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JUDICIARY
FEDERAL REGIONAL COURT 2nd Region

III - INTERLOCUTORY APPEAL 2009.02.01.006674-2

RAPPORTEUR	: ACTING FEDERAL JUDGE LUIZ PAULO DA SILVA ARAUJO FILHO
APPELLANT	: NATIONAL SANITARY SURVEILLANCE AGENCY - ANVISA
ATTORNEY-IN-FACT	: FABIO ESTEVES GOMES
APPELLEE	: PHILIP MORRIS BRASIL IND/ COM/ LTDA
ATTORNEY	: ROSANGELA SOARES DELGADO AND OTHERS
COURT	: ELEVENTH FEDERAL COURT OF RIO DE JANEIRO (200951010069526)

REPORT

This interlocutory appeal interposed by the NATIONAL SANITARY SURVEILLANCE AGENCY – ANVISA against decision (pp. 1,033/1,045) that granted partially the provisional protection so that plaintiff PHILIP MORRIS BRASIL IND. COM. LTDA. is exempt from advertising contents related to items 1, 2, 3, 4, 5, 6, 8 and 9 of art. 2 of the CBR (Collegiate Board Resolution) no. 335, of 11.21.2003, with wording by CBR 54, of 08.06.2008, issued by ANVISA, which rules on the packaging of tobacco-related products, under the foundation, in summary, that the content of the advertisement to be published, in accordance with the alluded Resolution, discloses a non-exempt approach, capable of infusing false information to consumers about tobacco products, since it associates advertising texts with images that are not consistent with the product it advertises. The Magistrate asserted that "although it is true that the use of smoking products is not 'good' for the health, it is incorrect to assume that this assertion is synonymous to say that smoking is not 'good'", adding that "it is up to the Democratic Rule-of-Law State to ensure the observance of the right to inform (art. 220 of the 1988 Constitution of the Republic) in order that individuals have access to different ideological, legal and social positions so they can form their beliefs freely in a pluralistic community" (p. 1,043).

The Appellant states: *(i)* that this interlocutory appeal must be passed out, by prevention, to the Honorable Federal Superior Court Judge Guilherme Calmon Nogueira da Gama, on the grounds that he was the responsible for reporting the Interlocutory Appeal no. 2008.02.01.020622-5, lodged by company Souza Cruz S.A., as well as Interlocutory Appeal no. 2009.02.01.004853-3, lodged by ANVISA, both pertaining to the originating records no. 2008.51.01.023632 autos-3, whose orders and cause of action are identical to the demand from which this Interlocutory Appeal originated; *(ii)* that there is a link between the ordinary proceeding brought by the Appellee, being processed in Rio de Janeiro and the ordinary proceeding of SINDITABACO, being processed in the Federal Court of Rio Grande do Sul, whereas the first instance Magistrate rejected the alleged link based on art. 104 of the Consumer Protection Code, as well as in art. 21, of Law no. 7,347/85, requiring, therefore, the annulment of the decision appealed herein, the acknowledgement of the link, and the remittance of the ordinary proceeding brought by Appellee to the 2nd Federal Court of Rio Grande do Sul, with a view to unite and judge the two proceedings simultaneously; *(iii)* the legality/constitutionality of the CBR/ANVISA no. 54/08, since such statute is a result of technical studies, researches and a successful track record of warning messages and images. Maintains that it acted within its sphere of competence, and the limits outlined by Law no. 9,294/96 and Law no. 9,782/99, adding that it sought, with new warnings and images, to comply with the constitutional guideline provided for in paragraph 4 of art. 220 of the Federal Constitution, so that the warnings and pictures call people's attention to the serious and real risks that tobacco consumption poses to health. Asserts that the preliminary injunction removal of the provisions of CBR/ANVISA no. 54/08 would depend on the characterization of blatant illegality or unconstitutionality, both cases do not apply therein, and, therefore, the provisional protection should not have been granted by the lower court. Adds that exists "inverse danger in delay, since the airing of the new warnings and images has the purpose of protecting the health of the Brazilian population", in addition, "exempt the appellee from advertising content accompanied by the images of the CBR 54/08, leads to benefit the appellee company to the detriment of other companies in the market, which are not willing to comply with the new CBR, even causing unfair competition between

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other companies in the field". Requires, in short, "alternatively", the amendment of the interlocutory appealed decision.

On p. 1,053, the subpoena of the Appellee was established, pursuant to section V of art. 527 of the CPC.

On pp. 1,099/1,105, ANVISA brought the duplicate records of the decision pronounced by the President of this Court, suspending the effects of the decision now contested.

