

Montevideo, July 24, 2019

REGARDING:

For the Final Judgment of the Court of First Instance these proceedings entitled: "La Republicana S.A. and other v. State - Executive Branch – AMPARO" IUE 2-29205/2019

WHEREAS:

1. The amparo action is promoted by virtue of the Executive Branch Decree No. 120/2019 by the *Compañía Industrial de Tabacos Montepaz S.A.* and *La Republicana S.A.* They understand that the Decree No. 120/2019 issued by the Executive Branch is illegitimate and deserves to be annulled, remaining without effectiveness and vigor in the national legal system. While the administrative procedure resulting from the lodging of the appeal is being processed, the decree injures or at least threatens current and more imminent rights recognized by the Constitution, for which its suspension is due. The natural jurisdictional body, the Administrative Court, is the one to whom we should request the suspension of the decree, but action cannot be taken until the administrative route is exhausted. The usual judicial or administrative mechanisms for the effective defense of rights are inefficient. The norm under attack is not a matter of punctual compliance (as was, for example, the prohibition of smoking in indoor spaces) because although it has a specific date of coming into effect, for the companies involved it represents enormous logistical efforts (withdrawal from the market of current boxes, printing, and distribution of the product with new packaging) which determines the incontestable inefficacy of the usual remedies provided by the legal system. The decree regulates the plain packaging and labeling of all tobacco products, prevents tobacco companies from using their logos and distinctive signs in apparent violation of their property and industry rights, and hinders or at least makes it difficult for consumers to identify the products they consume, in apparent violation of their right to health, precisely which is what is claimed to be protected. The decree, lacking in excess of any legal basis and violating the Constitution

by abuse and deviation of power, maintains greater illegality and unconstitutionality and is the one that prohibits informing that this product contains such tenors of nicotine, tar and carbon monoxide, prohibiting them to specify their quantities, as previously indicated. The fact that the Executive Branch has surpassed the law, multilateral and bilateral international treaties on industrial property, the regulations, the opinion of the Executive Branch, the opinion of the State Attorney, and opinion professors means that the contested decree must be annulled for the violation of the Constitution and the legal and regulatory norms in effect; and also for the violation of power and the unnecessary extension referred to and other deceptive and limiting demands of the individual rights it generates to 100%. The decree is manifestly illegitimate because of the subject matter it regulates and the limitations on the freedom of industry and commerce it establishes, since these are aspects reserved to the law, understood as a legislative act dictated in accordance with the constitutional norm. The content of the norm is also contrary to various laws and international conventions, which as such take precedence over decrees and ordinances. The Executive Branch is acting as the Legislative Branch, when in our country only the Legislative Branch can issue legislative acts and cannot delegate this function to another State branch. The packaging policy laid down in the legislation under attack is not useful for the protection of political health, but, on the contrary, has a negative impact on it because it makes it easier for counterfeiters and smugglers to do their job. That is why the characteristics of the current packaging protect the consumer in a better way than the confusing packaging that the new regulations are intended to establish. In short, it is requested that the execution of Executive Branch Decree No. 120/2019 of 04/29/2019 be suspended until the Administrative Court decides on the suspension of the act that will be requested of it.

2. The parties were summoned to a hearing on June 13, 2019; where **the defendant replied in writing and stated in a hearing that:** "...the amparo formulated, must basically be rejected for two reasons, namely: in the first place, the extremes required by Law 16011 for the formulation of the proposal made are not verified in the type, all of which has been extensively developed by our part while answering the amparo brought. Secondly, the suspension of the execution of the rule in question (decree 120/2019) does not proceed to the extent that said rule is legitimate, it was dictated according to law, to the

Constitution, and to the national legal norms, as well as to the norms of international order that were incorporated to our juridical ordering by means of the corresponding regulation (this is also the object of an extensive explanation on our part in the reply brief). Finally, and as it is credited in its opportunity, the sanctioned norm, as only objective the control and regulation of the consumption of tobacco, to take care of the public health, being this one of the main objectives pursued, not only by Uruguay but by the whole world". In a hearing, the parties were ratified, conciliation was held, the subject matter of the proceedings and the evidence was established, evidentiary measures were arranged, and a supplementary hearing was called, which is held from pages 172 to 174. The parties pleaded at the hearing of July 19, 2019, being to the hearing signal of dictation of the final sentence for the day of the date.

