

Unofficial Translation

FILE No. 788-10

ADMINISTRATIVE LAWSUIT OF NULLITY FILED BY THE FIRM RODRÍGUEZ ROBLES & ESPINOSA ON BEHALF OF BRITISH AMERICAN TOBACCO PANAMA S. A., FOR THE EXECUTIVE DECREE NO. 611 OF JUNE 3, 2010, ISSUED BY THE MINISTRY OF HEALTH, TO BE DECLARED INVALID DUE TO ITS ILLEGALITY.

FILE No. 818-10

ADMINISTRATIVE LAWSUIT OF NULLITY FILED BY THE FIRM ALEMÁN, CORDERO, GALINDO & LEE ON BEHALF OF PHILIP MORRIS PANAMA LIMITED PARTNERSHIP BY SHARES, FOR THE EXECUTIVE DECREE NO. 611 OF JUNE 3, 2010, ISSUED BY THE MINISTRY OF HEALTH, TO BE DECLARED INVALID DUE TO ITS ILLEGALITY.

FILE NO. 1013-10

ADMINISTRATIVE LAWSUIT OF NULLITY FILED BY THE FIRM C.F & CO LAWYERS ON BEHALF OF OBRIGADA PANAMA S.A., FOR THE EXECUTIVE DECREE NO. 611 OF JUNE 3, 2010, ISSUED BY THE MINISTRY OF HEALTH, TO BE DECLARED INVALID DUE TO ITS ILLEGALITY.

**REPUBLIC OF PANAMA**

**JUDICIAL BODY**

SUPREME COURT OF JUSTICE OF PANAMA – ADMINISTRATIVE CHAMBER

Panama, August three (3), two thousand sixteen (2016)

**VIEWS:**

The Third Chamber of the Supreme Court decides about the administrative lawsuit of nullity, accumulated, and presented by the forensic firm **Rodríguez-Robles & Espinosa**, on behalf of **British American Tobacco Panama SA**, **Alemán, Cordero, Galindo & Lee**, on behalf of **Philip Morris Panama Partnership Limited by Shares**, **CF & Co Abogados**, on behalf

of **Obrigada Panamá SA, Habanos Panama S.A., and G.R. International S.A.**, all of them have the claim of declaring invalid, as illegal, the Executive Decree No. 611 of June 3, 2010, issued through the Ministry of Health.

The aforementioned lawsuits were filed separately, and by means of Resolution of August 1, 2013, the Presiding Judge ordered the accumulation of the respective files (f. 338), in accordance with Articles 720, 721, 731 of the Judicial Code, to comply with the principle of procedural economy.

### **I. Arguments of the plaintiffs**

The legal representatives of the plaintiffs maintain that Decree No. 611 of June 2010, whose declaration of nullity is asked, violates the following norms:

1. Articles 3, 14 and 19 (numeral 2) of Law No. 13 of January 24, 2008, which set forth measures to control tobacco and its harmful effects on health. In their order, they refer to the power of the state to adopt the necessary measures to apply effectively the public health policies to prevent, control and reduce the consumption of tobacco and its products, with the participation of civil society; the total prohibition of any form of advertising, promotion and sponsorship of tobacco and its products, either through indirect and subliminal means, aimed to minors and adults; or through any form of advertising, promotion and cross-border sponsorship of tobacco and its products, that penetrate the national territory; and the prohibition of the sale of tobacco to minors, so that no retail store can have these products in places directly accessible to the customer.
2. Article 337 of the Civil Code, according to which private property is the right to enjoy and dispose of something with no limitations other than those established in the Law.
3. Articles 1, 35 and 36 of Law 45 of October 31, 2007, on consumer protection and defense of competition, which, respectively, state that the purpose of the law is to protect and ensure the process of free economical competition and the free competition; that consumers will have the right, among others, to receive from suppliers all the information about the characteristics of the offered product or service, in a clear and truthful manner, in order to make a decision when purchasing the product or service; that the supplier has the obligations towards the customer, among others, to inform, clearly and truthfully, about the characteristics of the offered product, such as its nature, composition, content, weight, origin, expiration date,

toxicity and precautions, which will be consigned in the packaging of the product or on the shelf of the commercial establishment, in comprehensible and legible terms.

