[CERTIFIED TRANSLATION]

THE SUPREME COURT OF PUERTO RICO

Puerto Rico Association of Beer Importers, Inc.; Heineken Brouwerijen B.V.; V. Suárez & Co., Inc.; Méndez & Co., Inc.; B. Fernández & Hnos., Inc., and Ballester Hermanos, Inc. v. Commonwealth of PR; José A. Flores Galarza, in his official capacity as Secretary of the Treasury; Cervecería India, Inc., and CC1 Beer Distributors, Inc.	**No.** CC-2003-831	CERTIORARI

JUDGMENT

San Juan, Puerto Rico, on May 16, 2007.

Public Law No. 69 of May 30, 2002 amended sections 4002 and 4003 of the Puerto Rico Internal Revenue Code, 13, L.P.R.A sects. 9521 and 9574. The purpose of the amendment was to raise taxes on distilled spirits, wines, and beers. However, Article 2 of Public Law No. 69 provides some relief by establishing a staggered tax exemption on all beers, malt

extracts, and other analogous fermented or non-fermented products whose alcohol content does not exceed one and one half percent (1½%) per volume, manufactured or elaborated by individuals whose total production during the most recent tax year does not exceed thirty-one million (31,000,000) gallons.

The petitioners herein, the Puerto Rican Association of Beer Importers, Inc. et al, filed a petition for declaratory judgment against the Commonwealth of Puerto Rico, et al, in the Court of First Instance, Superior Court, San Juan Part, requesting that the aforementioned Article 2 of Public Law No. 69 of 2002 be declared unconstitutional. They argued that, in their opinion, the purpose and effect of said statutory provision was to benefit beers manufactured on the Island and, naturally, to adversely affect imported beers. They also argued that said provision violated the Interstate Commerce Clause of the Constitution of the United States and Section 3 of the Federal Relations Act, 48 U.S.C. sect. 741(a).

The defendant requested that the complaint be dismissed alleging, in brief, that the decision issued by this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda*, 109, D.P.R. 456 (1980) had resolved the controversy and that there was no such constitutional violation. The court of instance *dismissed* the complaint, a decision that was *confirmed* by the Court of Appeals.

The plaintiff-petitioners then appealed before this court, pointing out three alleged errors on the part of the Court of Appeals, to wit:

> . . . by confirming the dismissal of the Sworn Petition without accepting as true the facts in the complaint while accepting as true others that did not arise from the complaint, contrary to the dismissal norm under Rule 10.2 of Civil Procedures and its interpretative case law.
>
> . . . by determining that Article 2 does not violate Sect. 3 FRA or the Commerce Clause, mistakenly applying the decision in *U.S. Brewers Assoc.* v. *Srio. De Hacienda*, 109 D.P.R. 456 (1980).
>
> . . . by restricting their analysis on the purpose of Article 2 to the text of Public Law No. 69, and ignoring the interpretation norm set by this Honorable Court.

We *agreed*, to the appeal. Having examined the record of the case and after a careful analysis of the arguments of the parties, we *confirm* the judgment issued by the Court of Appeals *dismissing* the action filed by the plaintiff-petitioner.

So stated and ordered by the Court and certified by the Clerk of The Supreme Court. Associate Judges Mr. Rebollo López and Mr. Fuster Berlingeri issued Concurring opinions. Associate Judge Mrs. Fiol Matta inhibited herself. Associate Judge Mrs. Rodríguez Rodríguez, did not participate.

[Round ink stamp: Commonwealth of Puerto Rico, General Court of Justice, Supreme Court.]	[Illegible signature] Aida Ileana Oquendo Graulau Clerk of The Supreme Court

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CONCURRING OPINION OF
ASSOCIATE JUDGE MR. FUSTER BERLINGERI

San Juan, Puerto Rico, on May 16, 2007.

I concur with the judgment issued by the Court in the case in caption. It is clear to me that Art. 2 of Public Law No. 69 of May 30, 2002 **does not have any constitutional** effect, whereby the dismissal of the action brought by the plaintiffs is in order, as was correctly decided by the court of instance and the appellate court.

To resolve this case it is only necessary to apply to it the previous decisions of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda*; 109, D.P.R. 456 (1980), ***which dealt with an essentially identical situation to that of the case in caption***, as was correctly done by the court *a quo*. *U.S. Brewers Assoc.* v. *Secretario de Hacienda*, 109, D.P.R., *supra*, is a clear determining precedent for the controversy in the case in caption, that may be adjudicated simply by applying here the aforementioned precedent.

In spite of the above, I wish to deal in this opinion with the thorny subject of whether the limitations arising from the Interstate Commerce Clause of the

Constitution of the United States apply to Puerto Rico ex *proprio vigore*. The matter was argued in the case in caption, and gave rise to the other concurring opinion issued here, which I consider incorrect and inclined to cause confusion. This is why I feel it is important to consider the question fully.

