REPUBLIC OF THE PHILIPPINES
NATIONAL CAPITAL JUDICIAL REGION
REGIONAL TRIAL COURT
BRANCH 196
PARAÑAQUE CITY

TELENGTAN BROTHERS & SONS, Inc., Doing business under the name and style LA SUERTE CIGAR AND CIGARETTE FACTORY,

Plaintiff,

- versus -

CIVIL CASE NO. 10-0277

THE HON. SECRETARY OF HEALTH ENRIQUE T. ONA and THE DEPARTMENT OF HEALTH,
Defendant.

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ORDER

Posed for consideration is petitioner's, Telengtan Brothers and Sons Inc. *(Petitioner for short) application for issuance of a writ of preliminary injunction* adverted to in its Amended Petition dated July 27, 2010 seeking to enjoin public respondent, the Department of Health (DOH) represented by its Secretary Enrique T. Ona (Public respondent for brevity) in implementing Administrative Order No. 2010-0013 (AO 2010-13) dated May 12, 2010 issued by former Secretary of Health, Esperanza I. Cabral, an administrative order essentially seeking to regulate labeling of tobacco products to include pictographs while proposing to delete particular descriptors.

In filing the amended petition for declaratory action, petitioner submit that public respondent issued Administrative Order No. 2010-0013 requiring local manufacturers and/or distributors of tobacco products to undertake printing of additional graphical health information in the packages of tobacco products, furthermore, cause to be eliminated from cigarette labels certain descriptors[1] presumed to be misleading informations in violation of Republic Act 9211 of June 23, 2003, the Act Regulating Packaging, Use and Sale of Tobacco Products,[2] if at all, the act of public respondent was exercised beyond the authority granted by law. Petitioner consider the present regulatory issuance a deprivation of property and should be enjoined by the court.[3]

Public respondent submission oppose the petition and prayed for the dismissal thereof.

The proceedings in court.

1 Ibid. Paragraph 25
2 Paragraph 23 & 24 of Amended Complaint dated July 27, 2010
3 Ibid. paragraph 35

On July 12, 2010, petitioner filed a petition for declaratory relief seeking an interpretation of Administrative Order No. 2010-0013 in relation to Section 13 (g) of the Tobacco Regulation Act of 2003 (RA 9211) before the implementation of the former issuance on September 8, 2010 attributing the arbitrary issuance of the administrative order upon the grounds: (a) it amended the existing law; (b) the same was issued beyond and in excess of authority of public respondent; and (3) the regulatory measure is a deprivation of the property right of petitioner to the distribution of its merchandise.

On July 12, 2010, this court issued an order setting the case for hearing on petitioner's application for a writ of temporary restraining order (TRO) for July 22, 2010.

On July 22, 2010, after due hearing, sans the appearance and comment of public respondent, this court issued an order denying petitioner's application for issuance of a TRO, which order reads:

> "Posed for consideration is plaintiff, Telengtan Brothers & Sons, Inc.'s application for issuance of a writ of preliminary injunction adverted to in its Petition dated June 23, 2010. Despite the period granted upon public respondent, the Department of Health, neither public respondent not the General Counsel filed any comment nor appeared before the proceedings in this Court, for which the same is considered waived. The incident is now submitted for resolution.
>
> It is the bone of contention by petitioner that under Republic Act 9211 of June 23, 2003, "Act Regulating Packaging, Sale, 'Advertisement of Tobacco products", the implementing agency on advertisement of tobacco merchandise devolves upon the inter-agency committee headed by the Secretary of the Department of Trade and Industry, the Vice-Chairmen for a Secretary of Health, along with eight (8) members of the committee as enumerated therein. Which committee has sole authority and prerogative in enforcing the provision of law, particularly Sec. 13 thereof, on printed warning on tobacco packaging distributed in the Philippines. That, on May 12, 2010, former Secretary of Health, Esperanza I. Cabral issued Administrative Order 2010-0013 requiring a graphic information be incorporated to tobacco product packagers,, with the intent of insuring information on the nature of tobacco products distributed in the country. Said administrative order allegedly violates the authority of the tobacco inter-agency committee on tobacco product under R.A. 9211 and, goes beyond by adding on more restrictions in the distribution and advertisement of tobacco products allegedly, to the prejudice of petitioner herein. It is petitioner's submission that grave and irreparable damage would arise in connection to the enforcement of Administrative Order 2010-0013, notwithstanding the penal provision thereof which might stand to be violated by petitioner requiring a declaratory action for the purpose, for which an injuntive should be issued against the Department of Health prior to the definition of the

assailed Administrative Order 2010-0013.

Given the line of submission by petitioner hereto, whereas this Court would have to determine the intention of a statute and an administrative order, as well as the nature of the petition posed before it culminating into an interpretation of a regulation where circumstances and material facts relevant to the enforcement of an administrative order. It is best that this Court determine such circumstances in a trial for the purpose as not to pre-empt the very nature of an action which an interpretation of an administrative order. If and when this Court would have to define possibly the coverage and the extent of an administrative issuance by respondent Department of Health (DOH), at this time, there could be no finer determination of a very right in esse which would stand to be violated in favor of a petitioner for which reason, as not to pre-empt the very principal issue of this petition, the same would have to be determined in the main merits of this case, to render the application pre-mature.

Perusing the averments to the petition and the appended documents thereto, the assailed Administrative Order 2010-0013 which might have been issued by former Secretary Esperanza I. Cabral, whereas petitioner has yet to implead a proper substitution of an indispensable party to this case, particularly the newly designated Secretary of Health who remains to be unnamed to the filing of this petition, this Court does not acquire jurisdiction upon a party against whom a relief is sought to be secure, to militate on the application.

For what is sought to be enjoined is a possible penal sanction which has yet to take its operative effect sometime in the early September 2010, as a penal provision has yet to be made operative and for which the possible violation would still have to be determined in consonance to a petitioner who has not brought itself within the ambit of its operation, the rouse of petitioner of a possible violation of a law becomes a little bit imaginary, in the meantime, and would not stand to prejudice petitioner to this action. Whereas injunction would never be utilized to enjoin a prospective circumstance or act, for which reason, the instant application would have to be denied.

As this Court has yet to determine what implementing rules and regulations has been issued to the enforcement of R.A. 9211, the exercise of authority that may be derived therefrom would have to be meticulously litigated to determine a possible abuse of exercise thereof. Such matter is purely evidentiary and would never be determined, as it could not be determined in these proceedings, for which reason, the application must fail.

WHEREFORE, premises considered, the petitioner's application for issuance of a writ of preliminary injunction adverted

In its Complaint dated June 23, 1010 is herewith DENIED for lack of merit.

SO ORDERED."

On July 28, 2010, petitioner filed an amended petition for declaratory relief *averring that:*

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5. The Honorable Secretary of Health is sued in his official capacity as the Department Head in charge of implementing Administrative Order subject matter of this petition. The recently appointed Secretary of Health is the Hon. Enrique T. Ona, while the previous Secretary who executed the questioned Administrative Order is the Hon. Esperanza I. Cabral. The incumbent Secretary of Health holds office at the San Lorenzo Compound, Rizal Avenue, Sta. Cruz, Manila, where he may be served summons, notices, orders and other process of this Court.