4. Articles 89 and 101 of Law No. 35 of May 10, 1996, which establish norms aimed at protecting the industrial property, which, respectively, indicate that a trademark is understood as any sign, word, combination of these elements and any other means that, for reasons of its characters, can identify a product or service in commerce; and that by use of the brand it will be understood the production, manufacture, elaboration or preparation of articles, products or merchandise, and the provision of services covered by it, followed by its placement in national or international trade.
5. Article 20 of Annex IC of the Agreement on Trade-Related Aspects of Intellectual Property Rights, approved by Law 23 of July 15, 1997, which approves the Marrakesh Agreement, constituting the World Trade Organization, that provides that, in the course of commercial operations, the use of a brand or trademark shall not be unjustifiably complicated with special requirements nor with their use in a way that impairs the ability of the mark to distinguish goods or services of one company from others; however, it will not prevent the requirement that the brand that identifies the company that produces the goods and services be used together, but not bindingly, with the brand that distinguishes the goods and services in question of that company.
6. Articles 34, 25 and 36 of Law No. 38 of July 31, 2000, law of administrative procedure, which states that the administrative actions of public entities must be carried out in accordance with the principle of strict legality; the order in which the legal provisions should be applied in matters that are issued, created or adopted by public entities; the prohibition of issuing or creating an administrative act in violation of a legal norm in force, even when it comes from the same authority that dictates or creates the respective act.

When explaining the charges of illegality, the plaintiffs assert that Decree No. 611 of June 3, 2010 totally exceeds the letter and spirit of Law No. 13 of January 24, 2008, since Article 14 of the aforementioned Law, at any time prohibits the simple placement or display of tobacco products in their respective dispensers and shelves at the points of sale, being this an abusive addition, as a consequence it lacks reasonableness and proportionality, thus violating the limits of regulatory authority, since it increases the scope of the prohibition.

They also argue that the new prohibition, not contemplated by the Law, restricts the right of the consumer to receive all the information about the product before making their purchase choice, thus impairing the ability of the brand to distinguish the goods or services of a company from the other companies, hindering the sale of tobacco and its derivatives in commercial establishments, as well as the free competition of suppliers.

## **I. Defendant Entity's arguments**

The lawsuit filed was transferred to the Ministry of Health so it could submit a report explaining its conduct, in which it indicated mainly the following:

“ ...

In accordance with the provisions of our legislation, the total prohibition of all forms of advertising, promotion and sponsorship of tobacco and its products is clearly evident, being the display of tobacco products and its derivatives on dispensers, stands and any other shelf located in the points of sale a form or means of advertising, regardless of whether the dispenser does not have any logos, signs or identification, since these objects show or show off the boxes and/or packets of cigars.

The prohibition stated in Executive Decree No. 611 of 2010 does not affect the freedom of choice and information, since the placement of a sign containing a textual list of products and their respective prices in the specific areas of the establishment where the products are dispatched is allowed.

The prohibition of displaying tobacco products and their derivatives on dispensers, stands, and any other shelf located in the points of sale, does not contravene, in our judgment, in any way, the Articles 6, 7, 8, 10 and 12 of the Law 13 of 2008, since the boxes or packets must comply or have the health warnings, pictograms, information on the origin of the product, production and expiration date, batch, registration, toxic content of the product, etc., in a clear and visible form on the product packaging, regardless of whether they cannot be displayed or exhibited.

Executive Decree 611 of 2010 does not cut short the consumer's right to receive all the information they need when deciding to purchase tobacco or derivative products, since as previously indicated, the fact of prohibiting their display does not exempt from the responsibility to strictly abide and comply with the content of Law 13 of 2008 (characteristics of the product and the labeling); nor does it interfere with the right to choose or access to the variety of products on the market, since the placement of a sign containing a textual list of products and their respective prices is allowed. In the same way, this does not imply that the consumer will learn about the characteristics of the product after acquiring it, because when the consumer is about to pay it, nothing prevents him from observing and carefully reading each and every one of the indications established there, thus complying with Law 45 of 2007, which dictates the Rules on Consumer Protection and Defense of Competition.

....

The total prohibition of displaying tobacco products and their derivatives on dispensers, stands and any other shelf located at the points of sale does not imply that any of the tobacco products will be displaced from the market, since the places of sale may exhibit a textual list of the products offered and their respective prices, so that the exercise of trade is not impaired.

....

In this order of ideas, we consider that, from the guidelines established by the World Health Organization, for the correct application of the Framework Convention on Tobacco Control, it is deduced that the total prohibition of tobacco advertising, promotion and sponsorship is effective only if it has a broad scope. Contemporary marketing communication has an integrated approach to advertising, promotion of the purchase and sale of merchandise, and includes direct marketing, public relations, sales promotion, as well as personal and online marketing methods of sale. If only certain forms of direct tobacco advertising are prohibited, the tobacco industry will redirect its spending towards other advertising, promotion and sponsorship strategies and will resort to creative and indirect ways of promoting tobacco products and their consumption.

....”.

#### IV. Office of the Solicitor-General’s view

By Concept No. 445 of November 21, 2013, the representative of the Office of the Solicitor-General requests the Chamber to declare that it is not illegal, for the following reasons:

“...

