is, the activities that arise from the concepts of advertising, promotion and sponsorship.

From this it follows that the primary law whose content was meant to be preserved through the issuance of the executive decree, established a comprehensive limitation.

It is also argued that in the executive decree, the concept of advertising is confused with display. Nevertheless, what the provision subject to challenge puts forward is not a similarity between these terms, but rather that by introducing the word 'display,' it addresses elements that are brought into play with the term 'promotion,' whose total prohibition is adopted by the law itself, and not by Executive Decree 611 of 2010.

While the executive decree does prohibit display, it cannot be overlooked that the incorporation of this expression does not involve the establishment of an equivalency thereof with the concept of advertising, but rather it addresses all those elements and situations encompassed by the term 'promotion' that were established in the law and not in the executive decree.

As we see, there is no additional limitation in the way that the law was regulated, because the reading and comprehensive analysis of the article subject to challenge reflects the fact that within itself, it extended the limitation that the law established for the subject of promotion (in addition to advertising and sponsorship), whose definition is associated with the subject of display adopted by the executive decree.

Therefore, the plaintiff's concept of wishing to show that the executive decree seeks to establish an equivalency between display and advertising is mistaken, and instead the term 'display' used in the provision under challenge is found to be in agreement and operating in tandem with the other total limitations the law establishes, that is, for promotion and sponsorship.

Having ascertained this conceptual agreement, we must reiterate our belief that item 14 of Article 184 of the National Constitution has not been violated, that is to say, by the regulation of the law. In other words, the way in which regulatory discretion was exercised did not go beyond the limits established in the law that are regulated by the challenged provision.

The last constitutional infringement that is put forward in the complaint of the action of unconstitutionality concerns Article 298 of the Constitution. This provision introduces the terms 'free competition' and the 'free market.'

To determine whether this provision has been contravened, it is important to understand clearly how these concepts are to be understood.

When we speak of free competition, it should be borne in mind that this term encompasses several elements, among others, freedom of choice of consumers and producer, the participation of different economic agents in an independent manner, but subject to the same rules; a situation which in turn gives rise to competitiveness and incentives that should lead to efficiency of enterprises, better product quality and reduced prices. The free market operates in similar terms, since it is the system where supply and demand play an important role in the determination of prices, the result of free participation in the market of consumers and suppliers.

These ideas allow us to state that the limitations established in the provision challenged as unconstitutional do not in any way impede market competition, and consequently, prices are established that are the result of free supply and demand. In addition, the content of Article 1 of Executive Decree 611 of 2010 not only applies to the products of British American Tobacco Panama, S.A., but also concerns a rule that operates for all parties involved with the matter of tobacco products: denoting the equality of rules that is established by Article 298 of the National Constitution itself.

Therefore, it is not demonstrated in any way that buyers and sellers are prevented from competing in the market, and from continuing to establish the policies needed to attract their clients.

On these grounds, the Plenary of the Supreme Court administering justice in the name of the Republic and by the authority of the law **DECLARES THAT** Article 1 of Executive Decree 611 of 2010 **IS NOT UNCONSTITUTIONAL**.

Let notice be given hereof.

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HON. HERNÁN A. DE LEON BATISTA

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HON. HARRY A. DÍAZ

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HON. LUIS R. FABREGA S.

[illegible signature]
HON. JERÓNIMO MEJÍA E.
[WITH SEPARATE OPINION]

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HON. HARLEY J. MITCHELL D.

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HON. ALEJANDRO MONCADA LUNA

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HON. OYDEN ORTEGA DURÁN

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HON. JOSE E. AYU PRADO CANALS

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HON. VICTOR L. BENAVIDES P.

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YANIXSA Y. YUEN C., ESQ.
Acting General Secretary

192-11 SPEAKER: HON. HERNAN DE LEON

ACTION OF UNCONSTITUTIONALITY BROUGHT BY THE LAW FIRM RODRÍGUEZ ROBLES & ESPINOSA, ON BEHALF OF BRITISH AMERICAN TOBACCO PANAMA, S.A., AGAINST ARTICLE 1 OF EXECUTIVE DECREE NO. 611 OF JUNE 3, 2010.

SEPARATE OPINION OF
HON. JERÓNIMO MEJÍA E.