TAKING INTO CONSIDERATION:

1. The purpose is to suspend the execution of Decree No. 120/2019 of the Executive Branch of April 29, 2019, as it is manifestly contrary to the Constitution, the law and international conventions. It establishes provisions common to the plain packaging and labeling of all tobacco products with respect to the color of the packaging which must be unique, uniform; to trademarks and other distinctive signs which must be incorporated in a single and uniform style of font, size, position and color; the trademark on such packaging corresponding to a single presentation of tobacco products, prohibiting the use of terms, descriptive elements, figurative signs, logos, among others. This to the effect that a particular product is less harmful than another. It also deals with different forms of advertising, understanding that it must not contain decorative elements, devices that make sound, produce a different aroma to that of tobacco, among others. With regard to the labeling, it indicates where the barcode should be located and its shape and color. It also modifies article 1° of decree 287/009 of 07/15/2009. It also stipulates with respect to the warnings used on tobacco product packages, images, programs and legends, these shall occupy the top 80% of both main sides of any cigarette box, and in general of all packs and packaging of tobacco product. Then, it regulates the packaging and labeling of cigarettes, their shape, and size. The material with which they are manufactured, the

location of the brand, the wrapping of each cigarette, the presentation of the cartons of cigarette packages, packet of armed tobacco and their material, location of the respective brands. There is a chapter for the packaging and labeling of other tobacco products. And at the end, it repeals Decree 235/2008 of 08/06/2008 and the Ordinance of the Ministry of Public Health N° 696 of 08/17/2018. Its article 18 establishes the moment in which it will begin to be in effect, indicating 12 months from the promulgation of Law 19723 of December 21, 2018.

2. We must consider whether we are faced with the situation described in **art. 1° of the referred law: "Any natural or legal person, public or private, may deduct the amparo action against any act, omission or fact of the state or parastatal authorities, as well as of individuals who, in their current or imminent form, in their judgment, injure, restrict, alter or threaten, with apparent illegitimacy, any of their rights and freedoms expressly or implicitly recognized by the Constitution (article 72), with the exception of cases in which the appeal of "habeas corpus" is filed..."**.
3. In our legislation, there is a contentious of the annulment of an administrative act that is filed before the Administrative Court; the challenge of such acts makes the examination of its legality. **It is in the field of administrative acts where the guarantee of protection is in effect as they are covered by the principle of immediate enforceability, which is not suspended when administrative resources are raised.** In such a case, **it is evident that the ordinary recursive route is not an effective remedy in the protection of the rights since many times the enforceability produces greater damage or imminence of the damage.** -That is why our law requires that illegitimacy be apparent and affect in a current or imminent manner; injure or restrict, alter or threaten the rights and freedoms recognized expressly or implicitly by the Constitution of the Republic (art. 72) with the exception of habeas corpus.- **Even more when it has occurred to the recursive route in order to exhaust the administrative route and to promote later the annulment action before the Administrative Court, the amparo action can be raised in time in order to avoid the expiration established in art. 4 of Law 16011.**