In accordance with the foregoing, it should be taken into account that Article 14 of Law 13 of 2008 establishes a total ban on any form of advertising, promotion and sponsorship of tobacco and its products, even through indirect or subliminal means, which has been regulated by the regulatory instrument that is the subject of the lawsuits, particularly with regard to the display of tobacco and its derivatives on dispensers, stands and any other shelf located in the points of sale. It is also important to note that the enactment of this prohibition does not limit the right of use of the factory’s brand, since the product keeps intact and without alteration its distinctive, which appears visibly on the packaging that contains it; therefore, the legal provisions invoked are in no way contradicted.

In the same vein, the regulatory norm whose nullity is being discussed does not interfere with the consumer's right to receive information before making their purchase choice, since a sign containing a textual list of the tobacco products that are for sale within the point of sale and their respective prices

is allowed. Likewise, once the product is requested at the point of sale, the customer will have the opportunity to learn about its characteristics before making the payment, which in no way prevents them from observing and reading all the signs established by the rules of consumer protection, in addition to the warnings contained on the packaging, which represents a direct communication of the consumer with the product; which is why the exercise of trade of the companies is not impaired and, in addition, it is shown that in this sense there is no contradiction between the regulatory text and the rules invoked as being infringed, so it is evident that the challenged act was issued in accordance with the principle of strict legality, ...”

## **VI. Considerations of the Chamber**

Once the formalities planned for these processes have been completed, it is up to the members of the Third Chamber of the Supreme Court of Justice to proceed to resolve the merits of this dispute.

### **Competency of the Chamber:**

First of all, it is necessary to point out that this Third Administrative Chamber of the Supreme Court of Justice is competent to hear the judicial action of nullity promoted by **British American Tobacco Panama S.A., Philip Morris Panama Limited Partnership Limited by Shares, Obrigada Panama S.A., Habanos Panama S.A., and GR International S.A.**, based on the provisions of Article 206, numeral 2, of the Political Constitution of the Republic of Panama, in accordance with article 97, numeral 1, of the Judicial Code and article 42A of Law No. 135 of 1943, as amended by Law No. 33 of 1946.

### **Standing of the plaintiffs and the defendant:**

In the present case, the plaintiffs as a legal entity that act in defense of the legality of the content of Executive Decree No. 611 of June 3, 2010, which modifies Article 18 of Executive Decree No. 230 of May 6, 2008, issued by the Executive Branch through the Ministry of Health, which is why it is entitled to promote the action examined.

For its part, the challenged act was issued by the Executive Branch through the Ministry of Health, a state entity, based on Law No. 13 of January 24, 2008, by means of which measures to control tobacco and its harmful effects on health were adopted, as a passive subject in this administrative process of nullity.

### **Preliminary issues**

Before entering into the analysis of the legality that falls to this Chamber, it is important to state that this administrative act was the subject of an unconstitutionality action filed by the legal representatives of **British American Tobacco Panama S.A.**, against Article 1 of Executive Decree No. 611 of June 3, 2010, issued by the Ministry of Health, decided by **Judgment of May 28, 2014** issued by the Plenary of the Supreme Court of Justice, which declares that it is not unconstitutional.

It is imperative to clarify that this situation does not constitute *res judicata*, on the contrary, the analysis carried out by the Plenary of the Supreme Court of Justice is different from the violations of the legal order, whose competence and analysis correspond to this Third Administrative Chamber.

In this vein, the action of unconstitutionality of the legal provisions constitutes a mechanism that make up the objective constitutional jurisdiction, reserved for the protection of the integrity of the fundamental norms set forth in the Magna Carta. The competence to safeguard the legal order is assigned to the administrative jurisdiction, which is the task of the Third Chamber of the Supreme Court of Justice, as is clear from the content of Article 206 of the Political Constitution.

It is clear, then, that the lawsuit in question raises a controversy at the level of legality, by stating that the challenged administrative act violates the established legal order, and what was decided in the action of unconstitutionality does not constitute a situation that prevents this Chamber to hear the present case, since the object of said action only analyzes whether or not there was a violation of the constitutional order.

### **Decision of the Chamber**

It is up to the Chamber to decide various legal problems, first, a.) Determine whether the challenged act issued by the defendant entity was issued within the limits of the regulatory power conferred in accordance with Law No. 3 of January 24, 2008, b) Define whether the prohibition to display tobacco products and their derivatives on dispensers, stands and any other shelves located at points of sale, in fact, violates or not the right of consumers to information, the habitual use of the brand, and consequently, hinders or not the sale of the tobacco product and its derivatives in commercial establishments.

**a. Limits of the regulatory power**

The plaintiff alleges that the contested act, Executive Decree No. 611 of June 3, 2010, exceeds the regulation of Law No. 13 of January 24, 2008, *by which measures were adopted for the control of tobacco and its harmful effects on public health*, in contradiction of the principle of strict legality, because this provision establishes an additional prohibition not contemplated by the Law, thus exceeding its text and spirit, by prohibiting the display of tobacco products and their derivatives in dispensers, stands and any other shelves located at the points of sale.

