Sentence No. 90/2018 **IUE 2-37586 / 2018**

Montevideo, September 18, 2018

REGARDING:

For the Final Judgment of the Court of First Instance these proceedings entitled: "British American Tobacco Limited v. State - Executive Power – *AMPARO*" IUE 2-37586/2018

WHEREAS:

1. The action is promoted by virtue of the Executive Power Decree 235/2018 issued on August 6, 2018, which introduced an extremely restrictive regime for the presentation of cigarette boxes, eliminating the use of brands and signs characteristic of each company.

   The decree establishes that health warnings will be used in tobacco supply packing, providing plain or generic packaging, labeling, and design of all tobacco products. It gives the Ministry of Public Health the power to determine the color, size, design of all the inside and outside packaging and wrappings of tobacco product, the text, color, style, and size of the font, and the publication or position of the legends of the containers.

   The new regime invades the reserved areas to the law (established in the Constitution), by prohibiting companies that produce or sell tobacco products from using their brands and distinctive signs of each of them.

   The claimant understands that there is no other efficient way of obtaining the same result from the defense against the decree as it is an amparo. This is because the Executive Power did not respond until the time of the requests for suspension of the decree. It will take months before the Administrative Court orders that suspension, when the decree will be in force and mandatory on February 6, 2019.

   Tobacco manufacturers and importers find impossible to observe the decree's implementations. Six months is too short a time to comply with the order, and consequently, the company must withdraw from the market because it cannot fulfill it.

There is obvious illegitimacy because fundamental rights can only be regulated by law dictated by parliament and for proven reasons of general interest.

The decree is contrary to the previous conduct of the Executive Power when it submitted a bill to the parliament with the same content as the decree, and that it was dictated by the delay in approving the bill sent to the parliament.

In that bill, the deadline for the industry to adapt to the new reality is one year and; in the decree, only six months.

The claimant appealed the decree and requested its provisional suspension from the Executive Power on August 31, 2018, asking for an urgent pronouncement on the suspension, on which no response has been obtained. The amparo is the only way to achieve the effective protection of their rights, until access to the jurisdictional protection of the Administrative Court.

The appellant understands that the decree is manifestly illegitimate because it violates the principle of legal reservation against the Constitution and current law.

The doctrine unanimously recognizes that fundamental rights such as property and freedom of trade-industry can only be limited by a law passed by parliament. The principle of legal reservation does not admit exceptions, and it is established in several articles of the Constitution: arts. 7, 10, 36.

The decree does not use any normative foundation that allows the Executive Branch to limit fundamental rights under the pretext of exercising functions of Sanitary Police.

The defendant cites Law 9202, the World Health Organization Framework Convention on Tobacco Control, and Law 18256.

The plaintiff understands that the decree is manifestly illegitimate, restricts and threatens to damage constitutionally protected freedoms imminently. The complainant proceeds the *amparo* because there are no other means that allows the BAT company and the workers to preserve their fundamentally injured rights effectively.

The appellant understands that the act is actionable, and the action was submitted in time by virtue of the fact that in less than 30 days ago BAT knew the decree, so that reaches the period established on article 4, subsection 2 of the law 16011.

The decree was issued on August 6, 2018, and was published in the official gazette on August 15, 2018.

In short, the claimant asks for sustaining the action, suspending the application of the decree concerning the British American Tobacco (South America) Limited Uruguay Branch, until the Administrative Court pronounces on the illegitimacy of the decree or failing that, proclaims itself on the request for provisional suspension of the decree.

2. The parties were called to a hearing on September 11, 2018; where the defendant replied in writing and stated that: "It is appropriate to answer the impetrated claim responding: that the action is inadmissible because the decree 235 of August 6, 2018, was appealed by the party and requested its suspension by administrative procedures at the time of presentation of the writ of appeals, and in writing the party appeared separately reiterating the suspension of the act before the Administration. Days after, the *amparo* was lodged, not giving rise to the instruction of the writings that had been presented. In administrative procedures, the Administration had diligently warned a formal issue that was serving notice, and without having reached to comply with this requirement, the action of *amparo* was filed. In essence, the *amparo* is inappropriate because this decree is not illegitimate in that its content is in agreement with the Law 18256. The decree regulates this law and adds a paragraph to the law's previous regulating decree. Likewise, the Executive Power acting in the exercise of its regulatory power in compliance with the provisions of the Framework Convention on Tobacco Control (law 17793) issues this decree carrying out guidelines that the said Convention established to the States Parties. In the exercise of its regulatory power and fulfilling the role of health police, the Executive Power through this decree regulates the mentioned laws, and therefore, does not invade the sphere of the legislator as alleged by the plaintiff. The measure is reasonable insofar as the guidelines of the framework convention and Law 18256 establish the progressiveness and advance in the adoption of measures to control smoking in order to achieve the goal of a smoke-free environment and its consequences as established by said norm".