The Appellee submitted its response on pp. 1,110/1,125 (3rd volume of the records), challenging the stated prevention of the Office of the Superior Court Judge Guilherme Calmon and of the 6th Specialized Panel, as well as the alleged link with the process established by SINDITABACO, in Porto Alegre. Furthermore, advocating the contested decision, sustains that the CBR 54/08, by imposing the Appellee to "incorporate to their product and packaging grotesque and repellent images that clearly do not illustrate correctly – and do not even suggest – the meaning of the respective written warnings, as required by art. 3, paragraph 3, of Law no. 9,294/96 "(p. 1,124 - underlined and in bold in the original), aiming at "demonizing tobacco products or their manufacture companies", manipulates public opinion "through the use of false images, which induce in error" and terrorizes people, "forcing them to see shocking and grotesque images", which goes beyond the competence of ANVISA, breaches Law no. 9,294 and are contrary to the Constitution (art. 220, paragraph 4), since regarding the tobacco advertising, the FC expressly identified the type of constraint that the State may impose, which is limited to the obligation of the manufacturer to "advertise 'warnings about the harms arising from tobacco use'" (p. 1,127, *ditto*). Thus, "any regulation issued with the purpose to regulate the restriction provided for in art. 220 of the FC, but that, in fact, has a diverse objective, violates the constitutional right to freedom of expression" (p. 1,128, *ditto*). The Appellee further claims the existence of flaws and disproportionality in the study which supports the CBR no. 54/08, since the objective of this study was to define which *'standard images'* would have greater potential to cause 'repugnance' in the general population (both smokers and non-smokers) and not

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define which '*standard images*' would meet the constitutional and legal requirements to inform these people '*about the evils of smoking*'" (p. 1,134 – underline, italic, and bold in the original), as well as glaring methodological failures, since the "sole research related to the new '*standard images*' was not performed by impartial bodies such as DATAFOLHA, IBOPE, etc., but precisely by the same group in charge of the development of those images", on the other hand, "the research involved a group of only 338 (three hundred and thirty-eight) people between the ages of 18 and 24, a group that does not represent the Brazilian population "(p. 1,135, *ditto*), especially because, quoting opinion attached to the instrument, "the Study *'does not reveal the geographic location of the interviewees, neither their occupations, incomes, distribution of ages 18 to 24, nor included people without schooling/ illiterate*'" (p. 1,136, italics in the original). Finally, it claims that the unanimous decision of the 3rd Panel of the Federal Regional Court of the 4th Region, which dismissed the provision of the interlocutory appeal of SINDITABACO, aiming at the suspension of validity of the CBR no. 54/2008 (pp. 71-91, 1st vol.), "incurred in a serious misunderstanding in understanding that 'the placing of images and warnings on the packaging is a different issue than the regulation of advertising methods'" (p. 1,138 and subsequent).

The Federal Public Prosecutor decided for the "maintenance of the contested decision", given that "although the State has the authority-duty to inform the harms of tobacco use, it cannot exercise this authority-duty outside of reasonable limits, nor determine the entailment of images that do not have an immediate relationship with cigarettes", concluding that there exists the appearance of right, since "the danger in delaying the case trial is consolidated in the financial costs that the company will have to bear if it is obliged to advertise the questioned images and in the loss that such publication may bring to the development of its economic activity" (pp. 1,128/1,134).

It is included in the instrument the legal opinions of Professors - Doctors Luis Roberto Barroso (pp. 348/395 – incomplete); Sergio Guerra (pp. 397/494); Humberto Avila (pp. 806/817, 2nd vol.); Jose Joaquim Gomes Canotilho, Jonatas Machado and Vera Lucia Raposo (pp. 1,156/1,212, 3rd vol.); and

new opinion of Luis Roberto Barroso (pp. 1,137/1,151 and repeated, pp. /1,170 1,156, 3rd vol.); in addition to medical opinion of Professor Dr. Marcelo Horacio de Sa Pereira (pp. 299/311).

This is the report.

LUIZ PAULO DA SILVA ARAUJO FILHO
Federal Judge Summoned

VOTE

1. At first, it is necessary to move away from the prevention claim of the Office of the Emeritus Superior Court Judge Guilherme Calmon Nogueira da Gama and, consequently, of the 6th Specialized Panel of this Court. Indeed: Although it might seem strange that the Appellant requests a gathering of the interlocutory appeal after having requested the "dismissal of the meeting" of the processes in first instance (refer to p. 980, item VII. 1, 2nd vol.), it is certain that, as the Federal Public Ministry (refer to p. 1,131, 3rd vol.), the party wants to attract jurisdiction to agencies where there is – or has been – judicial approval in its favor.

However, the lawsuit is not entitled for granting. To begin with, the reference to paragraph 3 of article 77 of the Internal Rules of Procedure of this Court to "cases that relate by connection, contingency, or ancillary" refers, naturally, to cases deriving from the Court itself, as would be the case in regards to court injunction or precautionary action related to an appeal.

