

**CONSULTATION: "CONSTITUTIONAL
PROTECTION PROMOTED BY LAWYER
MARCOS PERONI CLIFTON UNDER
SPONSORSHIP OF LAWER
GUILLERMO PERONI, IN
REPRESENTATION OF PHILIP
MORRIS PARAGUAY S.A.". YEAR:
2010 – No. 776.-----**

AGREEMENT AND JUDGEMENT NUMBER: FOUR HUNDRED EIGHTY
THREE.-

In the City of Asunción, Capital of the Republic of Paraguay, on the
eighteenth day of the month of October of the year two thousand ten, in the
Chamber of Agreements of the Supreme Court of Justice, H.E, Ministers of
the Constitutional Chamber, Doctor **VICTOR MANUE NUÑEZ
RODRIGUEZ**, President and Doctors **ANTONIO FRETES** and **MIGUEL
OSCAR BAJAC ALBERTINI**, who joins the Chamber in replacement of
Doctor **JOSÉ V. ALTAMIRANO AQUINO**, before myself, the authorizing
Secretary, the agreement was brought the file named: **CONSULTATION:
"CONSTITUTIONAL PROTECTION PROMOTED BY LAWYER MARCOS
PERONI CLIFTON UNDER SPONSORSHIP OF LAWER GUILLERMO
PERONI, REPRESENTATING PHILIP MORRIS PARAGUAY S.A."**., in
order to resolve the consultation promoted by the Lawyer Marcos Juan
Peroni Clifton, under sponsorship of Doctor Guillermo Francisco Peroni,
representing PHILIP MORRIS PARAGUAY S.A. and ABAL HERMANOS S.A. ---

Prior study of the history of the case, the Supreme Court of Justice,
Constitutional Chamber, resolved to consider and vote the following:-----

QUESTION:

Is Decree No. 4106 dated March 25 of 2010 "BY MEANS THROUGH
WHICH THE FULLFILMENT OF ARTICLE 11 OF LAW No. 2969/06 THAT
APPROVES THE FRAMEWORK AGREEMENT OF THE WORLD HEALTH
ORGANIZATION (WHO) FOR TOBACCO CONTROL REGULATION"
unconstitutional? -----

To the question posed, Doctor **NUÑEZ RORIGUEZ** said: in these
matters the representatives of the complainants PHILIP MORRIS PARAGUAY
S.A. and ABAL HERMANOS S.A. present themselves to promote an action of
constitutional protection against the Executive Power, a petition which is
received by the Penal Judge of Guarantees of Guard, Capital, who in
accordance with Law No. 600/95 that modifies the Code of Civil Procedura,
elevates this matter to H.E. Supreme Court of Justice so that such Court
pronounces itself regarding the unconstitutionality of **Decree No. 4106**

dated March 25 of 2010 "BY MEANS THROUGH WHICH THE FULLFILMENT OF ARTICLE 11 OF LAW No. 2969/06 THAT APPROVES THE FRAMEWORK AGREEMENT OF THE WORLD HEALTH ORGANIZATION (WHO) FOR TOBACCO CONTROL REGULATION" and that is how this matter comes to be filed before this Court.-----

1. The representatives of the complainant state that the same firms operate in the branch of production and commercialization of tobacco products and as such are subject to and affected by Decree No. 4106/10. They claim that the mentioned Decree is unconstitutional because it violates the constitutional principles set forth in article 3 "*Division of Powers Principle*"; Art. 9 "*Freedom principle*"; Art. 28, "*Right to be informed*"; Art. 33 "*Right to intimacy*"; Arts. 86 and 87 "*Right to work and full employment*"; Art. 107 "*Freedom of competition*"; Art. 108 "*Free circulation of products*" and Art. 137 "*Supremacy of the Constitution*", of our National Constitution:"-----

2. **Decree No. 4106** dated March 5 of 2010 "BY MEANS THROUGH WHICH THE FULLFILMENT OF ARTICLE 11 OF LAW No. 2969/06 THAT APPROVES THE FRAMEWORK AGREEMENT OF THE WORLD HEALTH ORGANIZATION (WHO) FOR TOBACCO CONTROL REGULATION", sets forth:

"Article 1. *Regulate the fulfillment of Article 11 of Law No. 2969/06, which approves the Framework Agreement of the World Health Organization (WHO) for Tobacco Control, in the following terms: Set forth that the boxes and any other type of package of cigarettes or tobacco products, of national or international production, intended for national consumption shall contain health warnings as set forth in this Decree.*