6. Respondent is the administrative agency of the government charged with promoting the health policies thereof. It holds office at the San Lazaro Compound, Rizal Avenue, Sta. Cruz, Manila, whereit may be served with summons, notices, orders and other processess of this Court.

7. Petitioner is a manufacturer of cigarette products. A copy of petitioner's Articles of Incorporation, inclusive of amendments, is attached as Annex "B" with submarkings.

8. Among its cigarette brands are "Astro", "Canon", and "Memphis" which are currently sold to domestic and foreign markets.

9. On 23 June 2003, the Tobacco Regulation Act of 2003 was enacted into law. This became effective on 13 July 2003. A copy of Republic Act No. 9211 is attached as Annex "C". A copy of its implementing Rules is attached as Annex "D".

10. The pertinent provisions of the Tobacco Regulation Act of 2003 are as follows:

    Section 3. Purpose – It is the main thrust of this Act to:

    a. Promote a healthful environment;

b. Inform the public of the health risks associated with cigarette smoking and tobacco use;

c. Regulate and subsequently ban all tobacco advertisements and sponsorships;

d. Regulate and labeling of tobacco products;

e. Protect the youth from being initiated to cigarette smoking and tobacco use by prohibiting the sale of tobacco products to minors;

f. Assist and encourage Filipino tobacco farmers to cultivate alternative agricultural crops to prevent economic dislocation; and

g. Create an Inter-Agency Committee on Tobacco (IAC-Tobacco) to oversee the implementation of the provision of this Act.

Section 13. Warning on Cigarette Packages – Under this Act:

a. All packages in which tobacco products are provided to consumers withdrawn from the manufacturing facility of all manufacturers or imported into the Philippines intended for sale to the market, starting 1 January 2004, shall be printed, in either English or Filipino, on a rotating basis or separately and simultaneously, the following health warnings are:
"GOVERNMENT WARNING: Cigarette Smoking is Dangerous to Your Health,
"GOVERNMENT WARNING: Cigarettes are Addictive;
"GOVERNMENT WARNING: Tobacco Can Harm Your Children"; or
"GOVERNMENT WARNING: Smoking Kills."

b. Upon effectivity of this Act until 30 June 2006, the health warning shall be located on one side panel of every tobacco product package and occupy not less than fifty percent (50%) of such side panel including any border of frame.

c. Beginning 1 July 2006, the health warning shall be on the bottom portion of one (1) front panel of every tobacco product package and occupy not less than thirty percent (30%) of such panel including any border or frame. The text of the warning shall appear in clearly legible type in black text on a white background with a black border and in contrasts by typography, layout or color to the other printer materials on the package. The health warning shall occupy a total area of not less than fifty percent (50%) of the total warning frame.

d. The warning shall be rotated periodically, or separately and simultaneously printed, so that within any twenty-four (24) month period, the four (4) variations of the warnings shall appear with proportionate frequency.

e. The warning shall not be hidden or obscured by other printed information or images, or printed in a location where tax or fiscal stamps are likely to be applied to the package or placed in a location where it will be damaged when the package is opened. If the warning to be printed on the package is likely to obscured or obliterated by a wrapper on the package, the warning must be printed on both the wrapper and the package.

f. In addition to the health warning, all packages of tobacco products that are provided to consumers shall contain, on one side panel the following statement in a clear, legible and conspicuous manner: "NO SALE TO MINORS" or "NOT FOR SALE TO MIONORS." The statement shall occupy an area not less than ten percent (10%) of such side panel and shall appear in contrast by color, typography or layout with all other printed material on the side panel.

g. No other printed warnings, except the health warning and the message required in this Section, paragraph F shall be placed on cigarette packages.

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Section 29. Implementing Agency – An Inter-Agency Committee – Tobacco (IAC-Tobacco), which shall the exclusive power and function to administer and implement the provision of this Act, is hereby created. The IAC-Tobacco shall be chaired by the Secretary of the Department of Trade and Industry (DTI) with the Secretary of the Department of Health (DOH) as Vice-Chairperson. The IAC-Tobacco shall have the following members:

a. Secretary of the Department of Agriculture (DA);
b. Secretary of the Department of Justice (DOJ);
c. Secretary of the Department of Environment and Natural Resources (DENR);
d. Secretary of the Department of Science and Technology (DOST);
e. Secretary of the Department of Education (DepEd);
f. Administrator of the National Tobacco Administration (NTA);
g. A representative from the tobacco industry to be nominated by the legitimate and recognized associations of the industry; and

h. A representative from a non-government organization (NGO) involved in public health promotion nominated by DOH in consultation with with the concerned NGO's;

The Deparment Secretaries may designate their undersecretaries as their authorized representatives to the IAC.

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Section 32. Penalties – The following penalties shall apply:

a. Violation of Section 5 and 6 – On the first offense, a fine of not less than Five Hundred Pesos (P500.00) but not more than One Thousand (Php1,000.00) shall be imposed.
On the second offense, a fine of not less than One Thousand Pesos (P1,000.00) but not more than Five Thousand Pesos (P5,000.00) shall be imposed.
On the third offense, a fine of not less than Five Thousand Pesos (P5,000.00) but not more than Ten Thousand Pesos (P10,000.00), the business permits and licenses to operate shall be cancelled or revoked.

b. Violation of Sections 7, 8, 9, 10 and 11 – On the first offense, any person or any business entity or establishment selling to, or distributing or purchasing a cigarette or any other tobacco products for a minor shall be fined the amount of not less than Five Thousand Pesos (P5,000.00) or an imprisonment of not more than thirty (30) days, upon the discretion of the business licenses or permits in the case of a business entity or establishment. If the violationis by establishment of business entity, the owner, president, manager, or the most senior officers thereof shall be liable for the offense. If a minor is caught selling, buying or smoking cigarettes or any other tobacco products, the provisions of Article 189 of Presidential Decree No. 603 otherwise known as The Child and Youth Welfare Code, as amended, shall apply.

c. Violation of Section 13 to 27 – On the first offense, a fine of not more than One Hundred thousand pesos (Php100,000.00) or imprisonment of not more than one (1) year, or both, at the discretion of the court shall be imposed. On the second offense, a fine of two hundred thousand pesos (Php200,000.00) or imprisonment of not more than two (2) years, or both, at the discretion of the court shall be imposed. On the third offense, in addition to a fine of not more than four hundred thousand pesos (Php 400,000.00) or imprisonment of not more than three (3) years, or both at the discretion of the court, the business permits and licenses, in the case of a business

entity or establishment shall be revoked or cancelled. In the case of a business entity or establishment, the owner, president, manager or officials thereof shall be liable. If the guilty officer is an alien, he shall summarily be deported after serving his sentence and shall be forever barred from re-entering from the Philippines.