The Rapporteur's prevention for the appeals perchance interposed in first-instance lawsuits, presupposes the recognition of link or identity of its own actions, with the gathering of processes for simultaneous trial, according to articles 103 to 105 of the Civil Procedure Code.

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Assembled the cases, in simultaneous processes, the "same process" shall be presented for incidence of art. 77, first paragraph, of the Internal Rules of Procedure.

Therefore, the main issue refers to the actual assembling of processes in first instance of jurisdiction, which was decided negatively by interlocutory appealed decision (pp. 1,033 - 1.034, 2nd vol.). It is a matter of public policy, concerning the absolute jurisdiction, which can be known *ex officio* (art. 301, section VII and paragraph 4 of the CPC), whereas the law does not provide for estoppel by legal fact of another process, since the estoppel is intra-procedural.

The assembling of the cases, however, should not be decisive, firstly because it prevails in jurisprudence, despite doctrinal dispute, the understanding that "the assembling of processes is a faculty of the magistrate and not an obligation, being the responsibility of the magistrate to conduct the case in an orderly way, verifying the opportunity and convenience of processing and judging of the set of lawsuits" (Superior Court of Justice, 5th Panel, Special Appeal no. 760,383/RJ, Reporting Judge Arnaldo Esteves Lima, unanimous, Court Gazette 10/16/2006 p. 420).

The interlocutory appealed decision, adopting the basis of the decision rendered in the 23rd Federal Court, strong in that "after granting the preliminary injunction, the subordinated case assignment has been unreasonable", in respect to the principle of the natural judge and to prevent fraud to the assignment (p. 924, 2nd vol.), is based on relevant argument, which deserved the support of the Federal Public Prosecutor (p. 1,131, 2nd vol.) and shall prevail.

2. Regarding the link to the proposed class action in Rio Grande do Sul, the Appellant is not worth of better merits. The doctrine is reasonable in a sense that "every legislation set forth in Title III of the Consumer Protection Code, including the one relative to the class action for the protection of homogeneous individual interests, is enforceable for the tutelage of other rights or diffused, collectives and individual interests, and not just those relating to consumers" (Kazuo Watanabe. *Brazilian Consumer Protection Code: reviewed by authors of the preliminary plan.* 4th ed. 2nd print run. Sao Paulo: University Courthouse, 1996 p. 535 – no original emphasis).

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Antonio Gidi affirms that Title III of the CDC (Consumer Defense Code) combined with the Law of the Public Civil Action shall, currently, serve the purpose of the Collective Code of Civil Procedure, as a general procedural ruling for all class actions (*Res judicata and lis pendens in class actions*. Sao Paulo: Saraiva, 1995. p. 74-8, specifically 77).

However, the Consumer Protection Code, in article 104, in addition to remove the *lis pendens* between individual actions and class actions, when settling the period of 30 days for the request of suspension of the individual action, under penalty of the plaintiff not benefiting from the *res judicata erga omnes*, established alternative incompatible with the application of the common rules of the Code of Civil Procedure to the class action and private actions articulation, since either the plaintiff requests the suspension of its process in order to benefit from any favorable decision in the class action, or it continues exercising its right of action, on an individual basis, without any encumbrance resulting from the class action.

Furthermore, as I already observed, in doctrinal stage, and I now transcribe, in the interest of brevity, the admission of the articulation of class and individual actions under articles 103 and 105 of the CPC, "breaches irreparably the collective tutelage of rights, guaranteed by the Constitution."

> "Thus, if the collective tutelage aims to allow, in the well-known expression by Kazuo Watanabe, judicial protection in *molecular* form, exceeding fragmentary demands, it does not seem appropriate to wish to tie, in simultaneous process, molecular action and fragmentary demands. The unification of the processes, in order to be judged simultaneously (art. 105 of the CPC), in regards to the class actions for the protection of homogeneous individual interests, violates the system established by law" (*Comments to the Consumer Protection Code: Procedural law*. 2nd ed. Sao Paulo: Saraiva, 2009. p. 185 – emphasis in the original).