This matter has been brought before our attention several times before, but this Court has dealt with it ambivalently, at least in recent times. The first times the matter was raised, this Court very deliberately resolved that ***the so called "dormant" aspect of the Commerce Clause of the Constitution of the United States did not apply to Puerto Rico.*** We decided it thus, *before* the establishment of the Commonwealth of Puerto Rico, in the substantive decision *Ballester Hnos.* v. *Tribunal de Contribuciones*, 66 D.P.R. 560 (1946); and after the establishment of the Commonwealth of Puerto Rico, we resolved it again in the very considered and fundamental decision *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), and again in *South Puerto Rico Sugar Corp. v. Comision de Servicio Publico*, 93 D.P.R. 12 (1966). However, in spite of these clear and substantial precedents, more recently, in a case in which the issue was again argued, this Court wavered and decided not to reiterate the resolutions of the three previously quoted opinions, preferring to limit itself to pointing out that even if the Commerce Clause were applicable, the facts in question did not constitute a violation of said Clause. *M & B.S., Inc. v. Depto. de Agricultura*, 118 D.P.R. 319, 336 (1987).

I believe that the subject in question requires further study and reflection for the simple reason that the erroneous notion that the Interstate Commerce Clause of the Constitution of the United States applies to Puerto Rico *ex proprio vigore* places upon the government an unnecessary judicial burden that constitutes **one more limitation to its capacity to successfully manage the serious financial problems of Puerto Rico.** There is no other alternative, then, but to vehemently denounce the supposed applicability of the aforementioned clause, and explain the grounds for our interpretation.

II

Why do some people in Puerto Rico continue to believe, incorrectly, that our country is subject to the Interstate Commerce Clause of the Constitution of the United States? Why are the three decisions of this Court, quoted two paragraphs back, which definitively resolved the inapplicability to Puerto Rico of the federal regulation in question, not followed? What is the reason behind this insistence to introduce in our case law the erroneous judicial criterion that Puerto Rico is bound by the dormant aspect of the Interstate Commerce Clause of the Constitution of the United States?

The answer to these questions are to be found in a supposedly "key case" of the First Circuit Court of Appeals of the United States on which the other concurring opinion in this case is grounded. Said

opinion is, clearly, only a sequel to the aforementioned federal judgment, which has been mimicked here. This is why, we must go to the origin of the matter to critically examine the decision handed down there.

III

In 1932 the First Circuit Court of Appeals resolved that the Interstate Commerce Clause of the Constitution of the United States did not apply to Puerto Rico. It did so in *Lugo v. Suazo*, 59 F 2d 386 (1932); and reiterated it subsequently in *Buscaglia v. Ballester*, 162 F 2d 805, *cert. denied*, 332 US 816 (1947). So, for decades, both the Supreme Court of Puerto Rico and the Circuit Court of Appeals of the First Circuit Court of the United States repeatedly held that the aforementioned clause did not apply to Puerto Rico. The grounds for the decisions of the one and the other were essentially the same and may be summarized as explained below.

From the very beginning, the relationship between the United States and Puerto Rico has been subject to the fundamental principle that the ***Constitution of the United States does not apply fully to Puerto Rico, because the Island is not and has never been an incorporated State of the Union and is not an integral part of the United States***. The Supreme Court of the United States has repeatedly found that only those guarantees of the principal and basic rights of individuals in the Constitution of

the United States, which due to their very nature always limit the enforcement of the U.S. Executive and Legislative powers apply fully to Puerto Rico. One of the clauses of the Constitution of the United States that no Federal Court had applied to Puerto Rico, was precisely the Commerce Clause, which provides that Congress has the power to regulate "***. . . commerce . . . among the several States . . . ".*** Puerto Rico, of course, is not a "State", and this is why it has been repeatedly found that the Island was not covered by the Congressional power to regulate commerce between States. ***The above does not mean that commerce between Puerto Rico and the United States was not subject to the power of Congress.*** Only that it was regulated solely through the clause that grants Congress the power to regulate United States Territories, known as the Territorial Clause. For this reason, the Commerce Clause, in its "dormant" aspect had always been conceived as a ***limitation of the powers of the States***, never as a limitation of the governing powers of the Territories.

With respect to the argument in the preceding paragraph, consideration must also be given to the United States Supreme Court's known reluctance to accept as applicable to Puerto Rico any provision in said Constitution that refers literally to the "States" of the Union *(States).* Thus, in *Puerto Rico v. Branstad*, 107 S.Ct. 2802 (1987), the Supreme Court of the United States applied to Puerto Rico ***the extradition statues of the United States*** which expressly encompass the territories of the United

States, so as not to have to determine whether the Extradition Clause of the Constitution of the United States, Art. IV, Sec. 2, applied to Puerto Rico.[1] The highest federal court stated the following:

> "It is true that the words of the [Extradition] clause apply only to "States" and we have never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution. We need not decide today what applicability the Extradition Clause may have to the Commonwealth of Puerto Rico, however, for the Extradition Act clearly applies. The Act requires rendition of fugitives at the request of a demanding "Territory", as well as a State."