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Section 39. Repealing Clause – DOH Administrative Orders No. S. 1993 and No. 24 s. 1993 are hereby repealed. Article 94 of Republic Act No. 7394 as amended, otherwise known as the Consumer Act of the Philippines, is hereby amended. All other laws, decrees, ordinances, administrative orders, rules and regulations, or any part thereof, which are consistent with this Act are likewise repealed or amended accordingly.

11. On 24 May 2010, respondent issued Administrative Order NO. 2010-0013.

This became effective on 10 June 2010.

12. The pertinent provisions of Administrative Order No. 2010-0013 are as follows:

I. OBJECTIVES

It is the policy of the State to promote the right to health of all the people and instill health consciousness among them. The State affirms this as one of their fundamental rights of a human being. Towards this end, the State shall implement effective measures to achieve the following objectives:

a. Provide necessary information about the health consequences, addictive nature, and mortal threat posed by tobacco consumption and exposure to tobacco smoke through measures that scientifically proven to be effective in increasing public awareness of the health effects of tobacco use and in reducing tobacco consumption;

b. Protect consumers from deceptive labels, packaging, descriptions and practices related to tabacco use;

c. Implement measures to prohibit means that are false, misleading, deceptive or likely to create an erroneous impression about the characteristics of tobacco, its health effects, hazards or emissions, so as to promote tobacco products in tobacco product packages.

To achieve these objectives, the Department shall ensure that effective, distinct, and highly visible graphic health information is placed on tobacco product packages.

Moreover, the Department shall ensure that tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product and its characteristics, health effects, hazards or emissions.

II. SCOPE AND COVERAGE

These policies and guidelines shall apply to all tobacco products and to all tobacco manufacturers, importers, exporters, wholesalers, distributors, retailers, concessionaires, and other sellers of tobacco products, as well as their agents and representatives, which are operating, existing, and/or found within the Republic of the Philippines.

III. DEFINITION OF TERMS

a. Graphic Health Information – means statements, and/or other information, accompanied by related full color pictures or pictograms, which inform about the contents and substances, in descriptive form, of tobacco products as well as inform against health dangers and other problems related to tobacco products, tobacco consumption, exposure to tobacco smoke, or other effects of tobacco use.

b. Tobacco Product Package meansthe packet and package of tobacco products and any outside packaging and labeling of tobacco products for sale, distribution, exportation, importation, trade, exchange or exhibition, such as, but not limited to, packs, tins, boxes, pouches, flip-tops, slide and shell packages, cartons, transparent wrappers, clear packaging, packages containing one product unit, master cases, or other containers of tobacco products.

c. Tobacco Products means products entirely or partly made of leaf tobacco as raw material, which are manufactured to bused for smoking, sucking, chewing or snuffing, or by any other means of consumption.

d. Insert means any communication inside an individual packages and/or carton purchased at either wholesale or retail by consumers, such as a leaflet or brochure.

e. Onsert means any communication affixed to the outside of an individual package and/or carton purchased at either wholesale or retail by consumenrs, such as a brochure beneath the outer cellophane wrapping or glued to the outside of the cigarette package.

IV. SPECIFIC PROVISIONS

The Department hereby promulgates the following rules and regulations governing packaging and labeling of tobacco products.

A. Graphic Health Information

1. Scope of Graphic Health Information – Each unit packet and package of tobacco products, including packages inserts and onserts, and any outside packaging and labeling of such products for sale, distribution or importation within the country, shall bear large, clear, visible and legible full-color graphic health information, as attached in Annex 1.
2. Size and Position of Graphic Health Information – The graphic health information shall occupy the upper portions of each tobacco product packet or package and no less than thirty percent (30%) of the front panel and sixty percent (60%) of the back panel (or all corresponding panels of the unit packet or package if in non-standard packaging) in a manner that ensures maximum visibility.

3. Rotation – There shall be a minimum of eight (8) variations of graphic health information that shall appear concurrently within a twenty-four month period. The variations shall appear on an equal number of retail tobacco and product packages for each brand and for each package size and type.

4. Transitions – During transition periods, when an old set og graphic health information is being replaced by a new set, there shall be a phrase-in period of sixty (60) days between sets of graphic health information, during which time both sets may be used concurrently.

5. Templates – The templates of graphic health information, which contain specific printing and other requirements, shall be issued by the Department on its own, or upon consultation with organizations with

established track record of, and expertise in public health policies and duly recognized by the Department as such. The template(s) shall be approved by the Secretary within thirty (30) days from its submission and shall be deemed automatically approved if not acted upon thereafter.

6. Strict Adherence – The tobacco manufacturers, importers, exporters, wholesalers, distributors, retailers, concessionaires, and other sellers, shall strictly follow the templates and shall submit their packagings and labeling for approval to the Department no later than three (3) months before they are to be used. The Department shall act on the packaging and labeling of the unit packet and package of tobacco products within thirty (30) days from its submission and shall be deemed automatically approved if not acted upon thereafter.

B. Misleading Descriptors

1. General Prohibition – Each unit packet and package of tobacco and products, including package inserts and onserts, and any outside packaging and labeling of such products for sale, distribution or importation within the country shall not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign (including colors, images or numbers) or any packages or product design feature that directly or indirectly create or are likely to create the false impression that a particular tobacco product or brand is less harmful than any other tobacco product or brand.

Use of misleading descriptors on tobacco products packages such as, but not limited to, "low tar", "light", ultra-light", "mild", "ultra", and similar terms in any language that might mislead consumers, is prohibited. Use of corresponding symbols or colors signifying the same is also prohibited. No misleading descriptor shall be used as part of a brand name or trademark for tobacco products introduced after the effectivity of this Order.

2. Prohibition on Misleading information –

information that might imply that one variant or brand is safer than the other is prohibited, such as statements indicating that the tobacco product contains "reduced levels" of contents, substances, and emissions. Figures for emission yields, such as for tar, nicotine and carbon monoxide, shall be prohibited, including when used as part of a brand name or trademark.

V. COMMON PROVISION

1. Compliance – Tobacco product packages that do not comply with this Order shall be prohibited after ninety (90 days) from the effectivity of this Order. Non-complaint products must be withdrawn no later than such date. Absolutely no extension of time to comply with the provisions of this Order shall be granted to tobacco manufacturers or any other affected party."

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"WHEREFORE, petitioner respectfully prays that:

1. Upon filing of the petition, that its application for preliminary injunction be immediately set for hearing;

2. Upon hearing of the application for preliminary injunction, a Writ of Preliminary Injunction be issued enjoining respondent from implementing and enforcing Administrative Order No. 2010-0013;

3. And thereafter, to declare Administrative Order No. 2010-0013 null and void;

Other relief just or equitable is likewise prayed for."

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On July 28, 2010, public respondent filed a motion to dismiss dated July 27, 2010 moving for the dismissal of the case upon the ground that: (1) the court does not have jurisdiction as the issuance is purely an administrative implementation of a treaty stipulation; (2) the issuance is in order under the framework of the convention on tobacco control (FCTC); (3) property right must yield to police power; (4) petition lacks the requisites for declaratory relief.