3. Furthermore, the resource *deserves* granting, along the same line of other decisions already pronounced by this distinguished Court. The 7th Specialized Panel in CA no. 390,214/RJ, reported by the eminent Superior Court Judge Guilherme Reis Friede, in trial which I took part as a voting member, with relation to the CBR no. 335/03, settled:

> ADMINISTRATIVE. ANVISA. RESOLUTION No. 335/03 REGULATES WARNING TEXTS AND IMAGES OF CIGARETTE PACKAGES. CONSTITUTIONAL ADJUDICATION.
> I - The plaintiff protested against Resolution no, 335/03 by ANVISA, which, in short, regulates the images of cigarette packing warning, determining that the contact number of the welfare service "Pare de Fumar Disque Saude" (Stop Smoking, Call Health) be added to the package, in enlarged form, also requiring, the addition of the warning – SALE PROHIBITED FOR UNDER 18 YEARS OLD, as well as: THIS PRODUCT CONTAINS MORE THAN 4,700 TOXIC SUBSTANCES AND NICOTINE, WHICH CAUSE PHYSICAL OR MENTAL DEPENDENCE. THERE ARE NO SAFE LEVELS FOR THE CONSUMPTION OF THESE SUBSTANCES.
> II - The Hon. Lower Court, on the understanding that the Appellant-Plaintiff repeated the concluded request in another action previously filed, ruled the case dismissed in relation to the *lis pendens* examined herein.
> III - Studying the records, it can be verified, however, that the alleged *lis pendens* does not exist, since, in the first lawsuit filed, the Plaintiff restricted itself in criticizing formal defect of Resolution no. 335/03. Only in this demand, with the same content of the aforementioned Resolution, considering it illegal and unconstitutional.
> IV - ANVISA is the agency responsible for the regulatory power in relation to the supervision of public health, considered of relevance for our Federal Constitution, in its art. 197.
> V - It is understood, therefore, that the decisions against which the Plaintiff protested appear to be fully legitimate,

> therefore, the regulatory power is applied by ANVISA, in strict compliance with its institutional purpose of promoting the protection of the populations' health, especially when considering, as highlighted by the Honorable Regional Public Prosecution Office, that tobacco use is already considered an epidemic.
> VI - It is evident, however, that one must have, as a basic consumer right, pursuant to art. 6 of the CDC, "adequate and clear information about the various products and services, with correct specification of quantity, characteristics, composition, quality and price, as well as regarding the risks they represent".
> VII - Appeal of the Petitioner deferred to annul the contested Sentence, in view of the absence of *lis pendens*.
> VIII - On the merits, the Petitioner request is dismissed.
> (Federal Regional Court 2nd Region, 7th Specialized Panel, CA no. 390,214/RJ, Rapporteur Superior Court Judge Guilherme Reis Friede, unanimous, Federal Court Gazette 9/12/2007, p. 61).

Recently, the 6th Specialized Panel, when judging Interlocutory Appeal no. 175,239/RJ, reported by the emeritus Superior Court judge Guilherme Calmon Nogueira da Gama, faced similar hypothesis, amended as follows:

> CIVIL PROCEDURAL. INTERLOCUTORY APPEAL. PROVISIONAL PROTECTION. ABSENCE OF REQUIREMENTS. RESOLUTION CBR/ANVISA No. 54/08 ESTABLISHING IMAGES AND QUOTES TO BE ADDED TO PRODUCT PACKAGING AND COMMUNICATION MATERIALS OF THE APPELLEE. WARNING AND INFORMATIVE PURPOSES TO THE FINAL CONSUMER AND TO NON-CONSUMERS OF CIGARETTES. ABSENCE OF COUNTERADVERTISING AND ADMINISTRATIVE PENALTY. PROPORTIONALITY OF THE ADMINISTRATIVE MEASURE. FRAMEWORK CONVENTION TO DISCOURAGE TOBACCO USE. PUBLIC CIVIL ACTION

PROPOSED IN RIO GRANDE DO SUL. ABSENCE OF LIS PENDENS.

I - Interlocutory appeal interposed by the National Sanitary Surveillance Agency (ANVISA) against interlocutory decision rendered in the records of the ordinary proceedings that brings the lawsuit to SOUZA CRUZ S.A, which granted, in part, the preliminary injunction, ruling the suspension of the fixed deadline set forth in Resolution CBR/ANVISA no. 54/08 for implementation of the amendments in the product packaging and communication materials of the plaintiff until the final judgment of the case.

II - There is no *lis pendens* or link with the case being processed before the Judicial Section of Rio Grande do Sul (record listed under no. 2008.71.00.026898-0), filed by the Tobacco Industry Union of the State of Rio Grande do Sul (SINDITABACO-RS). Effectively, the circumstances in which art. 104 of Law no. 8,078/90, was inserted in the Consumer Protection Code, does not confer application only, and solely, to the hypothesis of demands involving consumer relations. The action filed by SINDITABACO is genuinely a class action, which in turn, does not prevent the filing of individual actions, in which case the plaintiff of the individual case obviously gives up any benefit that he/she could perhaps receive as a result of the class action. Furthermore, the fact that different decisions in relation to the constitutionality/legality/legitimacy of the Resolution CBR/ANVISA no. 54/08 may take effect, by itself, does not characterize the occurrence of link imposing the gathering of the filed cases.