Considering that, **through Executive Decree No. 230 of May 6, 2008, when the content of Article 14 of Law 13 of January 24, 2008 was regulated for the first time, it was established that the total prohibition allowed the placement of tobacco products and their derivatives in the dispensers and shelves of the points of sale, which would contain their respective health warnings and pictograms;** however, later, by means of the challenged act, Decree No. 611 of June 3, 2010, the display of tobacco products and their derivatives in the dispensers, stands and any other shelves located in the points of sale was not allowed, **which the plaintiff considers that exceeds the limits of the regulatory power because it goes beyond the spirit and letter of Law No. 13 of January 24, 2008.**

Now, the Court observes that **the contested act consists of Executive Decree No. 611 of June 3, 2010**, issued by the Executive Branch through the Ministry of Health, which modifies Article 18 of Executive Decree No. 230 of May 6, 2008, that regulates Law 13 of January 24, 2008, which orders the following:



“Article 1: Amend Article 18 of Executive Decree No. 230 of May 6, 2008, which will read as follows:

**Article 18: The total prohibition mentioned in Article 14 of Law 13 of 2008 does not allow the display of tobacco products and their derivatives on dispensers, stands and any other shelves located at the points of sale. It will not be possible to participate in any way in the marketing, advertising, promotion or sponsorship of tobacco. This also includes the one that is introduced inside the boxes and/or packets of all tobacco products and the one that is sent to consumers via mail, internet and using any form of communication available in the national and international market.**

Only the placement of a sign containing a textual list of the product and its respective prices will be allowed, without promotional elements. The sign will have a white background, with a maximum size of 8.5 by 11 inches, the texts will have a white background, with a maximum size of 8.5 by 11 inches, the texts will be written in Arial 14”, black, closed uppercase letters, highlighted in bold. The signs will be placed in the specific areas of the store where the products are dispatched and their content will be validated by the General Directorate of Public Health of the Ministry of Health and by the Authority for Consumer Protection and Defense of Competition.

The delivery or distribution of samples, whether or not free, of any tobacco product and its derivatives is prohibited. "

Regarding the exercise of regulatory power in Panama, it is necessary to start from the content of **numeral 14 of Article 184 of the Political Constitution, which attributes to the Executive Branch the power to regulate the Laws** that require it, in order to facilitate their better compliance, without departing neither from its text nor from its spirit.

On this issue, the case law of this Chamber has stated that the exercise of regulatory **power is justified in the need to assist the regulatory scope of the formal Law and in the autonomy enjoyed by autonomous public entities, but it can only be exercised in the specific framework of the services and benefits they provide.** In this regard, the following is expressed in a Judgment of February 27, 2007:

“... This Judicial Chamber in a considerable number of opportunities has also underlined in various judgments that **the exercise of regulatory power cannot be deployed behind the back of the text or spirit of the formal Law, since it represents the impassable limit of the former.**”}

The Chamber, in a recent judgment of September 29, 2006, regarding a lawsuit of nullity against certain articles of a Regulatory Decree issued by the Executive Branch to regulate the cessions and compensations of tax credits, stated:

“In that order of ideas, **the regulations for the execution of the Laws, to which numeral 14 of Article 184 of the Constitution expressly refers,** are those issued by the President of the Republic and the respective Minister, to ensure or facilitate the compliance or application of laws. This is the traditional hypothesis and it is an activity of the Public Administration subordinate to the Law and with its own limits: **they cannot alter the text or the spirit of the Law they regulate.** Executive Decree No. 100 of 2004 is an Execution Regulation whose purpose is to regulate the assignments and compensation of tax credits.

In accordance with the challenged Decree, the Executive Branch, by regulating the matter on compensation and cession of liquid and enforceable credits (Article 1073-A of the Tax Code), originated as of January 1, 1992, that benefits taxpayers as a consequence of excess tax payments, should refer to the way to compensate these credits and not to those that have been the product of special laws, such as Tax Credit Certificates (TCC), Certificates with Cancellation Power (CCP), or Preferential mortgage interest Certificates or Credits.

In the opinion of this Chamber, the limitations and restrictions imposed by Articles 1 and 2 of Executive Decree No. 100 of 2004 are an excess in the exercise of the regulatory power of the Executive Branch recognized by numeral 14 of Article 184 of the Political Constitution, by including additional conditions to those provided in Laws 108 of 1974, Law 3 of 1985 and the Tax Code regarding tax incentives.

Finally, Articles 1 and 2 of the Regulatory Decree of Execution, whose illegality is accused, is of a lower category than Laws 108 of 1974, Law 3 of 1985 and the Tax Code itself, on the subject of tax incentives, therefore, the request of additional requirements to those contemplated, violates articles 752 and 757 of the Administrative Code.

(...) As stated, the Executive Branch, through the responsible minister, has the powers to regulate the laws with the purpose of ensuring or facilitating their compliance, application or implementation.