4. As for the **suspension of the act, this can be obtained by promoting the annulment process before the Administrative Court at the request of the plaintiff based on arts. 2 and 3 of Law 15869.** "Art. 2°. **The Administrative Court, at the request of the plaintiff, which must be formulated with the claim and after a six-day transfer to the defendant, may decree the temporary suspension, total or partial, of the execution of the challenged act, provided that it is likely to cause the plaintiff serious damages, the scope, and entity of which exceed those that the suspension could cause to the organization and functioning of the body involved.** The possibility of receiving the corresponding compensation shall not preclude the Tribunal, in the circumstances of the case, from ordering the suspension. **Such suspension may also be ordered by the Court when, in its judgment, the contested act appears, initially, as manifestly illegal.** The Court's decision, in this case, will be without prejudgment". "Art. 3°. Once the suspension of the act has been decreed, it shall remain in effect from its notification to the defendant until the conclusion of the proceedings, but the Court may, at the request of a party or ex official and at any time during the proceedings, **in view of new circumstances, leave it without effect or modify it.."**- **This does not imply that the amparo action cannot occur to prevent the damage that the aforementioned act will cause when it begins to unfold its legal effects before the intervention of the Administrative Court.-** That is why the book of Dr. Luis Alberto Viera - Graciela Bello - Selva Klett - Graciela Berro on Amparo, clearly sets out that **"The complainant remains unprotected during the entire period of initiation of administrative appeals, whose exhaustion is an essential requirement for the annulment claim before the Administrative Court. It is easy to understand that if the injury to the objector's right is immediate to the execution of the act, the stage of the exhaustion of the administrative act and the subsequent annulment before the Administrative Court can render harmless the common or ordinary means of objection..."** (op. cit., p. 28).- Article 7 of Law 16011 establishes the possibility of disposing provisional measures pertaining to the amparo of the right or freedom allegedly violated. **"If from the demand or at any other time of the process results, in the Judge's opinion, the need for his immediate action, he shall provide, provisionally, the measures that correspond in amparo of the right or freedom allegedly violated."**

5. From the working evidence, it appears that in the case Law 19723 of 12/21/2018 was promulgated; previously Decree 235/2018 of 08/06/2018 was in effect, and there was a draft law on "Packaging and Labelling of Tobacco Products." Already the law 18256 of 03/06/2008 in its 8th article refers in specific provisions to the labelling and packaging of tobacco products. **As mentioned, in this case, the Executive Branch issued Decree 120/2019 once the legal norm No. 19723 had been promulgated, replacing the wording of art. 8° mentioned above.** It is worth mentioning that the competent Legislative Branch already restricts what is related to the packaging and labeling of tobacco products. **"Article 1 - Article 8 of Law No. 18256 of March 6, 2008, is replaced by the following: (Packaging and labeling).- It shall be prohibited on packages and labels of tobacco products to promote them in a false, misleading or deceptive manner or to mislead as to their characteristics, health effects, risks or emissions. Provision is made for neutral or generic packaging, labelling and design of all tobacco products and uniformity of packaging for each type of product, with the aim of reducing the attractiveness of the product to the consumer, eliminating tobacco advertising and promotion, avoiding the possibilities of misleading or deceiving the consumer that one product is less harmful than another, and increasing the visibility and effectiveness of health warnings. The regulations shall determine the shape, color, material, size and design of all packaging and wrapping of tobacco products on the outside and inside; the text, color, style and font size and the location or position of the legends or inscriptions on the packaging, as well as any aspect deemed necessary for the pursuit of the objectives pursued by this Act, its amendments, concordant and complementary regulations".** In merit to it, the Decree 120/2019 of the 04/29/2019 published the 05/09/2019 is dictated.- **It is therefore ostensible that Article 36 of the Constitution of the Republic has been complied with which states:** "Every person may engage in work, cultivation, industry, commerce, profession or any other lawful activity, except for the limitations of general interest established by laws."
6. Consequently, as it was said, we must determine whether we are in the presence of the requirements demanded by Law 16011, and especially of the so-called "manifest illegitimacy". **The jurisprudence has said about it (2° shift Administrative Court -**