III - As it is known, the granting of emergency tutelage falls within the general power of caution of the judge, with its amendment, through interlocutory appeal, only when the judge interprets the law within a teratology scope, away from legal reasonableness, or when the act is blatantly illegal, illegitimate and abusive, which is not the case.

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IV - Verisimilitude in the allegations of the Appellee are removed, regarding the alleged purpose deviation, to the alleged lack of reasonableness and the alleged violation of constitutional assumptions, with regard to the content of Resolution no. 54/2008. In the light of existing regulations in period preceding the advent of Resolution no. 54/08, the provisions of Resolution no. 335/03 were considered in perfect harmony, which, as we know, also presented shocking and strong images. Thus, the warnings provided for in the law, regarding cigarette ads and packages proved to be necessary steps in regards to the alert and information about the deleterious effects of the use of tobacco products.

V - There is scientific proof that cigarettes are harmful and can cause the diseases set forth in Law no. 9,294/96. Currently, there is international concern about the deleterious effects of tobacco on the populations' health, hence the edition of international documents such as the Framework Convention on Tobacco Control, adopted by countries members of the World Health Organization. Therefore, it is important that necessary and adequate information are within reach of current consumers and non-consumers concerning the "health consequences, the addictive nature and the mortal threat imposed by the consumption and exposure to tobacco smoke" (refer to art. 4, 1, of the aforementioned Convention).

VI - The motivation of the CBR no. 54/08, at least in this provisional judgment, fits and is consistent with the idea of providing a warning, and alert tobacco consumers (and potential consumers) about the harm of cigarettes (as provisions contained in paragraph 4, of art. 220, of the Federal Constitution) and, simultaneously, introduce mechanisms for protection of the population against cigarette advertising and the encouragement to smoke (FC art. 220, paragraph 3, II).

VII - The fact that the images are striking, strong and repulsive, provocative of aversion, indeed represents the strict compliance with constitutional and legal rules existing on the subject. There is indication of

> papers, studies and comprehensive researches in order to enhance the efficiency of images and wordings set forth in Resolution no. 54/08, congregating the INCA (Cancer National Institute), ANVISA, UFF (Fluminense Federal University), UFRJ (Federal Universiy of Rio de Janeiro) and PUC-RJ (Pontifical University of Rj) in multidisciplinary group that, since 2006, has been devoted to the analysis of the subject-matter. The need for renewal of images and warnings obviously originates from the already ongoing marketing time of those listed in Resolution no. 335/03 and, during that period, surveys were performed to find out more about the impacts caused by the reduction of tobacco consumption. At first, the metaphorical images are used to inform the addressee of warnings about the seriousness of the risks of tobacco consumption.
> VIII - Finally, it is necessary to assume, at least at this stage, the legitimacy of the acts performed by the Public Administration, especially in regards to such a sensitive area as is the collective health and quality of life of the Brazilian population.
> IX - Appealed decision reversed to reject the injunction in the ordinary proceedings.
> X - Interlocutory appeal heard and granted; internal review heard and dismissed.
> (Federal Regional Court 2nd Region, 6th Specialized Panel, CA no. 175,239/RJ, Rapporteur Superior Court Judge Guilherme Calmon, Federal Court Gazette 7/27/2009, p. 72).

The provisional protection granted in this process, in fact, has been suspended by the Hon. Superior Court Judge, President of this Court, in Suspension of Injunction no. 1,306/RJ, according to decision transcribed on pp. 1,105/1,099 (2nd vol.), of which, despite the prominent autonomy on the merits of the incident of suspension of injunction, the following excerpt can be advantageously gathered:

> "At first, it is important to highlight that there is no doubt about the harms that cigarettes cause to public health in general.
> It is certain that the damages are not restricted only to those who smoke, since, in addition to the harms brought to the so-called

secondhand smokers, simply by cohabiting with consumers of cigarettes, there is also deterioration of the public economy, in the face of thousands of reais spent every year with diseases related to the consumption of the product in question.

The advertised images and texts, in accordance with Resolution CBR no. 54/2008, have indeed strong and shocking content, as can be verified on pages 161/166 of these records. However, the intention is exactly this, and there are no legal grounds that justify non-compliance with the mentioned standards.

The fictitious images printed on packs of cigarettes, with figures featuring human organs, and situations that may occur due to cigarette consumption (such as impotence and depression), aim precisely at clearly illustrating the diseases and consequences in question, so that the warning will serve to any type of consumer, with any level of education, avoiding understanding difficulties regarding the message conveyed.

Therefore, there is no need to restrict the advertising of any of the images established by the regulatory body, and resolution 54/2008 shall be complied with in its entirety.

I understand that the Government, through the National Health Surveillance Agency, acted within the powers conferred upon it by the Federal Constitution, in order to ensure the social right to health, advocated throughout the Constitution, more precisely in articles 6, 7, section IV, 23, section II, 24, section XII, and 227.