It is important to note, however, that said **regulatory power is limited, that is, it is framed within the principle of legality of legal reserve. For this reason, these regulations are subordinate to what is established in the objective condition or law, since they only constitute an instrument for their application, and at no time can they exceed their text or spirit.**”

(ADMINISTRATIVE LAWSUIT OF NULLITY FILED BY RAFAEL RIVERA IN ORDER TO DECLARE AS INVALID ARTICLES 1 AND 2 OF EXECUTIVE DECREE NO. 100 OF OCTOBER 18, 2004, ISSUED BY THE MINISTRY OF ECONOMY AND FINANCE) ... "

On the other hand, the Panamanian author Víctor L. Benavides Pinilla, in his work entitled: "Compendium of Panamanian Public Law", on the subject of regulatory authority, has indicated that:

**“... That power that the Executive Power has to issue provisions of a general and mandatory nature. Its characteristic manifestations are the regulations** (organic texts and of a certain length).

Decrees, orders, circulars and instructions can also be mentioned.

The regulatory power is an exclusive power of the Executive Branch, which has it by constitutional mandate, that is, its exercise does not emanate from the law or from an explicit legislative authorization.

...

According to its greater or lesser extent, we can distinguish two types of regulatory powers, the regulated power and the discretionary power.

**The regulatory power will be regulated power when the administrative entity, when making use of it, must be governed by a certain legal precept, which indicates its action in advance.** From the foregoing it can easily be inferred that what characterizes the regulated regulatory power is its subordination to a higher legal standard. **It should be noted that this regulated power is limited by the higher legal norm, in such a way that it cannot exceed or even ignore the terms established by the norm.** The regulatory power will be discretionary power when, by the time of exercising it, only two limits are recognized, which are: a) not to infringe any constitutional precept, and b) not to invade the sphere of the Law, that is, that set of matters whose regulation corresponds to the Law, in a formal sense.” (Benavides Pinilla, Víctor L. Compendium of Panamanian Public Law, Panama, 2012, p. 871, 873).

Under this legal framework, it is noted that **Article 14 of Law No. 13 of January 24, 2008**, by which measures were adopted for the control of tobacco and its harmful effects on public health, establishes the following:

"Law No. 13 of January 24, 2008

**"Article 14. Any form of advertising, promotion and sponsorship of tobacco and its products, whether through indirect or subliminal means, directed at minors or adults, is totally prohibited. Likewise, all forms of advertising, promotion and cross-border sponsorship of tobacco and its products, which penetrate the national territory, are prohibited."**

Likewise, the aforementioned Law contemplates in its article 32 **that in a period not longer than 3 months, after its promulgation, the Law that adopts measures for the control of tobacco and its harmful effects on health should be regulated**, therefore, it was regulated for the first time by means of Executive Decree No. 230 of May 6, 2008, and this was later modified by Executive Decree No. 611 of June 3, 2010, challenged in the present process of nullity. These provisions are as follows:

"Executive Decree No. 230 of May 6, 2008

That regulates Law 13 of January 24, 2008 and dictates other provisions.

**Article 18. The total prohibition indicated in Article 14 of Law 13 of 2008, only allows the placement of tobacco products and their derivatives on dispensers and shelves at points of sale, which will contain additional health warnings with their respective pictograms. It will not be possible to participate in any way in the marketing, advertising, promotion or sponsorship of tobacco. This also includes the one that is introduced inside the boxes and/or packets of all tobacco products and the one that is sent to consumers via mail, internet and using any form of communication available in the national and international market.**

The delivery or distribution of samples, whether or not they are free, of any tobacco product and its derivatives is prohibited.

Executive Decree No. 611 of June 3, 2010

Article 1. Amend Article 18 of Executive Decree 230 of May 6, 2008, which will 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 their derivatives on dispensers, stands and any other shelves located at**

**points of sale. It will not be possible to participate in any way in the marketing, advertising, promotion or sponsorship of tobacco. This also includes the one that is inserted inside the boxes and/or packets of all tobacco products and the one that is sent to consumers via mail, Internet and using any other form of communication available in the national or international market.**

Only the placement of a sign containing a textual list of products and their respective prices will be allowed, without promotional elements. The sign will have all white background, with a maximum size of 8.5 by 11 inches, the texts will be written in Arial 14'', black, closed uppercase letters, highlighted in bold. The signs will be placed in the specific areas of the stores where the products are dispatched and their content will be validated by the General Directorate of Public Health of the Ministry of Health and by the Authority for Consumers Protection and Defense of Competition.