   The hearing was held, the parties were ratified, the settlement was tried, the object of the process and the evidence were established; an audience of allegations was convened, which took place on September 17, 2018; the final judgment hearing was scheduled for today.

<u>TAKING INTO CONSIDERATION</u>:

1. That in this way, the petitioner seeks the suspension of Decree No. 235/018 of the Executive Power, as it is manifestly contrary to the Constitution, the law, and international conventions.

   The decree establishes the health warnings that will be used in tobacco products concerning plain or generic packaging, labeling, and design of said products. The decree

grants the Ministry of Public Health the power to determine the form, color, material, size, design of said products in its exterior and interior, text, color, style, and size of the typeface, among others.

The *amparo* pointed out that the decree is impossible to comply with by tobacco manufacturers and importers since they are granted only six months for compliance, for which the BAT Company would have to withdraw from the market.

The complainant requested the decree's provisional suspension in administrative procedures and did not obtain any response. It is understood that this act is the only way to obtain judicial protection prior to the intervention of the Administrative Court in order to avoid damage that would be final.

2. That it must be considered if this is facing the situation described in the art. 1 of the aforementioned law: "Any natural or legal person, public or private, may deduct the action of *amparo* against any act, omission or deed of the state or parastatal authorities, as well as of individuals who in a current or imminent manner, to their judgment, injure, restrict, alter or threaten, with manifest illegitimacy, any of its rights and freedoms expressly or implicitly recognized by the Constitution (art. 72), except in those cases in which the habeas corpus appeal is filed".

3. That it is possible to keep in mind that already in Mexican law, the administrative *amparo* operates as a substitute for the contentious-administrative appeal.

   The *amparo* is used against the resolutions or final acts issued by the current Administration "...whenever the rights of individuals are affected, and it also sets up an appeal of cassation when its purpose is the examination of the legality of administrative court decisions." (Fix Zamudio "*Amparo* Trial" Ed. Parrúa, Mexico, 1964, p. 382 ff.).

4. That in our legislation there is contested of annulment of an administrative act that is filed before the Administrative Court. The impeachment of such acts makes to the examination of its legality.

   It is in the scope of administrative acts where the guarantee of the *amparo* is in force since the *amparo*s are covered by the principle of immediate enforceability not suspended when the administrative resources are raised.

   In that case, it is evident that the ordinary recursive procedure is not an effective remedy in the protection of rights since often executoriness produces more significant damage or imminent harm.

- That is why our norm demands that illegitimacy be manifest and affect in a current or imminent way; injure or restrict, alter or threaten the rights and freedoms recognized expressly or implicitly by the Constitution of the Republic (art. 72) except for the writ of habeas corpus.

- Even more so when the recursive procedures has occurred in order to exhaust the administrative route and subsequently promote the annulment action before the Administrative Court, the *amparo* action may be filed in time to avoid the expiration established in the art. 4 of the law 16011.

5. That referring to 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. 2º. The Administrative Court, at the request of the plaintiff, which must be formulated with the claim and after substantiation with a six-day transfer to the defendant, may order the temporary suspension, in whole or in part, of the execution of the contested act, provided that its execution is liable to cause severe damages to the plaintiff, whose scope and entity exceed those that the suspension may cause to the organization and functioning of the body involved.

   The possibility of receiving the corresponding compensation will not prevent the Court from deciding the suspension, given the circumstances of the case.

   Said suspension might also be decreed by the Court when, in its opinion, the contested act appears, initially, as manifestly illegal. The decision of the Court, in this case, will not imply prejudgment."