The regulatory power was exercised within the constitutional limits and in accordance with provision set forth in Law no. 9,782/99, which conferred to ANVISA the task of regulating, controlling and monitoring products and services involving risk to public health, being included in this category all smoking products, with or without the tobacco ingredient." (pp. 1,103 - 1,104).

Interlocutory appeal interposed, the Plenary of this Court dismissed grating the appeal and "kept" the Presidency's decision, with the following amendment:

> INTERLOCUTORY APPEAL. SUSPENSION OF INJUNCTION. ANVISA. DAMAGE TO THE PUBLIC INTEREST. IMAGES ADDED TO CIGARETTE PACKAGES. PRACTICE OF REGULATORY POWER. REJECTION.
> I - Being established that the compliance with the granted provisional protection may result in risks to public health, and taking into account the prevalence of public interest on the private interest, the maintenance of the decision of this Presidency is imposed, which granted the application for suspension.
> II - The existence of three images whose advertising was not questioned by PHILIP MORRIS, which would be enough for the manufacturing and sale of products for more 15 (fifteen) months, does not change the conclusion regarding the existence of the possibility of harm to public health, for the reasons already set out in the appealed decision.
> III - The fact the opposing party performed hearing in the Ordinary Proceeding, in which the decision of the provisional protection was granted, has no relevance to the decision of suspension of the injunction, in this particular case.
> IV - The entry into force of Resolution 54/08 on May 26, 2009, just weeks after the date initially informed by applicant (May 8, 2009), is not enough to characterize "urgent manufacturing" and amendment of the contested decision, which relied on several other premises in addition to the proximity of dates.
> (Federal Regional Court 2nd Region, Plenary, SL no. 1306, Rapporteur Superior Federal Court Judge Paulo Espirito Santo, Federal Court Gazette 7/1/2009, p. 52).

The reading of the Framework Convention on Tobacco Control, adopted by countries members of the World Health Organization on May 21

2003, and promulgated in Brazil by Decree no. 5,658, of 01.02.2006, makes it clear that "The objective of this Convention and its protocols is to protect present and future generations from the devastating sanitary, health, social, environmental and economic consequences generated by consumption and exposure to tobacco smoke, becoming a benchmark for tobacco control measures, to be implemented by the Parties at national, regional and international levels in order to reduce continuously and substantially the prevalence of consumption and exposure to tobacco smoke" (art. 3), that "Every person shall be informed about the health consequences, the addictive nature and the mortal threat imposed by the consumption and exposure to tobacco smoke" (art. 4, 1), that "The Parties recognize that science has unequivocally demonstrated that exposure to tobacco smoke causes death, diseases and disability" (art. 8, 1), and that:

> Article 14
>
> Reduction measures of demand concerning tobacco dependency and abandonment
>
> 1. Each Party shall develop and disseminate appropriate, complete and integrated guidelines, based on scientific evidence and their best practices, taking into account national circumstances and priorities, and shall adopt effective measures to promote the abandonment of tobacco consumption, as well as *appropriate treatment for tobacco dependency.*
>
> 2. To this end, each Party shall endeavor to:
>
> (a) create and implement effective programs of promotion for the abandonment of tobacco consumption in places such as educational institutions, health facilities, workplaces and sporting environments;
>
> (b) include the *diagnosis and treatment of tobacco dependency*, and counseling services for quitting smoking in national programs, plans and strategies of health and education, with the participation, as appropriate, of health professionals, community workers and social workers;

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> (c) establish, *in health and rehabilitation centers, diagnostic*, counseling, *prevention, and treatment programs for tobacco dependency*; and
>
> (d) cooperate with other parties to facilitate accessibility and enforceability to tobacco dependency treatments, *including pharmaceutical products*, in accordance with article 22. These products and their components may include *medicaments, products used to administer medicaments or for diagnostics when appropriate*.

Thus, it is not without reason that tobacco exploitation, while it is a lawful activity, as the Appellee has stressed many times, is internationally and lawfully recognized as a *harmful* activity, which can cause several aggressive diseases and often *death*, without forgetting that the very chemical dependency to nicotine is admitted and treated as a *disease* (refer to art. 22, 1, *e*, of the Convention).

Therefore, it is not without reason that, article 13 of the Framework Convention on Tobacco Control states that: "1. The parties recognize that a total ban on advertising, promotion and sponsorship will reduce the consumption of tobacco products", and propose, in principle, to carry out "a total ban on all forms of advertising, promotion and sponsorship of tobacco" within a period of five years, although item 3 indicates: "The Party that is not in a position to carry out a total ban due to the provisions of its Constitution or its constitutional principles shall apply restrictions on all forms of advertising, promotion and sponsorship of tobacco", whilst item 4 of art. 13 establishes the "minimum" that each Party undertakes to do, which in this case refers to: (b) demand that all tobacco advertising and, where applicable, its promotion and sponsorship, come accompanied by warning or health message, or another type of relevant message; [...] (e) carry out, within a period of five years, the total ban or, if the Party cannot enforce a total ban due to their Constitution or constitutional principles, the restriction of advertising, promotion

and tobacco sponsorship on the radio, television, printed media and, where applicable, in other media, such as the Internet."