Sentence No. 157 - Dr. Jorge Omar Chediak, dated 6/6/2007.) **"In view of the foregoing, ...the Court has long held that "it is shared that the qualification of "manifest" attached to the requirement of legitimacy set forth in Article 1 of Law No. 16011 requires that the offense invoked must stand out and show itself reliably... manifestly is equivalent to "clear, notorious, undoubted, unequivocal, certain, ostensible, obvious". (Cf. BIDART CAMPOS, *Legal Regime and Jurisprudence of Amparo in the Field of Administrative Contentious Jurisdiction*, p. 254-255; VESCOVI, *Origin and Budgets of the Amparo Action in the Field of Contentious Administrative Jurisdiction*, RUDP, 4/86 p. 490; VIERA, *The law of amparo*, p. 22; SAGUES, *Amparo Action*, p. 115 et seq.; RUDP 2/90 case 444, 449, 454, 455; 1/91 case 498). Therefore, in this process, the cognition of the Judge should be limited exclusively to capturing illegality if it emerges on the surface of the conflict, if it is clearly and forcefully exteriorized, if it manifests itself, but should never dive into it, scrutinize it in the way it should in another type of litigation (RIVAS - *About the New Uruguayan Amparo Law*, *Judicatura Journal*, 1989, numbers 25-26, p. 42) (Judgment of the Court No. 42/97 in RUDP, year 1998, No. 3-4 p. 424, case 515; also sentences No. 11/96 and 77/96 in 1997, No. 3, p. 386, case 504 and 505)." (Judgment of Chamber No. 1/2003 in *Uruguayan Journal of Procedural Law*, 2005, No. 1, p. 219, case 652). In this sense, the Judgment drafted by Dr. Tabaré Sosa of 2° shift Administrative Court No. 112/2009 of 6/10/2009 says: "In effect, it coincides fully with the concept developed in the previous instance, which coincides with that of the dominant jurisprudence, on manifest illegitimacy, objective element of the amparo ex-law 16011.**

Thus, the Court in sentence 174/07 has expressed in concepts that are ratified in the current integration: **"The apparent illegitimacy demanded by art. 1 of Law 16011, imposes the need that the denounced defect possesses an entity of such magnitude that it is possible to recognize it without the least analysis, given the summary of the procedure. A vice that must be unequivocal, incontestable, notorious, etc. (Sagues, Néstor: *Amparo Action* p. 115 et seq; Palacio, Lino: *Civil procedural law* T. VII p. 144). The court must limit itself exclusively to capturing illegality if it comes to the surface of the conflict, if it is exteriorized with clarity and forcefulness, if it is**

apparent; but it must never seek it, scrutinize it with the manner in which it must do so in other types of litigation (RIVAS, *About the New Uruguayan Amparo Law*, *Judicatura Journal*. No. 25-26 p. 42; RUDP 2-3/94 c. 697 - Administrative Court 5°)".

7. It is known that within the objective elements established **by the amparo law, we must be in the presence of an act, fact or omission of the Administration, but we do not foresee the presence of such elements.** The only thing that can call the attention is the term granted by the Regulatory Decree of one year from the promulgation of **the legal norm No. 19.723 of the 12/21/2018 for the fulfillment of the provisions for the plain packaging and labeling of tobacco products.**
8. We believe that **the industry was already aware of Decree 235/2018 of 08/06/2018 and the Ordinance of the Ministry of Public Health No. 696 of 08/17/2018 regarding packaging and labeling provisions.** -Moreover, the industry was also aware of the Executive Branch bill sent to the Legislative Branch regarding the issue at hand. All this leads us to conclude that the constitutive elements of the action of protection have not been given, and therefore, its rejection is appropriate.

For these reasons;

THE COURT,

Orders the following measures:

1. **Dismiss the amparo action. Without special indictment.**
2. **Notional fees \$ 100,000 (Uruguayan pesos one hundred thousand) for the part not exonerated.**
3. **If not appealed, file.**

Document signatures:

Electronically signed by:
PABLO ARTURO EGUREN CASAL
Judge Capital

Unofficial Translation

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