   "Art. 3º: Once the suspension of the act has been decreed, it will remain in force from its notification to the defendant and until the conclusion of the process, but the Court, at the request of the parties or upon court's decision and at any time during the process, may, in response to new circumstances, leave it without effect or modify it...".

   - These articles do not imply that the writ of *amparo* cannot occur to prevent the harm that the abovementioned act will cause when it begins to display 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 a*mparo,* 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."

6. That when referring to the suspension of the execution of the act, Emilio Biasco Marino in his book "General *Amparo* in Uruguay" p. 47, says: "The suspension of the execution of the act is a kind of command of not to innovate, with a form of prohibition to comply from now on. The recipient of the order, must abstain or fail to do, which is generally given within an administrative procedure or jurisdictional process. It only has ex nunc effects and does not invalidate the activity carried out until that moment. The suspension of doing proceeds only in relation to the positive facts; but important doctrine and jurisprudence understands that it also proceeds in cases of negative facts...". "...within the *amparo*, precautionary measures can be requested and obtained" (op. cit. pp. 47-48).

7. That with the development of international law since the founding of the United Nations the *amparo* has been promoted or globalized "as a typical fast, simple and effective means to achieve the realization of the enjoyment of rights and freedoms." (op. cit. p.51).

   The Universal Declaration of Human Rights of 12/10/1948 recognized the *amparo* as the right of every subject to an effective appeal before the competent courts, which raises against acts violating fundamental rights.

   The International Covenant on Civil and Political Rights of 12/16/1966 imposes on the states parties the commitment to guarantee to every person their rights and freedoms recognized in the Covenant that had been violated.

   The American Declaration of the Rights and Duties of Man (Bogotá 05/02/1948) points out that a brief and straightforward procedure must be available to protect people against the acts of the authority that violate the fundamental rights constitutionally consecrated.

   The American Convention on Human Rights - Pact of San José de Costa Rica also contains this action establishing that "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of

state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." (op. cit. p.54).

8. That we have seen part of the development of *amparo* in international law that makes the defense of people's constitutional rights.

Notwithstanding this, the art.7 of our fundamental norm establishes the protection of the substantive rights as a guarantee of the subjects' rights and liberties and for that reason it says: "The inhabitants of the Republic have the right to be protected in the enjoyment of their life, honor, freedom, security, work, and property. No one can be deprived of these rights except in accordance with the laws established for reasons of general interest ".

Clearly, the principle of the legal reserve is established to limit these fundamental rights for reasons of general interest.

Regardless of Article 7, the Charter itself mentions this concept in others articles, such as 28, 32, 36, 47, and 300. Not only does this Charter do so, but also different laws are declared of "general interest", as well as 18104 (promotion of equal rights and opportunities between men and women); 17849 (protection of the environment); 17775 (regulation of lead contamination); 17514 (domestic violence); and 13181 (conservation of the Lussich Forest), among many others.

"BRITO points out "the general interest is positively defined by the notion of assistance and support provided to the inhabitants and the smaller social entities for the realization of their purposes (the achievement of their respective perfections). Such character of the general interest involves the recognition of the human's own need and their communities for the action of the politically structured society (the State) to affirm the potentialities of its nature. Therefore, that support and assistance is, primarily, security..." (Mariano Brito, "The Principle of Legality and Public Interest in the Positive Uruguayan Law", L.J.U., Volume 90, 1985.).

In this respect, CARLOS DELPIAZZO has argued that "the limitation cannot be based on any interest but only on the superior general interest -which cannot be the interest of a group or part of the social collective- since it must be widely encompassing", that is, equivalent to the common good understood not as the mere sum of particular goods but as "the set of conditions of social life that enable the individuals and the intermediate communities that they form, the fullest achievement of their perfection." (Carlos Delpiazzo, Uruguayan Administrative Law, p. 7).

The Supreme Court of Justice has expressed that the guidelines that define the general interest are not rigid or unalterable, "but they vary with the evolution of each medium and each era; hence the legislative solutions are not coincidental, and what matters, in

short, is that the new provisions consult the general interest of the moment in which they are dictated, adjusting themselves to the existing political, economic and social conditions". (Judgment No. 12/81).