On August 19, 2010, this court ~~issued~~ the admission of the amended petition for declaratory action, for which, petitioner caused the withdrawal of its motion for reconsideration dated August 4, 2010, while, public respondent caused the withdrawal of its motion to dismiss dated July 27, 2010.

On even date, public respondent filed a comment opposing the application for issuance of a writ of preliminary injunction and moved for the dismissal of the petition, pertinent portions of the comment reads as follows:[4]

"On 4 September 2005, following its ratification through the concurrence of two-thirds of the Philippine Senate in accordance with the Constitution, the FCTC was transformed into municipal law. As such , the FCTC became legally binding upon state organs.

Article 11 of the FCTC provides:

Article 11

Packaging and labeling of tobacco products

1. Each party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

a. tobacco product packaging or labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about it's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light , "ultra-light", or "mild"; and

b. each unit packet and package of tobacco products and any outside packaging and labeling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

4 p. 6 Opposition dated August 20, 2010

(iii) shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

(v) may be in the form of or include pictures or pictograms.

2. Each unit packet and package of tobacco products and any outside packaging and labeling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.

3. Each party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labeling of such products in its principal language or languages.

4. For the purposes of this Article, the term "outside packaging and labeling" in relation to tobacco products applies to any packaging and labeling used in the retail sale product.

The inclusion of a specific time frame of three years in Article 11 underscores the mandatory and prescriptive nature, as well as the exigency, of the Philippines' obligation to adopt and implement effective measures in compliance with the said provision.

On 25 May 2010, then Secretary of Health, Dr. Esperanza I. Cabral issued Administrative Order (AO) No. 2010-0013 directing tobacco manufacturers, importers, exporters, wholesalers, distributors, retailers, concessionaires and other sellers of tobacco products to, among others, comply with the following:

a. the requirement to place graphic health information on tobacco product packages; and

b. the prohibition on the use of misleading *descriptions or information.*

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On 28 July 2010, petitioner filed its Amended Petition dated 27 July 2010 *impleading DOH Secretary Enrique T. Ona* as respondent in the instant case which was admitted by the Honorable Court in an Order dated 19 August 2010.

ARGUMENTS

I

A. O. NO. 2010-0013 WAS ISSUED PURSUANT TO THE DOH'S AUTHORITY TO ISSUE RULES AND REGULATION.

II

THE ISSUANCE OF AO 2010-0013 IS IN ACCORD WITH THE FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC),

III

THE FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC) IS A SELF-EXECUTING TREATY.

IV

THERE IS NO IRRECONCILABLE CONFLICT BETWEEN AO 2010-0013 AND OTHER EXISTING NATIONAL LEGISLATION.

V

UNDER THE CONSUMER ACT, THE DOH MAY ISSUE ADDITIONAL LEBELLING AND PACKAGING REQUIREMENTS TO PREVENT DECEPTION OF CONSUMERS.

VI

PROPERTY RIGHTS MUST YIELD TO THE COMPELLING NECESSITY TO ADDRESS HEALTH PROBLEMS CAUSED BY TOBACCO SMOKING.

VII

THE PETITION LACK THE REQUISITES FOR A DECLARATORY RELIEF.

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The Philippines is also a signatory of the Vienna Convention on the Law of Treaties, which it signed on 23 May 1969. The Philippines ratified the convention on 15 November 1972 that entered into force on 27 January 1980.

Sections 26 and 27 of the Convention provide the rules that State parties should observe with respect its bilateral and multilateral agreements:

Article 26

Pacta sunt servanda

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal Law and Observance of Treaties

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Petitioner argues that the only basis for the issuance of the assailed AO is the FCTC which is not a law.

Petitioner's argument must fail.

Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.

For a treaty to be valid and effective, two things must coincide – was entered into force by its own provisions and it has been concurred by the Senate. The FCTC was signed by the President on 23 September 2003, and concurred in by the Senate on 22 February 2005. Having been ratified by the President and concurred in by the Senate in compliance with the Philippine Constitution, in 2005, FCTC became a part of the Philippine Laws and became binding in the Philippines.

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The issuance of A.O. No. 2010-0013 is pursuant to the framework Convention on Tobacco Control (FCTC), a legally binding treaty that has for several years now, formed part of the law of the land of the Philippines, which requires the use of graphic health information and prohibits the use of descriptors.

The FCTC is a public health treaty tha requires parties to adopt a comprehensive range of measures to combat the damaging effects of tobacco. It reaffirms the inherent and constitutional right to health of all Filipinos. Dean Merlin M. Magallona ("Dean Magallona"), one of the very few recognized international law experts in the Philippines, introduces the FCTC as follows:

> After its adoption by the 56th World Health Assembly in May 2003, the Who Framework Convention on Tobacco Control (WHO FCTC) was opened for signature until 29 June 2004. During this period, 168 states signed the WHO FCTC...This response of the international community demonstrates clearly that it one of the most widely embraced treaties in the United Nation's history, owing to the fact that it is an evidence-based treaty re-asserts the right of all people to the highest standard of health. The Conference of the parties to the WHO FCTC describes conference of the parties to the WHO FCTC describes the regulatory strategy it embodies as a "paradigm shift"...to address "addictive substances," such as tobacco; it gives importance in the Convention to "demand reduction strategies as contained in Articles 7 and 11..."

The FCTC mandates the adoption of new policies that are not limited to the enactment of legislation alone. For one, Article 5.1 of the FCTC mandates parties to develop, implement periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with the FCTC. Article 5.2(b) of the FCTC provides that towards this end, each Party shall, in accordance with its capabilities:

> ...adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.
> [Emphasis added]

The obligation of the Philippines is more specifically amplified in Article 7 of the FCTC, which mandates States Parties to "adopt and implement effective legislative,

executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13" *i.e.*, including Article 11 on Packaging and labeling. Article 7 of the FCTC provides:

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Petitioner argues that the FCTC is not self-implementing and could not therefore be used as basis by an administrative body to make law."

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Likewise, Article 79 of the consumer Act provides that if the Department determines that regulations containing requirements are necessary to prevent the deception of the consumer, it may issue additional labeling and packaging requirements. The pertinent section provides:

> Art. 79. Authority of the Concerned Department to Provide for Additional labeling and Packaging Requirements. – Whenever the concerned department determines that regulations containing requirements other than those prescribed in Article 77 hereof are necessary to prevent the deception of the consumer or to facilitate value comparisons as to any consumer product, it may issue such rules and regulations to:
>
> (a) establish and define standards for characterization of the size of a package enclosing any consumer product which may be used to supplement the label statement of net quality, of contents of packages containing such products but this clause shall not be construed as authorizing any limitation on the size, shape, weight, dimensions, or number of packages which may be used to enclose any product;

The provision provides for instances when such regulations may be released. However, it must be stressed that the purpose of the law, as enshrined under Article 3, is to consider the best interest of the consumers in the interpretation and implementation of the Act, including its implementing rules and regulations. Thus, Article 79 should not be considered as exclusive enumeration of the regulations that the Department may issue.