Respectfully, although I am in agreement with what has been decided, I consider it pertinent to set forth certain considerations in relation to the Judgment that declares that Article 1 of **Executive Decree 611 of 2010 IS NOT UNCONSTITUTIONAL,** *Which modifies Article 18 of Executive Decree 230 of May 6, 2008, which regulates Law 13 of January 24, 2008."*

As is well explained in the Judgment, the challenged provision modifies Executive Decree No. 230 of 2008, which permitted the placement of tobacco products and derivatives in display cases and racks at points of sale, in contravention of what is set forth in the **FRAMEWORK CONVENTION OF THE WORLD HEALTH ORGANIZATION (WHO)**, ratified by Panama through Law 40 of July 7, 2004,[1] and Article 14 of Law 13 of January 23, 2008, which prohibits any kind of advertising, promotion or sponsorship of tobacco and its products addressed to adults or minors in the national territory.

The aforesaid Article 1 of Executive Decree No. 611 of June 3, 2010, handed down by the Ministry of Health, states as follows:

> "Article 1. Modifying Article 18 of Executive Decree 230 of May 6, 2008, which is to read as follows:
>
> Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008 does not allow the display of tobacco products and derivatives in display cases, racks or any other shelving located at points of sale. It is not permitted to participate in any way in the marketing, advertising, promotion or sponsorship of tobacco. This also includes anything that is inserted inside cartons or packs of any tobacco products or that is sent to consumers

[1] The FRAMEWORK CONVENTION OF THE WORLD HEALTH ORGANIZATION (WHO) adopted at the 56th WORLD HEALTH ASSEMBLY held in May of 2003, expresses the concern of the States Parties about the impact of all forms of encouragement of tobacco consumption, and recognizes that the total prohibition of its advertising, would reduce the consumption of such products.

by mail, internet or using any other form of communication available in the national or international market. The only thing permitted is placement of a sign containing a written list of products and their respective prices, without promotional elements. The sign shall have a white background, with a maximum size of 8.5 by 11 inches, and the texts are to be written in typeface Arial 14, in black, closed capitals, emphasized in bold face. Signs are to be place in the specific areas of the establishment where distribution of products takes place, and their content is to be validated by the General Administration of Public Health of the Ministry of Health, and by the Authority for Consumer Protection and Defense of Competition.
The giving out or distribution of samples of any tobacco product or derivative is prohibited, regardless of whether or not they are for free.

The provision whose constitutionality was examined comprises part of the so-called "*adjective regulations concerning public health,"* which seek to impede the use of certain media to transmit messages that are considered harmful to your health (See FAUNDEZ LEDESMA, Héctor, "*Los Límites de la libertad de expresión* ['The limits of freedom of expression]." Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica No. 21, 2004, ISBN970-32-1947-0, http//biblio.jurídicas.UNAM.mx/libros/4/1540/p11540.htm, p. 645). These kinds of restrictions **on advertising** "… essentially aim at the content of the message, but eventually may also be addressed to other adjective aspects – involving place, timeliness and manner of expression-. This circumstance could prevent certain information or messages from being disclosed in the form of films or songs that speak favorably of drugs or narcotics, or regulate advertising for cigarettes or alcoholic beverages, indicating through which media this can be disseminated, and possibly defining the characteristics that such advertising can or should have" (op. cit., p. 637).

The foregoing Judgment addresses in the first place the charge of infringement of Article 37 of the Constitution which the plaintiff has brought, **establishing the non-absolute character of freedom of expression** and **the essential nature of health for the human being**, to conclude that the challenged measure is legitimate considering that it "… seeks to preserve and protect health, which is a matter of social interest and, in

turn, enables national and international authorities to limit certain recognized liberties…" (p. 16). To this effect, it states that:

> The duty of the State to safeguard the public requires the adoption of measures that evidently affect others, but this does not therefore automatically convert them into a contravention of a particular constitutional right. We believed that the central point for determining whether or not Article 37 of the Constitution had been infringed, was whether freedom of expression could or could not be limited owing to factors of a public nature such as health. And indeed it has been determined that there are grounds for this, in keeping with what is set forth in the other legal provisions cited above, wherefore it behooves us to state that the alleged unconstitutionality has not been established.
> In light of what has been analyzed, it is concluded that we find ourselves faced with the issuance of a provision that complies with international commitments to preserve world health, which evidently becomes one of those exceptional reasons for which it is permitted to establish limitations on certain freedoms recognized in the Constitution. And we must add that according to what is set forth in the National Constitution concerning laws of social interest, they do incorporate this exceptional element that requires that private interests, in this case tobacco companies and the like, must yield in favor of the wellbeing of all the inhabitants in the national territory and the world. When the social interest (collective wellbeing) is invoked and pursued, the adoption of a particular decision or act on the part of State authorities is justified…" (p. 17).