- In parallel, the guiding principle should also be for the Supreme Court of Justice "reasonableness". By saying of the Corporation: "it is accepted and maintained the criterion that it is the power of the Corporation to apply rules of reasonableness when judging whether the justifying reason of the law is or not based on the concept of general interest. The illustrious maestro Justino Jiménez de Aréchaga already consecrated it, by teaching that, it has been admitted, besides, the possibility that the Supreme Court, in the constitutional comptroller procedures, reviews the reasonableness of that judgment formulated about the convenience of the general interest".

That means, the reasonableness of the reason invoked by the legislator, to limit those rights, according to the general interest and not, on the other hand, reasonableness or opportunity of the legislation itself". (Sentence No. 42/93); "THE GENERAL INTEREST. ARGUMENT TO LIMIT INDIVIDUAL RIGHTS". (ALEJANDRO REY).

9. That our fundamental rule when dealing with the regulation of private activity does not refer to the freedom of business, "although it seems clear that it is implicit in article 36 and, in general, in the regime of freedom established in the Charter". "With the foregoing, it seems mandatory to recognize that our Constitution, with the recognition of property rights and freedom in analysis (constitutive elements of the capitalist mode of production), is located within a market economy framework, although, of course, not in its nineteenth-century conception, but in the scheme of a social state of law" (Martín Risso Ferrand "Constitutional Law. Volume I, 2006, p. 729. F.C.U.).

- Then, the author summarizes on p. 732 that the Social and Democratic State based on the rule of Law protects the freedom of enterprise -art. 36 of the Constitution-, the property right of the inhabitants of the Republic, that can be limited for reasons of general interest, which derives from the regulation of the right to work, protection of the environment, protection of culture, historical patrimony of the nation, etc., "also work appears as a legal right specially protected by the Constitution (...) articles 53 and following, 67..." (op. cit. p. 732).

The author points out that among the normative guarantees, the typical and most common of comparative law and at international level is the principle of legal reserve in the matter of human rights. "Only by formal law, and obviously within the parameters and constitutional provisions, restrictions on fundamental rights may be established" (op. cit. p. 781).

That right of freedom, industry, commerce, profession or any other lawful activity implies only the limitation established by law in the general interest. These reasons of general interest that limit freedom are also set in our fundamental rule in art. 50, subsection 1, referring to foreign trade; art. 50, subsection 2, concerning the State control of trustified commercial or industrial organizations; art. 51, regarding the boost of decentralization policies to promote general development and general welfare; art. 85, concerning the powers of the General Assembly in the protection of individual rights, promotion of learning, agriculture, industry, domestic and foreign trade; what is related to customs and export and import rights, to tourist areas, etc. (p. 715 to 717).

The author culminates making reference to article 36, which establishes that these possibilities that the State has in our constitutional and legal scheme do not imply the exercise of an absolute power of discretion to limit the right to freedom. "...the limitation will make the State civilly responsible and it must compensate the damages caused to third parties..." (p. 719).

10. That from the evidence, it emerges that there are a message and a Bill of the Executive Power relative to the "Packaging and Labeling of Tobacco Products" with the exposition of reasons concerning the State policy in the fight against smoking.

When it is pointed to the General Law on Tobacco Control No. 18256, it refers to specific provisions regarding the packaging and labeling of tobacco products "that are substantially developed generically, those contemplated in the Framework Convention".

It is referred to Article 8 of the said law approved on March 6, 2008, explaining that the norm advances "on the regulation of advertising and promotion included in the packaging and labeling of tobacco products. The regulation establishes certain prohibitions tending to prevent the consumer from being deceived or induced in error, but it does not contemplate the regulation of plain or generic packaging and labeling of such products".

"For this reason and in light of the aforementioned Guidelines of the World Health Organization for the application of Articles 11 and 13 of the Framework Convention, it is imperative to move forward in such regulation by reducing the attractiveness of the product to the consumer, eliminating all forms of packaging advertising and promotion of tobacco, giving greater visibility to health warnings."

"In this sense, it is proposed to modify article 8 of Law 18256 in order to include in the new wording, the decision that the packages and labels of all tobacco products shall be plain or generic, leaving the definition of the characteristics that the presentation will have to the regulation of this Law." (fs. 17 to 20 reverse).

Then, the bill in its article 1, modifying article 8 of Law 18256, incorporates the text of article 1 of the decree of August 6, 2018, in its first and second paragraphs that are identical to those proposed in the project.