Article 79(a) also provides the Department can establish and define standards for characterization of the size of the package which may be used to supplement the label of th product. Hence, it may use the package to place additional measures to supplement the label such as graphic health

information on cigarette packs. This is not only in accordance with the Department's mandate under the Consumer Act but also in conformity with its obligations under the FCTC.

Petitioner argues that RA 9211 already supplants Republic Act 7394 of the Consumer Act of the Philippines, being a later and special law governing tobacco regulation and tobacco labeling and packaging. Section 39 of RA 9211 provides:

> Section 39. Repealing clause –DOH Administrative Orders No. 10 s. 1993 and No. 24 s. 1993 are hereby repealed. Article 94 of the Republic Act No. 7394, as amended, otherwise known as the Consumer Act of the Philippines, is hereby amended. All other laws, decrees, ordinances, administrative orders, rules and regulations, or any part thereof, which are consistent with this Act are likewise repealed or amended accordingly.

This is incorrect and misleading. RA 9211only expressly repealed Article 94 of the Consumer Act with respect to specific warnings for tobacco products but not the other provisions. RA 9211 does not and could not have possible stripped the Department of its power to protect the consumers against hazards to health and safety, deceptive, unfair and unconscionable sales acts and practices, and facilitate sound choice and the proper exercise of consumer rights.

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The administrative order was issued by DOH as part of its constitutionally mandated and therefore positive duty as above-quoted to promote and protect the right to health. Together with recent scientific and medical data, and international standards and legislation, the administrative order fulfills the constitutional duty to to adopt an integrated and comprehensive approach to health development.

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An actual controversy must be an existing case or controversy that is appropriate or ripe for determination, and not merely conjectural or anticipatory. Here, petitioner trifles with legal processes and invokes the court's discretionary power with nothing more than a conjectural and anticipatory controversy.

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Assuming, completely for the sake of argument, that this claim is correct, then the appropriate remedy that petitioner should have first exhausted is to seek redress

before the IAC-T instead of immediately resorting to the courts, since it is convinced that "regulation...of tobacco products fall within the sole and exclusive jurisdiction of a 'specialized agency' under RA No. 9211, which is the IAC-T."

Having failed to avail of the adequate administrative remedy, petitioner cannot now be permitted to invoke the jurisdiction of the regular courts. Consequently, petitioner has no cause of action and the condition precedent to file the judicial action has not been complied with.

Non-exhaustion of an administrative remedies render the action premature, the claimed cause of action is not ripe for judicial remedies and for that reason a party has no cause of action to ventilate in court.

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PRAYER

WHEREFORE, it is respectfully prayed that the instant petition be DISMISSED for lack of merit.

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On August 31, 2010, petitioner filed a reply to the opposition.

On September 2, to the hearing on the application for preliminary injunction, petitioner waived the presentation of further evidence and submitted the incident upon the evidence based on submission, pleading and stipulations of the parties to the case.

On September 7, 2010, public respondent presented Under Secretary Alex Padilla of the Department of Health who testified on his participation to the crafting of the assailed administrative order and the underlying purpose and reason behind the same identifying twin tobacco packaging materials with graphic warnings for export to Thailand by the Philip Morris Philippines,[5] Memorandum Circular No. 1 Series of 2008 on Guidelines on Tobacco Regulations and Implementing Rules and Regulation,[6] submitting a copy of the WHO Framework Convention on Tobacco Control dated May 21, 2003 and a copy of the FCTC implementing guidelines. It is the submission by said witness that Article 7 in relation to Article 11 of the FCTC covenants permit an immediate implementation ob none-price measures on demand of tobacco products and able permit public respondent to issue an order to protect primarily youth in the country which is now the thrust of distribution by tobacco manufacturers. And, as a responsibility of the DOH, what was the shortcoming of the statute (RA 9211) in dealing with graphic notices was sought to be covered by the same administrative order of the Department, if only to comply with the covenant

5 Exhibit 1 and 2
6 Exhibit 3

entered into by the State under Article 11 of the FCTC.

The incident is now submitted for resolution.

DISCUSSION

Initially, the nature of the petition is not square point a petition for declaratory action but a petition seeking to invalidate an administrative order issued by public respondent. As the averments in the petition determines the nature thereof whereby a court is not bound by the nomenclature to the title of the pleading, and it would be prudent of this court to assume the case revolving upon the validity of existing laws in relation to an assailed administrative order issued by public respondent, and to make a judicial determine of the factual and legal basis bordering on the regularity and validity of an executive issuance.

Incidentally, this court takes judicial notice of the existence and validity of Republic Act 9211 (RA 9211), the Act Regulating the Packaging, Use, Sale of and Advertisement of Tobacco Products of June 23, 2003. Parties adopted the material provisions thereto along with fact of effectivity thereof, over which, this court has to simply understand meaning of the contents thereof covering printed warnings on cigarette packages distributed in the country.

On the tobacco law, particularly section 13 of RA 9211 which requires to be printed by cigarette manufacturers and distributors of cigarette products of health warnings in the "english" language or "filipino" dialect to be located on rotating basis on a panel section of tobacco package of such printed government warnings along with restriction of sale on minors, said extent of a health warning is already defined by the definition of terms of the law to include visual images or "pictograph" in addition to messages. This is so considering visual images or "pictograph" are part and parcel of print form of advertisements that well goes into the packaging materials used on tobacco products, which considerably permitted by under the law. The nature of the printed and graphical warnings in tobacco packages are already imbued into the passage of the law.

To the petition at hand.

As a rule of evidence, the provision of Section 4 of Rule 129 of the Revised Rules of Court, which states:

> **Section. 4 - Judicial admissions. An admission, verbal or written, made by a party in the course of the proceedings in the same case does not require proof. The admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made.**

Judicial admissions may be made in: (a) the pleadings filed by the parties; (b) in the course of the trial either by verbal or written manifestations or stipulations; or, (c) in other stages of judicial proceeding.7

Thus, the facts pleaded in the amended petition, the motion, comment, complimented by the submissions of parties in court are deemed admissions of plaintiffs cause and are not permitted to be contracted to the contrary, 8 and are binding to public respondent.9

It is beyond cavil, born by the submission and pleadings in the records of this case that, petitioner Telengtan Brother's and Son's is a domestic corporation existing under domestic laws with official address as Kilometer 14, South Super Highway, Paranaque City, which company is engaged in the manufacture of tobacco brands among others: "Astro", "Canon" and "Memphis" branded cigarettes with a current distribution in the domestic and foreign markets.