Therefore, it seems entirely oblivious to reality the claim that strong images linking smoking to: "danger" of stroke; or highlighting that cigarettes are "toxic products"; or emphasizing that smoking causes “premature aging of the skin"; or "premature childbirth and death"; or "death by heart disease"; or "death by lung cancer and emphysema"; or "gangrene", since the consumption of cigarettes "blocks the arteries and hinders blood circulation", meaning the "demonization" of the product, or that represent the manipulation of the public opinion "through the use of false images, which induce in error" and terrorize people.

No matter how strong the contested images are, which would aim, in the Appellee’s opinion, to cause disgust in the general population, those would certainly not be as strong or repulsive than many actual images that can easily be captured in oncology hospitals or medical books. Shocking and grotesque images, arising from very serious diseases, in fact, are the possible reality of smoking, which for many years had been disguised by the false – that is, truly false! – and glamorous advertising that insisted on associating cigarettes to the well-being and success.

It is, in fact, herein, quite clear, that the necessity for strong and shocking images results – in addition to immanent tobacco risks – from the peculiarities of consumption of the product itself, to the extent that the tobacco industry uses the packages – that are not quickly disposed and stay with the smoker for a certain period – as an advertising and marketing strategy, since the simple exposure to cigarette packages, with colorful and nice designs, already constitutes propaganda, allowing, as stated the Appellant, "a high degree of social visibility of the product" (p. 18 and subsequent; refer also to "Subsidies to ANVISA" on pp. 93/124).

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Even before CBR no. 54/2008 – during the period of Resolutions no. 104, of 05.31.2001, and no. 335, of 11.21.2003 –, there were already strong and striking images, such as those of the inane premature child or of the patient breathing through cannula ("intubated", in medical diction), as seen in p. 276 (1st vol.), or still the necrotic leg, or the fetus inside a glass container, with the following warning: "smoking causes spontaneous abortion", or the indescribable image under the warning "smoking causes lung cancer", as stated in pp. 282 and 283, or web address: http://www.smoke-free.ca/warnings/Brazil%20-%20warnings.htm.

Besides, strong and shocking images are used in many other countries, always seeking to restrict the advertising and, *ipso facto*, cigarette consumption, as can be seen, for example, in the images added to pp. 748 and 1,029 (2nd vol.), depicting throat cancer with warning "*smoking can cause a slow and painful death*" (the image can also be seen where the consumer reads the full warning); or depicting mouth cancer, with warning "*smoking causes 92% of oral cancers*" (http://www.smoke-free.ca/warnings/Singapore-warnings.htm).

Therefore, the images of the CBR 54 do not convey *false* information to consumers of tobacco products, associating advertising texts to images that are not compatible with them, as understood by the appealed decision, since the Brazilian images follow the world trends, based upon recognized and already established scientific knowledge.

However, it is not, as stated in the appealed decision, to ensure compliance with the right to information (art. 220 of the 1988 Constitution of the Republic) in order that individuals have access to different ideological, legal and social positioning so they can freely form their beliefs in a pluralistic community; but to restrict advertisement and inhibit the consumption of a product harmful to the smoker's health and those who are exposed to smoke, which causes *addiction* and *chemical dependence* – that, by themselves, lead to medical treatment, serious diseases and, often, *death*.

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As the Superior Court Judge, Guilherme Calmon, has asserted, through the genius and elegance of his writings: "The motivation of the CBR no. 54/08, at least in this provisional judgment, fits and is consistent with the idea of providing warning, and alert tobacco consumers (and potential consumers) about the harms of cigarettes (according to provisions contained in paragraph 4, of art. 220, of the Federal Constitution) and, simultaneously, introducing mechanisms for protection of the population against cigarette advertising and the encouragement to smoke (FC art. 220, paragraph 3, II). The fact that the images are striking, strong, repulsive, provocative of aversion, indeed, represents the strict compliance with constitutional and legal rules existing on the subject."

The Constitution is clear in stating that: "The federal law is responsible for [...] establishing the legal means to ensure to the individual and his family the possibility to *defend* themselves [...] from the *advertisement* of products, practices, and services that may be harmful to health and the environment" (art. 220, paragraph 3, section II), in addition to indicate expressly that: "Commercial advertising of tobacco, alcohol, pesticides, medicines and therapies will be subject to legal restrictions, in accordance with section II [...], and shall include, where necessary, warnings about the harms arising from their use" (art. 220, paragraph 4).