The delivery or distribution of samples, whether or not free, of any tobacco product and its derivatives is prohibited. "

Now, the Court notes that **Law No. 13 of January 24, 2008** was issued with the purpose of adopting measures for the control of tobacco and its harmful effects on health, **which arose as a result of the international obligations assumed in the Framework Convention on Tobacco Control of the WHO**, which was ratified by Panama through Law 40 of July 7, 2004, and which establishes a series of measures whose adoption must be considered by the Member States, including the **total prohibition of any form of advertising, promotion and sponsorship of tobacco, as approved at the fourth plenary session of the World Health Organization, on May 21, 2003.**

Likewise, Article 13, numeral 2 of the WHO Framework Convention on Tobacco Control provides that each State Party, in accordance with its constitution or constitutional principles, **will proceed to a total prohibition of all forms of tobacco advertising, promotion and sponsorship.** It also stipulates in numeral 4 **the minimum measures that must be adopted by the parties, but always to achieve a total prohibition.**

On the other hand, Article 7 of the WHO Framework Convention on Tobacco Control establishes that the Conference of the State Parties will formulate guidelines to help the Parties comply with the obligations assumed in said Convention, in that sense, it is observed that according to the **Guidelines approved in Durban, South Africa, on November 17-22, 2008**, the following was recommended:

**“Retail and display**

12. Display of tobacco products at points of sale in itself constitutes advertising and promotion. Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display.

13. To ensure that points of sale of tobacco products do not have any promotional elements, Parties should introduce a total ban on any display and on the visibility of tobacco products at points of sale, including fixed retail outlets and street vendors. Only the textual listing of products and their prices, without any promotional elements, would be allowed. As for all aspects of Article 13 of the Convention, the ban should also apply in ferries, airplanes, ports and airports.

14. Vending machines should be banned because they constitute by their very presence a means of advertising or promotion under the terms of the Convention.

#### **Recommendation**

**Display and visibility of tobacco products at points of sale constitutes advertising and promotion and should therefore be banned. Vending machines should be banned because they constitute, by their very presence, a means of advertising and promotion.**

Given these facts, the Chamber is of the opinion that when Article 14 of Law 13 of January 2008, on the total prohibition of advertising, promotion and sponsorship of tobacco products, was regulated, on a first time, by Executive Decree No. 230 of May 6, 2008, **the placement of derivative products in the dispensers and shelves of the points of sale, with their respective health warnings and pictograms, was allowed, adopting at that time the measures contemplated in the WHO Framework Convention on Tobacco Control, where the display and visibility of tobacco products at points of sale was not included.**

Subsequently, **in order to comply with the new guidelines assumed in said Convention approved in Durban, South Africa, on November 17-22, 2008,** the Panamanian State **amended Executive Decree No. 230 of May 6, 2008,** and issued Decree No. 611 of June 3, 2010, challenged regulation, **prohibiting the display of tobacco products and their derivatives in dispensers, stands and any other shelf located at the points of sale; modification that has not exceeded the limits of regulatory power because it was carried out within the spirit of the Formal Law, Law No. 13 of January 24, 2008, since, in Article 14, it establishes a total prohibition of advertising, promotion and**

**sponsorship of tobacco products**, and the guidelines of the WHO Framework Convention on Tobacco Control stated that **the display of tobacco products at points of sale is itself a form of advertising and promotion.**

- b. Define whether or not the prohibition to display tobacco products and their derivatives on dispensers, stands and any other shelves located at the points of sale, in effect, violates or not the right of consumers to information, the habitual use of the brand, and consequently, hinders or not the sale of the tobacco product and its derivatives in commercial establishments.**

The second legal problem to be solved is to determine whether the prohibition to display tobacco products and their derivatives on dispensers, stands and any other shelves located at points of sale, violates or not the right to information of consumers, and the habitual use of the brand.

The Court considers it necessary to indicate that the right of consumers to information, according to Dr. Luis Camargo Vergara in his work "**Legal Regime of the Markets**" constitutes *"... a duty imposed on each and every one of those who make up the production and marketing chain, and is not limited only to the retailer who has contact with the consumer; nor does it constitute a duty referred exclusively to the stage of formation of the contract; the obligation imposed by the legal norm also extends throughout its execution.* It is about that *"the recipient of the product knows precisely everything that may be able to influence his decision to contract, that is, the information that is necessary for that contract must be conveyed, and the full compliance of that information by the provider is not limited to mere verbal transmission, but must be part of the contractual plexus"* (Camargo Vergara, Luis, Legal Regime of the Markets, Imprenta Articsa, 2011, Panama, pages 97-98).

**Law No. 45 of October 31, 2007** *"Which dictates regulations on consumer protection and defense of competition and another provision"* provides in its article 36, numeral 1, that **the supplier is obliged to inform clearly and truthfully to the consumer about the characteristics of the product or service**, which must be consigned on the packaging, container, vessel or the product label on the shelf of the commercial establishment. The legal norm also contemplates that said information must be on the label and in the Spanish language when it comes to medicines, agrochemicals and toxic products and **food**

**products that require specific warnings or precautions that represent a danger to human health, that is, derived products of tobacco.**

Under this framework, the Court is of the opinion that, although it is true that the display of tobacco products and their derivatives is prohibited in dispensers, stands and any other shelves located in the points of sale, by means of Executive Decree No. 611 of June 3, 2010, however, **the right of consumers to information is not violated because when he is going to purchase the tobacco product, he gets its characteristics before consuming it**, that is, he knows in advance its nature, composition, content, weight, origin, expiration date, toxicity, **and warnings.**

In addition, the prohibition of the exhibition of tobacco products **does not exempt the compliance with the requirements contemplated in Law 13 of January 24, 2008**, that is, that tobacco products must contain health warnings in their containers that indicate the risks and damages that its consumption causes in people.