Indisputably, AO 2010-0013 was exclusively issued by public respondent in recognition of Article 11 of the Framework Convention on Tobacco Control (FCTC) which is a public health treaty under the World Health Organization (WHO) requiring the labeling of tobacco products to include pictographs, as "approved by competent national authority" showing the health hazards to tobacco products. The specific provisions of the administrative order provides:

"V. SPECIFIC PROVISIONS

The Department hereby promulgates the following rules and regulations governing packaging and labeling of tobacco products:

A. Graphic Health Information

1. Scope of Graphic Health Information – Each unit packet and package of tobacco products, including package inserts and onserts, and any outside packaging and labeling of such products for sale, distribution or importation within the country shall bear large, clear, visible, and legible full-color graphic health information, as attached in Annex 1.

2. Size and Position of Graphic Health Information – The graphic health information shall occupy the upper portions of each tobacco product packet or package and no less than thirty percent (30%) of the front panel and sixty percent (60%) of the back panel (or all corresponding panels of the unit packet or package if a non-standard packaging) in a manner

7 Regalado, Remedial Law Compendium, Vol. II, 1997 p. 650
8 Moran, Comments on the Rules of Court, Volume V, 1980 p. 64
9 Republic v. Sandiganbayan, Ferdinand Marcos, et al. GR No. 152154 July 15, 2003 p 85

that ensures maximum visibility.

3. Rotation – There shall be a minimum of eight (8) variations of graphic health information that shall appear concurrently within a twenty-four (24) month period. The variations shall appear on an equal number of retail tobacco product packages for each brand and for each package size and type.

4. Transitions – During transition periods, when an old set of graphic health information is being replaced by a new set, there shall be a phase-in period of sixty (60) days between sets of graphic health information , during which time both sets may be used concurrently.

5. Templates - The templates of graphic health information, which contain specific printing and other requirements, shall be issued by the Department on its own, or upon consultation with organizations with established track record of, and expertise in public health policies and duly recognized by the Department as such. The templates shall be approved by the Secretary within thirty (30) days from its submission and shall be automatically approved if not acted upon thereafter.

These templates shall be issued by the Department every two (2) years or as the need for it arises.

6. Strict Adherence – The tobacco manufacturers, importers, exporters, wholesalers, distributors, retailers. concessionaires, and other sellers, shall strictly follow templates and shall submit their packagings and labellings for approval to the Department no later than three (3) months before they are to be used. The Department shall act upon the packaging and labeling of the units packet and package of tobacco products within thirty (30) days from its submission and shall be deemed automatically approved if not acted upon thereafter.

B. Misleading Descriptors

1. General Prohibition – each unit packet or package of tobacco products, including package inserts and onserts, and any outside packaging and labeling of such products for sale, distribution and importation within the country shall not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign (including colors, images or numbers) or any package or product design features that directly or indirectly create or are likely to create the false impression that a particular tobacco product or brand is less harmful than any other tobacco product or brand.

Use of misleading descriptors on tobacco products packages such as, but not limited to, "low tar", "light", ultra-light",

"mild", "ultra", and similar terms in any language that might mislead consumers, is prohibited. Use of corresponding symbols or colors signifying the same is also prohibited. No misleading descriptor shall be used as part of a brand name or trademark for tobacco products introduced after the effectivity of this Order.

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VI. COMMON PROVISIONS

1. Compliance – Tobacco product packages that do not comply with this Order shall be prohibited after ninety (90 days) from the effectivity of this Order. Non compliant products must be withdrawn no later than such date. Absolutely no extensions of time to comply with the provisions of this Order shall be granted to tobacco manufacturers or any other affected party.

Imported tobacco products meant to be sold in the Philippines, even if they are in product packages that carry graphic health information compliant with the country of origin shall comply with this Order within thirty (30) days from this Order's effectivity.

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VII. VIOLATIONS

The Department, or any office designated by the Secretary of Health, shall investigate any reported violations of this Order, and after due notice and hearing, if found responsible thereof, apply such administrative sanctions and penalties, including seizure, recall and condemnation, where appropriate, on the concerned manufacturers, importers, exporters, wholesalers, distributors, retailers. Concessionaires, sellers, or other concerned individuals/entities."

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On the purely legal issue raised to this court.

The pivotal issue posed to this court is whether or not visual images or pictograph on government warnings of cigarette products, in addition to existing printed warnings, can be well be determined and simply enforced by public respondent through the issuance of EO 2010-0013 under existing laws.

This is answered in the negative.

The Revised Administrative Code did not expressly grant the DOH to *issue regulation to implement the covenant of the FCTC.* *As insisted by* public respondent,[10] the issuance of the foregoing administrative order, is founded on the authority of the Department of Health enumerated under Section 3 Chapter I of Title IX of the Revised Administrative Code (EO 292) which allegedly grants the Secretary of Health to administer all laws, rules and regulation in the field of health, while mandated to present proposals to appropriate authorities on national issues which have health implications to the general public. The material provisions of the administrative code provides, viz:

"Sec. 3. Powers and Functions – the Department shall:

1. Define the national health policy and formulate and implement a national health plan within the framework of the government's general policies and plans, and present *proposals to appropriate authorities on national issues which* have health implications;

2. Provide for health programs, services, facilities and other *requirements as may be needed, subject to availability of* funds and administrative rules and regulations;

3. Coordinate and collaborate with, and assist local communities, agencies and interested groups including international organizations in activities related to health;

4. Administer all laws, rules and regulations in the field of health, *including quarantine laws and food and drug safety* laws;

5. Collect, analyze and disseminate statistical and other *relevant information on the country's health situation, and* require the reporting of such information from appropriate sources;

6. Propagate health information and educate the population on *important on important health, medical and environment* matters which have health implications;

7. Undertake health and medical research and conduct training in support of its priorities, programs and activities;

8. Regulate the operation of and issue licenses and permits to *government and private hospitals, clinics and dispensaries,* laboratories, blood banks, drugstores and such other establishments which by the nature of their functions are required to be regulated by the Department;

9. Issue orders and regulations concerning the implementation of established health policies; and

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10 p. 12 Motion to dismiss dated July 27, 2010; p. 8 Comment dated August 20, 2010

10. Perform such other functions as may be provided by law."

Sifting through the enabling authority of the DOH as provided for under Section 3 (4) Chapter I of Title IX of EO 292, there is no expressed provision or implied understanding of the Revised Administrative Code authorizing public respondent Secretary of Health to issue an administrative order to cause immediate implementation of foreign convention stipulation of the FCTC under the WHO considering it is only mandated to administer and enforce existing laws in the local forae. Moreover, under Section 3 (1) of the same Code, provides that any additional policy direction and planned action of the Health Department as may be proposed to be implemented through the provisions of the assailed administrative order have yet to be formulated and proposed to appropriate authorities involving issues of health implications, by dictum of said section of the law. Aforegoing, a hasty issuance of AO 2010-0013 without conforming to Section 3 of Chapter I of Title IX of EO 292 is a clear violation of the Code bordering on a prematurity of action by public respondent. This limitation on the authority of public respondent as a criteria under EO 292, requiring a propositional activity by the Department of Health, is even envisioned and specifically embodied in the whereas clause of AO 2010-0013 when it signified the manner of labeling tobacco products in such language and form as it could be "approved by competent national authority. Clearly, with the proviso of EO 292 at hand, public respondent arrogated to itself in implementing through a simple administrative issuance a foreign convention stipulation on health warnings covering pictographs in tobacco labels without securing from the proper national authority in government a policy guideline and approved action plan to render the issuance infirmed.