Article 2. *Such warnings must fulfill with the following conditions:*

a) *Be approved by the Ministry of Public Health and Social Welfare.*

b) *Be used simultaneously on the external surface of each package of tobacco products. A warning, with a full color picture and corresponding text with such image for each box or package, and must include the series of 4 warnings in each batch of packages of tobacco products.*

c) *Be available to the manufacturers and importers of tobacco products, in the National Program of Tobacco Control of the Ministry of Public Health and Social Welfare.*

d) *Use the following text, accompanying the corresponding images that will be determined by the Ministry of Public Health and Social Welfare.:*

- *SMOKING CAUSES LUNG CANCER, EMPHYSEMA AND ASTHMA ATTACKS.*
- *SMOKING CAUSES STROKE.*
- *SMOKING CAUSES SEXUAL IMPOTENCE.*
- *SMOKING CAUSES HEART ATTACKS AND HIGH BLOOD PRESSURE.*

e) *The texts set forth in numeral 4 of this Article must be preceded by the affirmation: "The Ministry of Public Health and Social Welfare warns" in a*

size smaller than the warning texts, and shall be subject to annual revisions and modifications by such Ministry.

f) *The warnings must be printed directly on the package of tobacco products, so that the image remains visible at all moments, including the period of exhibition at sale points.*

Article 3. *It is ordered that, as of July 6, 2010, the date on which the "National Day free from tobacco smoke" is celebrated, the size of each warning shall occupy 50% of the front main surface and 40% of the main surface of the back of the pack of cigarettes or container of tobacco products, without spaces between the warning and the box containing it. That the images be crisp and the text clear and readable, and written in black letters on white background, during the years 2010 and 2011. That as of July 6, 2011, the size of the warning on the back main surface occupy the bottom 50% of said surface. That as of July 6, 2012, the warnings occupy 60% of both principal surfaces.*

...///...

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...///... That the background on which the warning shall be written, starting from July 6, 2012, shall be yellow.

Article 4. *It is ordered that on packages and labels of tobacco products, no promotion of a product may be made in a false, misleading or deceiving way, or way that that is likely to create error with respect to its characteristics, health effects, risks or emissions. That no terms, descriptive elements, trademarks or logos, figurative signs or of another class are used that have a direct or indirect effect in creating a false impression that a particular tobacco product is much less harmful than others. For example, expressions such as "with low tar content", "light", "ultra-light", "soft" and similar.*

Article 5. *It is ordered that the packaging of tobacco products must indicate on one of its lateral faces the classification of the substances that compose it, indicating: "This product contains more than 4000 toxic and carcinogenic substances. There is no safe level of exposure to tobacco smoke."*

Article 6. *It is ordered that a breach of the terms of this provision constitutes a serious offense and shall subject those responsible liable to the penalties provided in the Health Code.*

Article 7. *It is ordered that the National Health Surveillance will be in charge of the control and enforcement of these provisions.*

Article 8. *Final Provisions, Definitions:*

- a) *The expression "external packaging and labeling in relation to tobacco products, applies to all packaging, labeling used in the retail selling of the product.*
- b) *"health warning" any and all message through which it informs in an express way the harmful effects to health of the use, consummation, and exposure to tobacco and tobacco smoke, and which may include legends, pictograms or images of warning.*
- c) *"tobacco product" includes products prepared totally or in part using tobacco leafs as raw material, and intended to be smoked, sucked on, chewed or used as snuff.*

Article 9. *This decree shall be approved by the Minister of Public Health and Social Welfare.*