I believe that the finding under scrutiny only analyzes the legitimacy of restricting **one of the manifestations of freedom of expression, such as advertising** (let it be noted that the challenged provision confines itself to establishing restrictions on advertising for tobacco products in display cases, racks and any other shelving located at points of sale for cigarettes.)

Because of this, I am not in agreement with the assertion **in an absolute fashion** that laws of social interest "…do incorporate this exceptional element that requires that private interests, in this case tobacco companies and the like, must yield in favor of the wellbeing of all the inhabitants in the national territory and the world;" nor do I share the view that "When the social interest (collective wellbeing) is invoked and pursued, the adoption of a particular decision or act on the part of State authorities is justified."

While I do agree that, in this case, the private interests of the tobacco companies and the like must give way before the general interest of

society, as manifested in the health of the public, the fact is that this is something very different from asserting categorically that – as is deduced from the judgment – always and in all cases, the general interest prevails over freedom of expression, which is in the final analysis the consequence that is to be derived from the argument set forth in the ruling. These assertions have not been the object of analysis, nor do they necessarily conclude what is argued in the judgment.

Rather, I deem it necessary to emphasize that none of the legitimate restrictions to which freedom of expression may be subject contradict such freedom as a constitutionally recognized right, also enshrined in Article **13** of the **American Convention on Human Rights**, as well as other international instruments, because it involves an element that is indispensable to the existence of a democratic society and the Rule of Law.

Accordingly, I underscore that what is being declared constitutional is **the restriction of freedom of expression** on **a specific point, which is the advertising of tobacco** and its derivatives, for a specific reason, which is the protection of health.[2]

In this light, I cannot concur with a ruling on a matter that is **so specific**, that involves only **one manifestation of freedom of expression,** that asserts that "When the social interest (collective wellbeing) is invoked and pursued, the adoption of a particular decision or act on the part of State authorities is justified," as if the mere allusion to a social interest were sufficient to justify "the adoption of a particular decision or act on the part of State authorities," in circumstances in which **that**

[2] In this connection it is useful to mention by way of example the Judgment of December 12, 2006 of the **COURT OF JUSTICE OF THE EUROPEAN COMMUNITY (CJEC)**, which makes reference to the impact of the advertising prohibitions of Articles 3 and 4 of **Directive 2003/33/CE** of the European Community, on the freedom of expression guaranteed in Article 10 of the **European Constitution of Human Rights (ECHR)** in appraising the adjustment of these measures to the principle of proportionality. On this ruling the author Pedro De Miguel Asensio states as follows "…The CJEC underscores that the discretion for establishing a fair balance between freedom of expression and objectives of the general interest as contemplated in Article 10.2 CEDH that could support restrictive measures such as those contained in Directive 2003/33/CE is especially broad in the domain of advertising, because this is an especially complex and variable realm of commercial use of freedom of expression, going on to assert that in any case, freedom of expression in journalism, as such, remains intact, since the endeavors of journalists are not affected." (See DE MIGUEL ASENSIO, Pedro Miguel, "*Prohibiciones de la Publicidad del Tabaco: Impacto de la Armonización Europea e Internacional* [Prohibitions on Tobacco Advertising: Impact of European and International Harmonization]," in *La Ley* (A Spanish legal magazine of theory, jurisprudence and bibliography), 2007, No. 1, pp. 1811-1824, ISSN: 0211-2744. *Document deposited in the institutional archive E Prints Complutense http://www.ucm.es/eprints (*Emphasis added).

reference does not by itself necessarily imply that there is such an interest in the case under consideration, nor that the social interest, moreover, **once established, must always be imposed**, for example, when faced with the fundamental rights of individuals or other constitutionally protected goods or interests, **without undertaking the respective analysis of the specific situation** involved.