Section 7 of the FCTC covenant directed the manner for adopting and implementing graphic warnings. It must be pointed out, public respondent in quoting Section 7 of the Framework Convention on Tobacco Control (FCTC) in relation to Article 8 and 13 thereof, had practically enumerated the manner with which an adaptation and implementation of the foreign covenant can be undertaken, viz:[11]

> **"The parties recognize that comprehensive non-price measures are an effective and important means of reducing tobacco consumption. Each party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles."**
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> (Underlining Supplied)

The aforementioned FCTC proviso expressly mentioned the manner with which a party State may adopt and implement effective "legislative, executive,

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11 p. 16 Comment dated August 20, 2010

administrative or other measures necessary to implement it obligations pursuant to Article 8 and 13", which classified into itself the manner with which any action of a State would be undertaken. In enumerating a legislative or executive exercise of rule making authority, the FCTC proviso would have envisioned the necessity of an enabling law by act of congress or possibly the exercise of executive ordinance power in implementing a foreign covenant, even before an administrative issuance can be undertaken to implement such foreign covenant. This is gleaned from the enumeration makes such designation under Article 7 of the FCTC. Otherwise, the power to implement by administrative issuance would and should not have followed the enumeration after the congressional or possibly an executive rule making prerogative. Moreover, the category of an administrative issuance by a line agency of government does not stand in equal footing with the legislative and if ever an executive ordinance power, as understood in point of law, and will never bring itself into a spring which is higher that the source to a hierarchy of statutes, executive issuance or an administrative act to enforce an international covenant. Significantly, public respondent is mistaken in considering that an ordinary departmental issuance can be easily issued without assuring itself of an enabling law from legislator or possibly thru an executive directive.

It can be gainsaid that the convention of the FCTC in providing Article 7 as foreign treaties stipulation granted host government the implementation of the covenants between member states through the existing legislative, executive and administrative local authorities of host member state, and, acknowledges the successive manner of implementation of a foreign covenants governing regulations to labeling of tobacco products. The very existence of the enumeration in Article 7 of the FCTC is the defining manner in implementing a foreign agreement and did not consider the covenants to the foreign agreement self-executory, as it referred to the legislation and the executive prerogative as means of effecting the covenant. Had it been the case, the very Article 7 of the FCTC as a covenant should not have existed at all if the administrative authority is equally classified similarly to a legislative and/or executive rule making authority. But since the same article exist as a treaties stipulation, even public respondent should haver been guided in the the manner with which foreign covenants can be implemented by dictum of the very covenant itself. It would appear that Article 7 of the FCTC was not meticulously ascertained by public respondent resulting to the misapplication thereof.

It must be pointed out, that even the implementing guidelines on the legal measures on Article 11 of the FCTC posed by general undertaking that parties for host State should consider as an issue as to whom is responsible for the administrative implementation of packaging materials and labeling measures, be that a "relevant responsible authority", which guideline did not squarely designate public respondent as the sole relevant authority to undertake the covenant on tobacco control, which guidelines provide:

> "Drafting
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> In drafting legal measures with respect to tobacco product packaging and labelling, Parties should consider issues such as who will be responsible for their administration, the available approaches for

ensuring compliance and enforcement , and the level *or levels of government involved.*

Administration

Parties should identify the authority or authorities *responsible for overseeing implementation of tobacco* product packaging and labelling measures. Parties should consider ensuring that the relevant authority responsible for tobacco control matters is the same as that which the administers the legal measures. In the event that the administration is made the the responsibility of another area of government, the *relevant health authority should provide input into* label specification."

However, for a guideline which is subordinated to the FCTC covenant as *an enabling treaty stipulation, the provision on Article 7 of the FCTC already gave* a direction to the hierarchy of government functionaries responsible in providing legal measures to implement the covenants of the Convention, as it is reasonably discussed before hand. Again, *it has to be emphasized that, in the absence of* an expressed directive from the covenants of the FCTC to pubic respondent, there should be an enabling law by legislation or possibly an executive directive to determine the purpose and the coverage of a regulatory measure before a *simple administrative issuance could have been issued by public respondent.*

The argument of public respondent citing the legal opinion of Dean Merlin M. Magallona in his commentaries in Introduction to International Law in Relation to Philippine Laws (1999 Edition)[12] is of no moment considering that public *respondent could not even set out any particular provision of the* FCTC convention expressly providing the application of a foreign treaties to be self executory in this forae through a direct issuance of an administrative order. *Definitely, it is not article 7 of the FCTC treaties stipulation which is being* asserted by public respondent. The maxim of pactu sun servanda becomes more appropriately to be heeded by public respondent under the circumstances, however, is not properly articulated and understood under the circumstances.

Ergo, the arrogation of authority by public respondent aforesaid can not create a protection in law and should not be countenanced by the court.

This court can not give premium to public respondents reference to Article *79 of RA 7394 otherwise known as the Consumer Act*[13] *to allegedly authorize the* Department of Health to prevent deceptive advertising on consumer goods when the aforecited law was issued to aid the Department of Trade and Industry (DTI) in enforcing regulations to protect the consuming public from defective goods, misrepresentation and deception in the sale thereof of unlawful activities to the distribution of consumer products. The Consumer Act is based on the underlying purpose covering consumer goods which is within the realm of administrative

12 p. 16-25 Opposition dated August 20, 2010
13 p. 25 Ibid.

exercise of the Secretary of Department of Trade and Industry (DTI) on "product hazards" to consumers and would not stand to be implemented by a different agency of government which is interested predominantly in "health hazards" of the public. Public respondent can not acclaim implementation of the provisions of the consumer act as it is best reserved for the proper agency of government, beyond the public health concerns of the Department of Health.

The question arises, which agency of government is considered the appropriate authority.

The Inter-Agency committee on Tobacco (IACT) is the regulatory body tasked in implementing regulations on the distribution of tobacco products. Section 13 in relation to 29 of RA 9211 of June 23, 2003 creating the Inter-Agency Committee on Tobacco (IACT) granted said agency exclusive power and function to implement the provisions of the law regulating the sale, advertisement and distribution of tobacco products, to which, public respondent is a standing member to date. The law provides:

"Section 13. Warning on Cigarette Packages – Under this Act:

a. All packages in which tobacco products are provided to consumers withdrawn from the manufacturing facility of all manufacturers or imported into the Philippines intended for sale to the market, starting 1 January 2004, shall be printed, in either English or Filipino, on a rotating basis or separately and simultaneously, the following health warnings are:
"GOVERNMENT WARNING: Cigarette Smoking is Dangerous to Your Health,
"GOVERNMENT WARNING: Cigarettes are Addictive;
"GOVERNMENT WARNING: Tobacco Can Harm Your Children";
or
"GOVERNMENT WARNING: Smoking Kills."