Thus, without excuses or dissimulation, protect the individual and his family from the advertising of a product so injurious to health and environment, this is exactly what ANVISA aims to achieve with the strong images in question.

Therefore, there is no likelihood between the Appellee's claims and the founded risk of damage, required for the concession of the provisional protection (art. 273 of the CPC), and the deferral of the process is imposed.

4. Finally, it should be noted that the claims related to the efficiency of the images or on the necessity of its aggravation, as well as on methodological

flaw of the researches conducted by ANVISA, *are unsuitable*, either because to the judiciary competes only examine the constitutionality/legality of administrative acts of the Agency, without the possibility of simply enforcing what seems more convenient to them (art. 2 of the FC); either because the verification of any methodological flaws would require – if the assertion were considered relevant – technical evidence, since it involves statistical knowledge.

Moreover, it would be inappropriate, notwithstanding the five legal opinions attached to the three volumes of this instrument, examine in depth the parties' arguments, and intend to exhaust the discussion: we are in the preliminary injunction stage, and here the cognition is provisional and summary.

5. All things concerned, *I defer in part* the interlocutory appeal, to amend the contested decision and *reject* the provisional protection.

This is my final decision.

LUIZ PAULO DA SILVA ARAUJO FILHO
Assigned Federal Judge

ABSTRACT

ADMINISTRATIVE AND CIVIL PROCEDURAL. RESTRICTION ON TOBACCO ADVERTISING. STRONG AND SHOCKING IMAGES. CONSTITUTIONALITY AND LEGALITY.
1. Reference to paragraph 3 of art. 77 of the Internal Rules of this Court to "cases that relate by connection, contingency, or ancillary" refers to cases deriving from the Court itself, as would be the case in regards to court injunction or precautionary action related to an appeal. Thus,

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in the case of several actions in first instance of jurisdiction, there is no prevention of the Reporting Judge.
2. Art. 104 of the CDC, applicable to all and any class action, as well as remove the *lis pendens* between individual actions and class actions, establishes its own system, which is incompatible with the gathering of collective and individual processes, based on the general guidelines of CPC (arts. 103 to 105).
3. The Constitution is clear to establish that the federal law is responsible for determining the legal means to ensure the individual and his family the possibility to defend themselves from product advertising, practices, and services that may be harmful to health and the environment, as expressly "commercial advertising of tobacco" (art. 220, paragraph 3, II, and paragraph 4).
4. Consequently, Law no. 9,294/96, addresses the restrictions on use and advertisement of tobacco products, and the Framework Convention for Tobacco Control, promulgated in Brazil by Decree no. 5,658/2006, makes it clear that "the objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences generated by the consumption and exposure to tobacco smoke, becoming a benchmark for tobacco control measures, to be implemented by the Parties at national, regional and international levels in order to reduce continuously and substantially, the prevalence of consumption and exposure to tobacco smoke" (art. 3), establishing, for instance, that "Every person shall be informed about the health consequences, the addictive nature and the mortal threat imposed by the consumption and exposure to tobacco smoke" (art. 4, 1), that "the Parties recognize that science has unequivocally proved that exposure to tobacco smoke causes death, diseases and disability" (art. 8, 1), and that addiction and chemical dependency to nicotine are admitted and treated as disease (art. 22, 1, e).
5. As a result: "The motivation of the CBR no. 54/08, at least in this provisional judgment, fits and is consistent with the idea of providing warning, and alert tobacco consumers (and potential consumers) about the harms of cigarettes (according to provisions set forth in paragraph 4, of art. 220, of the Federal Constitution) and, simultaneously, introducing mechanisms for protection of the population against cigarette advertising and the encouragement to smoke (FC, art. 220, paragraph 3, II). The fact that the images are striking, strong,

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repulsive, provocative of aversion, indeed, represents the strict compliance with constitutional and legal rules existing on the subject." (Federal Regional Court 2nd Region, 6th Specialized Panel, CA no. 175,239/RJ, Rapporteur Superior Federal Judge Guilherme Calmon Nogueira da Gama, Federal Court Gazette 7/27/2009, p. 72).

6. Interlocutory appeal granted in part to reject the provisional protection.

JUDGMENT

After reviewing, reporting on and discussing the case records, in which the parties are indicated above: The members of the 5th Specialized Panel of the Federal Regional Court of the 2nd Region, unanimously, *grant the appeal, in part*, pursuant to opinion of the Rapporteur.

Rio de Janeiro, September 23, 2009 (date of judgment).

LUIZ PAULO DA SILVA ARAUJO FILHO
Assigned Federal Judge

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