Regarding what the plaintiffs argue, in the sense that the prohibition of displaying tobacco products and their derivatives on dispensers, stands and any other shelves, located at points of sale undermines the habitual use of the brand, the Chamber is of the opinion that **Law 13 of January 24, 2008 and its regulations do not prevent tobacco products from being registered as a trademark, nor does it hinder their registration.**

In addition, the Law, although it prohibits the exhibition of tobacco products, its regulations do not provide that they be removed from the point of sale, **but that they be located in another area, and that these will be known by the consumer through a sign and their respective prices, without promotional elements.** Executive Decree No. 611 of June 3, 2010 establishes:

Article 1. Amend Article 18 of Executive Decree 230 of May 6, 2008, which will read as follows:

“... ”



**Only the placement of a sign containing a textual list of products and their respective prices will be allowed, without promotional elements.**

The sign will have all white background, with a maximum size of 8.5 by 11 inches, the texts will be written in Arial 14'', black, closed uppercase letters, highlighted in bold. The signs will be placed in the specific areas of the establishment where the products are dispatched and their content will be validated by the General Directorate of Public Health of the Ministry of Health and by the Authority for Consumers Protection and Defense of Competition.

Now, **the marketing and promotion of tobacco and its derivative products may increase their sales, however, it is noted that in parallel it would increase the death of people for such consumption, which is scientifically proven by the World Health Organization (WHO)**, hence, as we have noted previously, in May 2003 the World Health Assembly unanimously adopted the WHO Framework Convention on Tobacco Control, and the Republic of Panama was one of the first countries to ratify it through Law 40 of July 7, 2004.

In this sense, it should be noted that the WHO Framework Convention on Tobacco Control aims **to protect present and future generations against the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to smoke** providing a framework for tobacco control measures to be implemented by parties at the national, regional and international levels in order to continuously and substantially reduce the prevalence of tobacco use and exposure to tobacco smoke. Hence, its guiding principles consist of:

**“Principle 1. Effective measures to provide protection from exposure to tobacco smoke**, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment. There is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence. Approached other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke.

**Principle 2. All people should be protected from exposure to tobacco smoke.** All indoor workplaces and indoor public places should be smoke free.

Principle 3. **Legislation is necessary to protect people from exposure to tobacco smoke.** Voluntary smoke free policies have repeatedly been shown to be ineffective and do not provide adequate protection. In order to be effective, legislation should be simple, clear and enforceable.

Principle 4. **Good planning and adequate resources are essential for successful implementation and enforcement of smoke free legislation.**

Principle 5. **Civil society has a central role in building support for and ensuring compliance with smoke free measures, and should be included as an active partner in the process of developing, implementing and enforcing legislation.**

Principle 6. **The implementation of smoke free legislation, its enforcement and its impact should all be monitored and evaluated.** This should include monitoring and responding to tobacco industry activities that undermine the implementation and enforcement of the legislation, as specified in Article 20.4 of the WHO Framework Convention.

Principle 7. **The protection of people from exposure to tobacco smoke should be strengthened and expanded, if necessary; such action may include new or amended legislation, improved enforcement and other measures to reflect new scientific evidence and case-study experiences.**

That the Executive Report prepared by the National Directorate for the Provision of Services of the Ministry of Health concluded that through the National Survey of Health and Quality of Life, **in Panama in 2007 9.4% of the Panamanian population of 18 years and more consumed some tobacco product, which means that for 2009 a total of 205.277 people consumed these products; and the expenses incurred in the care of patients affected by said consumption was assessed in an estimated health expense of one hundred and five million balboas with 22/100 (B/.105,000,000.22)**, in treatment of patients with cancer associated with tobacco, consultations, hospitalization, hiring of environmental sanitation inspectors to monitor the standards, and health promotion and education (World Health Organization, Executive Report prepared by the National Directorate for the Provision of Services of the Ministry of Health, National Survey of Health and Quality of Life, Panama, 2007, [http://search.who.int/search?q=tabco&ie=utf8&site=who&client=es\\_r&proxystylesheet=es\\_r&output=xml\\_no\\_dtd&oe=utf8](http://search.who.int/search?q=tabco&ie=utf8&site=who&client=es_r&proxystylesheet=es_r&output=xml_no_dtd&oe=utf8)).