b. Upon effectivity of this Act until 30 June 2006, the health warning shall be located on one side panel of every tobacco product package and occupy not less than fifty percent (50%) of such side panel including any border of frame.

c. Beginning 1 July 2006, the health warning shall be on the bottom portion of one (1) front panel of every tobacco product package and occupy not less than thirty percent (30%) of such panel including any border or frame. The text of the warning shall appear in clearly legible type in black text on a white background with a black border and in contrasts by typography, layout or color to the other printer materials on the package. The health warning shall occupy a total area of not less than fifty percent (50%) of the total warning frame.

d. The warning shall be rotated periodically, or separately and simultaneously printed, so that within any twenty-four (24) month period, the four (4) variations of the warnings shall appear with proportionate frequency.

e. The warning shall not be hidden or obscured by other printed information or images, or printed in a location where tax or fiscal stamps are likely to be applied to the package or placed in a location where it will be damaged when the package is opened. If the warning to be printed on the package is likely to obscured or obliterated by a wrapper on the package, the warning must be printed on both the wrapper and the package.

f. In addition to the health warning, all packages of tobacco products that are provided to consumers shall contain, on one side panel the following statement in a clear, legible and conspicuous manner: "NO SALE TO MINORS" or "NOT FOR SALE TO MIONORS." The statement shall occupy an area not less than ten percent (10%) of such side panel and shall appear in contrast by color, typography or layout with all other printed material on the side panel.

g. No other printed warnings, except the health warning and the message required in this Section, paragraph F shall be placed on cigarette packages.

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Section 29. Implementing Agency – An Inter-Agency Committee – Tobacco (IAC-Tobacco), which shall the exclusive power and function to administer and implement the provision of this Act, is hereby created. The IAC-Tobacco shall be chaired by the Secretary of the Department of Trade and Industry (DTI) with the Secretary of the Department of Health (DOH) as Vice-Chairperson. The IAC-Tobacco shall have the following members:

a. Secretary of the Department of Agriculture (DA);
b. Secretary of the Department of Justice (DOJ);
c. Secretary of the Department of Environment and Natural Resources (DENR);
d. Secretary of the Department of Science and Technology (DOST);
e. Secretary of the Department of Education (DepEd);
f. Administrator of the National Tobacco Administration (NTA);
g. A representative from the tobacco industry to be nominated by the legitimate and recognized associations of the industry; and
h. A representative from a non-government organization (NGO) involved in public health promotion nominated by DOH in consultation with with the concerned NGO's;

The Department Secretaries may designate their undersecretaries as their authorized representatives to the IAC."

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When the law is clear and unequivocally provide the regulatory measure and the

implementing personalities for the same, the law will have to be simply enforced without qualification. Unfortunately was not heeded by public respondent.

It would be an understatement for public respondent to disregard Section 29 of RA 9211 creating the IACT when the broad spectrum of social relevancy of tobacco sale, distribution, advertisement is left for the policy determination by the IACT, which collegial body determines as a matter of policy and plan of activity means of regulating the distribution of tobacco products. It can not be overly emphasized that the existence of Section 29 of RA 9211 is a delimitation to the authority of the Department of Health to exclusively undertake policy formulation and plan activities for tobacco regulation under Section 3.1 Chapter I of Title IX of EO 292 by force of statute, given the expressed intention and meaning of the law. Unfortunately, was disregarded by public respondent to render the assailed AO 2010-0013 to have been issued in excess of authority, without drawing policy guideline and plan framework from the IACT which board was created by law.

The remaining question arises, assuming arguendo that the public respondent was granted authority to implement added regulations to the advertisement of local tobacco products, was it authorized to expand on the scope of the coverage of deceptive descriptors on tobacco packaging under existing laws.

The public respondent is not authorized.

Public respondent expanded the coverage of RA 9211. Invariably, Section 13 of RA 9211 delimited the scope and manner of undertaking health warnings to be printed on tobacco packages, which law limited itself on various government warnings to be placed in tobacco packaging without reference to misleading descriptors, such descriptors which are are sought to be further regulated by AO 2010-0013. The administrative regulation in question categorized the terms "low tar", "light", "ultra-light", "mild", "extra" or "ultra" as deceptive descriptors which categorization were never embodied or restricted as printed warnings under RA 9211, but were simply added by public respondent in the assailed AO 2010-0013. Understandably, a deficiency in statutory grant which can not be regulated further by public respondent through a simple administrative, the guise of the issuance tantamount to a executive fiat. Moreover, where the law is silent on potential descriptors under paragraph 13 sub-paragraph (g) of the statute, the intention of legislators to the passage of RA 9211 can only be found on the enumerated restriction and regulatory activities in the law, "verba legis". Otherwise, to permit a expanded regulatory measure not expressly provided for by statute would be considered an intrusion to a plenary function of Congress or the delegated power of issuance of presidential ordinance to issue laws, making the issuance of public respondent beyond its authority by law. Not having a similar mandate by direct fiat from existing laws, public respondent function remains to only the execution of the law and administer the affairs of government, and should have restrained its enthusiasm to sally forth into the domain of legislative action.

Again, for nagging reiteration, assuming that public respondent was authorized to issue such administrative order, the line of proposition therein

attempting to delete misleading descriptors rendered the same administrative order to have been issued in excess authority under existing laws, to render AO 2010-0013 for that point alone invalid.

It is not safe to say that public respondent, in the guise of police power to the implementation of a regulatory measure on tobacco product, can hide behind the exercise of such power, the least limitable of power of Government, when a department of the executive branch of government is duty bound to uphold all existing laws, and to perform its line function within the framework of its mandate. The exercise of police power is not a shield in a judicial proceeding to prevent a court in striking down an issuance of a government agency line of activity when it violates the separation of powers and exceeds the exercise of authority as laid down by law, which is the case of public respondent. The court are duty bound to interpret and uphold the law to bring stability to the enforcement thereof by the government which is mandated to comply with its own laws, as the interpretation and implementation of the law is herewith determined to the issuance of this order.

In sum, this court finds the issuance of Administrative Order No. 2010-0013 by former Secretary of the Department of Health as adopted by public respondent was made without authority under Section 3, Chapter I of Title IX of the Revised Administrative Code or the FCTC Convention, without discounting the circumstances that the said administrative issuance was issued in excess of the authority for violating of Sections 13 and 29 of RA 9211, to consider Administrative Order No. 2010-0013 to be null and void.

FALLO

WHEREFORE, premises considered, this court finds the issuance by public respondent, the Department of Health of Administrative Order No. 2010-0013 dated May 12, 2010 to have been made in violation of existing law, and having been issued in excess of authority, for which, the Petition dated July 27, 2010 of Telengtan Brothers & Sons, Inc. is GRANTED, and Administrative Order No. 2010-0013 dated May 12, 2010 issued by Public Respondent Department of Health is declared NULL and VOID.

SO ORDERED.

Parañaque City, September 8, 2010.

BRIGIDO ARTEMON M. LUNA II
Presiding Judge

BAML/lc