It should be noted that the debate on the issue of advertising for tobacco and its derivatives is not a peaceful matter, and in some latitudes, greater weight has been given to freedom of expression over and above other rights such as the right to health. The proof of this is that, in the case of the United States, the Supreme Court in *Lorillard v. Relly,* concluded that a law from the State of Massachusetts that prohibited both indoor advertising at a height below five feet, as well as sales of tobacco at a distance of less than one thousand feet from schools and playgrounds, violated the 1st Amendment on freedom of expression, as protected commercial speech, by imposing a restriction on tobacco and its commercialization.[3]

On the other hand, I observe that the appellant also formulated a complaint of infringement of Article 298 of the Constitution which states that "The State shall watch over free economic competition and free market competition…"

I concur with the Judgment inasmuch as the restrictions on advertising for tobacco and its derivatives established by Article 1 of Executive Decree No. 611 of 2010 do not entail infringement of Article 298 of the Constitution.

Nonetheless, it seems to me that it remains to address the conflict between the right to health of consumers and freedom of the press that has been part of the analysis offered in certain countries regarding laws that prohibit advertising and promotion of the consumption of tobacco and its derivatives, and that, in my opinion, was most appropriate for deciding this matter.

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[3] See Judgment 830-10 of the Constitutional Court of Colombia : United States Report, Volume 533, "Cases Adjudged in the Supreme Court, October Term, 2000," Washington, 2002, http://www.supremecourt.gov/opinions/boundvolumes/533bv.pdf

This perspective was adopted by the Constitutional Court of Colombia, which posited the legal problems with respect to laws regulating advertising for tobacco and its derivatives, between the right of consumers to health, and the right to free enterprise and free private initiative, which covers – just like freedom of expression - the protection of commercial advertising.

In this light, **Judgment C830/10 of October 20, 2010** of the Constitutional Court of Colombia declared enforceable Articles 14, 15, 16 and 17 of Law 1335 of 2009, *"provisions whereby damages are prevented to the health of minors, to the non-smoking public and public policies are stipulated for the prevention of tobacco consumption and quitting tobacco among the Colombian public,*" because it found that:

> "… 35. Articles 14, 15, 16 and 17 of Law 1335/09, studied harmoniously, allow the conclusion that the legislature intended the total prohibition of advertising and promotion of tobacco consumption, as well as the restriction of sponsorship at cultural and sporting events, when it is aimed at direct or indirect advertising of tobacco products and derivatives. These measures are compatible with free enterprise and free private initiative, considering that the legislature can impose restrictions, extending as far as prohibition on commercial advertising when overriding reasons call for proportional measures of this kind. In the case under review, there is a global consensus about the intrinsically harmful nature of tobacco products and derivatives, taking into account the true, objective and verifiable harm caused to the health of those who consume tobacco and *passive smokers,* as well as to the environment. This proven fact, together with the fact that the legal prohibition under discussion (i) does not affect the essential core of economic freedom, insofar as it is compatible with the production and sale of tobacco products and derivatives; (ii) preserves the right of consumers to learn about the effects and consequences of the consumption of such products; and (iii) is part of the development of commitments undertaken by the Colombian State with regard to tobacco consumption; make it possible to conclude that the provisions analyzed do not contravene the liberties in question."

As I have said, I am personally inclined towards this latter view, because it is where, in my view, the true constitutional conflict takes place between free enterprise – which encompasses the right to advertise and commercialize one's products - and the right-duty of the State to adopt measures necessary to protect the health of both active as well as passive smokers, the undersigned being of the opinion

that the right to health must prevail, since there is scientific evidence and general consensus regarding the harmful effects of tobacco on health. It should be remembered that the Constitution includes a series of rights of a social nature which oblige the State to attend to and execute positive actions for their achievement. And the right to health is one of these rights, which justifies the State's intervening through the adoption of measures aimed at safeguarding it.

For the reason set forth, I respectfully submit this separate opinion.

Date same as above,

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HON. JERÓNIMO MEJÍA E.

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YANIXSA Y. YUEN
GENERAL SECRETARY