Article 10. *Communicate, publish and be provided in the Official Registry".-*

3. Proceeding to the analysis of Decree No. 4106/10, we have that the Executive Power dictated such Decree on March 25, 2010 "BY MEANS THROUGH WHICH THE FULLFILMENT OF ARTICLE 11 OF LAW No. 2969/06 THAT APPROVES THE FRAMEWORK AGREEMENT OF THE WORLD HEALTH ORGANIZATION (WHO) FOR TOBACCO CONTROL REGULATION", and for the implementation of the measures set forth in the mentioned decree they use as a base Art. 11 of Law No. 2969/06 "Which approves the Framework Agreement of the World Health Organization (WHO) for Tobacco Control" and Art. 203 of Law No. 836/80 of the Health Code, which states that: "The Ministry, when it deems it necessary, can determine that packages in which the tobacco products are sold must have in a clear and visible way a warning that they can be harmful to the health".-----
4. However, our National Constitution provides in Article 137 "Of the Supremacy of the Constitution: The Supreme Law in the Republic is the Constitution. This, the treaties, conventions and international agreements approved and ratified, laws enacted by Congress and other legal provisions of inferior hierarchy, sanctioned by consequence, constitute national positive law in the order of priority stated...". Similarly, and in accordance with, Article 141, which provides: "Of the international treaties". "The international treaties duly entered into, approved by law of the Congress, and whose instruments of ratification were exchanged or deposited, are part of the internal legal regulations within the hierarchy set forth by Article 137". In turn, within the duties and powers of the Congress set forth in Article 202 of the National Constitution, we have "...2) dictate the codes and other laws, amend or repeal them, interpreting this Constitution; ...9) approve or reject treaties and other international agreements signed by the Executive Power". And Article 238 provides: "Duties and powers of those who exercise the presidency of the

Republic: ...5) issue decrees, that, for validity, require the approval of the Minister of the branch...".-----

5. As previously mentioned above, at the time of issuance of Agreement and Judgment No. 916 dated December 28, 2009 of the Constitutional Court of the Supreme Court of Justice, in the rulings: "TOBACCO UNION OF PARAGUAY AND OTHERS PETITION OF CONSTITUTIONAL PROTECTION", laws can be operational or programmatic. The operative are those that do not need to be regulated nor conditioned by another normative act in order to be applicable. They contain sufficient concrete descriptions of such assumptions of fact that make possible their immediate application. A law is operative when it is directed to a situation of the reality in which it can operate immediately without needing other institutions. On the other hand, the programmatic are those that have their effectiveness subject to the condition of being regulated. That is, the standards of a treaty, constitution or a law, by their nature, can be operational or programmatic. These last ones require the complement of another law that specifies and carry out the "program" of the programmatic norm. They are those that are not self-implementing because they need complementary rules to become operational. They have also been categorized as imperfect or incomplete because their effectiveness is subordinate to the dictates of other standards.-----

6. Now, Law No. 2969/06 "That approves the Framework Agreement of the World Health Organization for Tobacco Control" determines that each country, in accordance with its domestic law, must implement the standards recommended by the World Health Organization (WHO). This law limits itself to ratification of the agreement, which has a programmatic content, and therefore must be regulated through other operative rules.-----

In our country we have a history similar to this particular case, Law No. 1333/98 "Of the Promotion Publicity of Tobacco and Alcoholic Drinks" which in its Article 70 provides: "The advertising by means of massive national written communication mediums (newspapers, magazines), on the public highway, in public institutions and places of public access (flyers, cartels, murals, stickers and the like) in printed form, illustrated or luminous, as well as television spots, must include within the same context of the publicity in a space no less than ten percent of the total of the advertisement ...//...

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...///... notice, the following legend in a clear legible way and with contrast). Products that contain tobacco must include the following: "SMOKING CAUSES CANCER AND RESPIRATORY DISEASES. Warning of the Ministry of Public Health and Social Welfare" just like Law No. 825/95 "Protection of non-smokers" that prohibits smoking in public places. Both laws impose their standards through the Laws of National Congress. Law No. 2969/06 does not have any provision that sets forth the procedure for the regulation of the agreement, therefore in accordance with the current legislation and proceedings similar to the case, I arrive at the conclusion that a Law of the National Congress is needed for its application.-----