That the World Health Organization report on the Global Tobacco Epidemic, 2015, concluded that the advancements promoted by the WHO Framework Convention on Tobacco Control and the consistency in the application of the measures of the MPOWER plan in the last decade has helped protect 40% of the world's population thanks to at least one MPOWER measure applied with the utmost rigor, including a total ban on tobacco advertising, promotion and

sponsorship. As the process of adopting and implementing effective tobacco control strategies continues, countries can look to other countries that have successfully pushed their policies to the level of best practice for inspiration and guidance (World Health Organization, World Health Organization Report on the Global Tobacco Epidemic, 2015, [http://www.who.int/tobacco/global\\_report/2015/summary/es](http://www.who.int/tobacco/global_report/2015/summary/es) .

In merit of the foregoing, this Chamber is of the opinion that the adoption of a prohibition to display tobacco products and their derivatives on dispensers, stands and any other shelves located at the points of sale **is not intended to hinder the sale of the tobacco product and its derivatives in commercial establishments, but not to exhort their consumption**, since the Panamanian State has as a priority to guarantee the health of its citizens, as established in our **Political Constitution of the Republic of Panama**, in Article 109, which provides that the **function of the State is to ensure the health of the population of the Republic, considering that 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 this as the complete physical, mental and social well-being.**

It should be noted that the **Constitution of Colombia** also establishes the State to guarantee the health of the population, as observed in Article 49, which states: *“Health care and environmental sanitation are public services in charge of the State. **Everyone is guaranteed access to services of health promotion, protection and recovery.** It is the responsibility of the State to organize, direct and regulate the provision of health services for the inhabitants... and to establish the policies for the provision of health services by private entities and exercise surveillance and control”.*

In addition to the fact that, through Law No. 23 of July 15, 1997, Panama adopted the Legal Framework of the World Trade Organization (WTO), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Protocol of accession of Panama to said Agreement together with its Annexes and list of commitments; **internal legislation is adapted to international regulations and other provisions are issued**, it is stated in Article XX called "General Exceptions", numeral b, of the General Agreement on Customs Tariffs and Trade (GATT 1947), **that no provision of the Agreement should be**

**interpreted in order to prevent the adoption of measures necessary to protect public health and the life of people and animals or to preserve plants.**

On the other hand, **the right to life** is defined in our domestic legislation through Law No. 15 of October 28, 1977, which approves the American Convention on Human Rights (Article 4), the **broad interpretation of which includes the obligation to guarantee the right to health of the people.**

Henceforth, the Inter-American Court of Human Rights has specified that everyone has the right to have their life respected, hence it has stated in the following terms: "*The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible.*" 1, and that "***States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur***" 2. (1. Case of the "Street Children" (Villagrán Morales et al.), Judgment of November 19, 1999, Series C No. 63, paragraph 144. 2. Case of the Barrios Family v. Venezuela. Merits, Reparations and Costs. Judgment of November 24, 2011. Series C no. 237, para. 48.)

For these reasons, the State, through the Ministry of Health, which has the responsibility to protect its population from disease and death caused by tobacco consumption, within its legal powers and in strict legality, **decided to modify the measures to safeguard the health of the population, establishing a ban on displaying tobacco products and their derivatives on dispensers, stands and any other shelves located at points of sale, as a preventive measure to combat one of the greatest threats to public health , because the consumption of tobacco, according to the World Health Organization, kills almost six million people a year, that is, to protect public health and people's lives.**

Hence, although Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that the use of a trademark or brand of commercial operations will not be unjustifiably complicated with special requirements, **there is a public health justification for imposing the entire ban on all tobacco advertising, promotion, or sponsorship.**

Unofficial Translation

Consequently, this Chamber is of the opinion that **the regular use of the brand is not violated**, by dictating by means of Executive Decree No. 611 of June 3, 2010 the prohibition of displaying tobacco products and their derivatives in dispensers, stands and any other shelves located at the points of sale.

In merit of the above, the charges of violation of Articles 3, 14, and 19 (numeral 2) of Law No. 13 of January 24, 2008, Article 337 of the Civil Code, Articles 1, 35 and 36 of Law 45 of October 31, 2007, Articles 89 and 101 of Law No 35 of May 10, 1996, and Articles 34, 25 and 36 of Law No 38 of July 31, 2000 are dismissed.

In merit of the foregoing, the Third Chamber of the Supreme Court of Justice, administering justice on behalf of the Republic and by authority of the Law, **DECLARES THAT Executive Decree No. 611 of June 3, 2010, issued through the Ministry of Health, IS NOT ILLEGAL.**

**BE IT NOTIFIED,**

**ABEL AUGUSTO ZAMORANO**

JUSTICE

**CECILIO CEDALISE RIQUELME**

JUSTICE

**LUIS RAMÓN FABREGA S.**

JUSTICE

**KATIA ROSAS**

SECRETARY