Regarding regulation, the decree already determines that it is the Ministry of Public Health that "will determine the form", as stipulated in the project, the only difference is that it speaks of the Executive Power.

-At the same time, the bill states that for the entry into force of the legal modification, twelve months must elapse after its enactment. On the other hand, the decree grants "it will come into force (only) six months after its promulgation."

- See that the decree grants a significantly lower term to the companies affected to adapt themselves to the new regulations.

11. That the ruling of the Administrative Court No. 642 of November 18, 2014, is brought up. "After the exhaustive analysis of the applicable legal provisions and the dispositive/regulatory content of the contested act in the questioning phase, the Executive Power is considered to be incompetent to limit the freedom of the plaintiffs to make their publicity. In particular, insofar as the contested act imposes on the providers that destine a specific space of their messages to publicize the policies defined by the Administration.

The right of advertising of the promoters must be seen located without a doubt in the field of freedom. This liberty is subject to authorizations and controls of the Administration, but in principle, it is placed in the field of freedom protected by the constituent. (arts. 7, 10, 36 and its related articles of the Constitution of the Republic).

In the emergency, arts. 2 and 3 of the decree significantly restrict the content of the advertising that the pretensioners can make, while they are obliged, by regulation, to allocate a substantial part of the content of their advertising messages to disseminate the policies that the Ministry of Public Health defines every year."

"Such a restriction could only have been imposed by a legal provision sanctioned for reasons of general interest (art. 7 of the Constitution of the Republic).

For which reason, a norm created by Decree lacks the legal aptitude to limit fundamental rights contained in the Charter. The impugned Decree is not a regulation for the execution of the Law, as the defense of the defendant claims."

The law enforcement regulation, as CAJARVILLE teaches, "is dictated with the motive that there is a law to be enforced and with the purpose of enforcing it; to say it with our

Constitution's words, with the aim of enforcing it and having it enforced." (CAJARVILLE, Juan Pablo: "Relations between regulation and Law in Uruguayan Law", in "On Administrative Law", Volume I, FCU, 3rd Edition, 2012, p. 471)".

12. That undoubtedly, we are in the presence of a decree of the Executive Power issued on August 6, 2018, as a result of the bill on "Packaging and Labeling of Tobacco Products" amending article 8 of Law 18256 of March 6, 2008, has not yet been approved by the Legislative Branch.

- As it has been said, article 36 of the Constitution of the Republic establishes the freedom of work, cultivation, industry, commerce, profession or any other lawful activity, whose unique limitation can be effected only through the law dictated by reasons of general interest.

- For this reason, the actions of the Executive Power, which was put into consideration in the amending bill of Article 8 of Law 18256, are contradicted by the decree object of this act.

What GIORGI has rightly expressed is brought up: "The administrative act must be formulated by the competent administrative body or center, that is, by who has been legally authorized to issue it. When the Administration dictates an act exorbiting the field of its attributions and violating the rules of competition, the act is vitiated by incompetence, which, in principle, is the most serious and the most important of the legal vices." (GIORGI, Héctor, "The Annulment Administrative Litigation", p. 199, Montevideo, 1958).

13. That the Administrative Court is the one that must decide if the contested act has no budget for its dictation and therefore becomes completely invalid.

In this opportunity, we must bear in mind that the decree is more restrictive than the article of the bill since it gives companies six months to comply. Such situation makes that, once the administrative procedure is exhausted, it occurs before the Administrative Court and it understands whether it should suspend the validity until issued in a final judgment, which naturally entails a time that could widely exceed the term granted in the decree.

The harm that such a situation would cause makes the Rule of Law and the protection of its interests.

We are in the presence of a manifestly unlawful act on the part of the Executive Power, which is why we understand appropriate the suspension required in this *amparo* proceeding until the Administrative Court issued a decision concerning the suspension of the effects of Decree No. 235/018.

For these reasons;

THE COURT,

Orders the following measures:

1. To partially met the demand and, in its merit, to suspend the application of Decree No. 235/018 issued by the Executive Power until the Administrative Court decides on the request for provisional suspension of this decree.

2. Notional fees $ 100,000 (Uruguayan pesos one hundred thousand) for the part not exonerated.

3. If not appealed, file.

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Dr. Pablo EGUREN CASAL

Judge Ldo. Capital