7. Following the same order of ideas, and taking into consideration the provisions of Article 238 of the National Constitution: "*Duties and powers of those who exercise the presidency of the Republic: ...5) issue decrees that, for validity, require the approval of the Ministry of the branch.*" I consider that for the validity of a Decree, it is necessary to take into account that the warnings, prohibitions or impositions, must be based, and in accordance with the parameters clearly established in advance by law. In the case at hand, the health warnings regarding the effects of tobacco set forth in Decree No. 4106/10 are devoid of this legal framework and therefore, in absence of legislative delegation, the constitutional rule that determines that the regulation of a law can only be done via legislative act must be followed, that is, through the National Congress, and if such exists, it can be regulated through a presidential decree issued by the Executive Power in better view of the implementation of budgets and the presuppositions already set forth in the law. This is in consideration of the hierarchical legal order set forth in Article 137 of the National Constitution, which sets forth that inferior rules must follow the guidelines of superior laws and cannot create, repeal or modify them.
8. While it is true that the Health Code confers power the Executive Power. "*The Executive Power shall regulate the provisions of this Code,*" and Article 203 of the code states: "*The Ministry when it deems it necessary, can determine that the packages in which products made from tobacco are sold, must have in a clear and visible way the warning that they can be harmful to health*"; the warnings that the Executive Power, by means of Decree No. 4106/10, pretends to impose exceed the parameters set forth in the mentioned article and therefore violate the rights set forth in the National Constitution, in the law that ratifies the Framework Agreement of the World Health Organization for Tobacco Control and the Health Code, and as such, they cannot be enforced against those who do not observe them.-----
9. Therefore, I believe from the reading of the mentioned provisions, that the Executive Power has assumed powers exceeding the limits set forth in the current law, issuing a decree that establishes burdens, obligations and restrictions not permitted by the National Constitution, nor in the law that ratifies the Framework Agreement of the World Health Organization, nor the Health Code. Although the Health Code

sets forth the obligation of placing in *a clear and visible way the warning that they can be harmful to the health* in no way can you affirm, and much less impose, placing on the packages images so shocking and warnings to grave such as *"smoking causes stroke" "smoking causes sexual impotence" and "smoking causes cheart attack and blood hypertension"*, exceeding the parameters set forth in the law, exceeding the limits of competence and meaning of the purpose of the word *"warning"* allowed.-----

10. In consideration of the provisions mentioned and the current legal legislation, the Framework Agreement of the World Health Organization can only be regulated via legislation of the National Congress, or if there is pre-established legal framework, through a regulatory decree, as is set forth in the National Constitution in Article 137, *"Of the supremacy of the Constitution" "The supreme Law of the Republic is the Constitution. This, the treaties, conventions and international agreements approved and ratified, the laws enacted by the Congress and other legal provisions of inferior hierarchy, sanctioned by consequence, constitute national positive law in the order of priority stated..."* in accordance with Article 202 *"Duties and powers of the Congress ...2) issue the codes and other laws, amend or repeal them, interpreting this Constitution ...9) approve or reject treaties and other international agreements signed by the Executive Power... and Article 238: "Are duties and powers" of those who exerciss the presidency of the Republic: ...5) issue decrees that for validity, require the approval of the Ministry of such branch.....*
11. Regarding the second issue raised, Doctor **VICTOR MANUEL NUÑEZ RODRIGUEZ** continued to say: That in the same rulings, it has also been raised by the Supreme Court of Justice ruling on the unconstitutionality of Decree No. 4174 dated April 7, 2010 *"BY MEANS THROUGH WHICH ART 8 OF LAW 2969/2006 THAT APPROVES THE FRAMEWORK AGREEMENT FOR THE WORLD HEALTH ORGANIZATION (WHO) FOR TOBACCO CONTROL REGULATION"* given that the complainants have argued that such decree violates the principles set forth in article 3 *"Principle of division of Powers"* and Art 137 *"Principle of legal hierarchy and principle of criminal legality".----*
12. Analyzing the terms of the mentioned Decree No. 4174 dated April 7, 2010, the same preceding considerations apply regarding the circumstances that Law 2969/06 *"By means of which the framework agreement of the World Health Organization (WHO) for tobacco control is approved"* does not contain an express legislative delegation that permits the Executive Power to regulate Article 8, especially if there already is a previous law fully in force, Law No. 825/96 *"Protection of non-smokers,"* a law higher in the hierarchy than the Decree. It is worth noting that, although in both bodies the protection of the health is the ultimate purpose, the final provisions are in open contradiction, so that the contested Decree is clearly unconstitutional for disavowing the principle of hierarchy and priority of law, and additionally, because, unlike Law 825/96, it classifies infringements and penalties for delegation or reference to other legislative bodies, a

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situation inadmissible for openly violating the principle of penal
legality.-----

13. Therefore, in accordance with the foregoing, the consultation carried
out by the Penal Judge of Guarantees of Guard, Capital is to be be
vacated, concluding that Decree No 4106 of March 25, 2010 "BY
WHICH THE COMPLIANCE OF ARTICLE 11 OF LAW NO. 2969/06 THAT
APPROVES THE FRAMEWORK AGREEMENT