The alluded reluctance, illustrated by the case *Puerto Rico v. Branstad*, *supra*, has been reflected in other important decisions of the Supreme Court of the United States regarding Puerto Rico. Thus, in *Calero Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974), said court determined that the due process and equal protection of the law guaranties applied to Puerto Rico, but refused to find that Amendment Fourteen of the Constitution of the United States, that expressly extends these guarantees to the States of the Union, was applicable to Puerto Rico, because

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[1] The Extradition Clause, where relevant, reads as follows: "Any person accused of a . . . crime . . . who flees the State where he is accused and is found in another State, shall be . . . returned to the State having jurisdiction to judge the crime.

it is not a State. The Court chose instead to find that the aforementioned constitutional rules applied to Puerto Rico under the Fifth or the Fourteenth Amendment, without stating which ("*Either-or*"). The same thing happened in *Examining Board v. Flores Otero*, 426 US 572 (1976). In this case, one of the Judges of the Court, Judge Rehnquist, who later became Chief Judge, stated the following in his own opinion:

> "The Fourteenth Amendment is by its terms applicable to States: Puerto Rico is not a State . . . I would be inclined to reject the claim that the Fourteenth Amendment is applicable to Puerto Rico until a case sufficiently strong to overcome this "plain meaning" obstacle, found in the language of the Amendment itself, is made out."

In view of the above, which refers to cases resolved ***after*** the creation of the Commonwealth of Puerto Rico, it seems evident that the very Supreme Court of the United States would not be willing to hold that the provision of the Constitution of the United States that regulates commerce " . . . *among* . . . *the several States*" in any way refers to Puerto Rico, which is clearly not a State.

When the Federal Court of the First Circuit decided to revoke itself regarding this matter in 1992, it did so based on a very limited and superficial analysis, that in no way replicated the grounds of the opposing precedents of both that same court and those of this Court. Its "analysis" was essentially

based on two points. First, that the creation of the Commonwealth of Puerto Rico made every effort to grant to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. Wherefore, the Court reasoned, the limitations that applied to the States of the Union also applied to Puerto Rico.

Note that this first argument is incongruous, not to say mistaken, in that it ***derives a limitation of power by invoking the concession of autonomous power.*** The false argument is that since the creation of the Commonwealth of Puerto Rico granted to the Island a greater degree of autonomy than that which it previously had, comparable to that enjoyed by the States of the Union, it also acquired a limitation of power that it did not have before. That is, to the repeated affirmation of the Supreme Court of the United States recognizing the ***greater autonomy*** given to the Island by the creation of the Commonwealth of Puerto Rico (*Puerto Rico v. Branstad*, *supra*; *Examining Board of Engineers v. Flores de Otero*, *supra*), the First Circuit Court added, on its own, ***a limitation***, that does not arise in any way or manner from the expressions of the higher federal court, and that is in no way consistent with the clear intention of the Supreme Court of the United States to ***underscore*** the importance of that which was created by Public Law No. 600. The Supreme Court of the United States, which has claimed the authority to determine what clauses of the Constitution of the United States apply to Puerto Rico for itself only, in

the absence of some related Congressional provision [*Torres v. Puerto Rico*, 442 US 465 (1979); *Examining Board v. Flores de Otero*, *supra*] has never determined that the Commerce Clause applies to Puerto Rico, even when the matter has been brought before it. In spite of this, however, the federal intermediate appellate court has had the audacity to intrude in this matter, and decree that which the highest judicial court has deemed unacceptable to determine.

Moreover, the belief by the Supreme Court of the United States, that the creation of the Commonwealth of Puerto Rico, had the effect of equating Puerto Rico and the other States of the Union in terms of autonomy and independence can scarcely be managed with the indulgence applied by the First Circuit Court in the case law that concerns us herein. This is so, not only because the Congressional reports regarding Public Law No. 600 emphasize that the creation of the Commonwealth of Puerto Rico did not propose to alter the relationship between the United States and Puerto Rico, ***fundamentally*** [see, *US* v. *Lopez Andino*, 83l F.2d 1164 (1987), concurrent opinion of Judge Torruella], but also because of the other undeniable fact that the very autonomy of the States of the Union is grounded, in great measure, on their political powers of full Congressional representation and presidential vote, which Puerto Rico does not have; and on the guarantee provided by the Tenth Amendment of the Constitution of the United States, which does not include Puerto Rico. Therefore, we must be cautious and not expect to reach new and

strange conclusions, based on the premise that Puerto Rico has the same "autonomy and independence" as a State of the Union.

Finally, in considering the matter that occupies us here, regarding the meaning that may be derived from the creation of the Commonwealth of Puerto Rico, it is necessary to consider what the very Supreme Court of the United States has said, in the sense that

> " . . . Puerto Rico . . . is an autonomous political entity, sovereign over matters not ruled by the Constitution . . . "

Posadas v. Tourism Co., 478 US 328 (1986); *Rodriguez v. Popular Democratic Party*, 457 US 1, 8 (1982). It would seem that the proposition of imposing a limitation on the legislative powers of Puerto Rico based on the "dormant" aspect of the Commerce Clause is clearly inadmissible and inconsistent with this other expression of the Supreme Court of the United States. At least, the position of the other concurring opinion in this case echoing now the decree in question of the First Circuit is no way in harmony with the repeated expressions of the Supreme Court of Puerto Rico regarding the broad judicial authority of the Commonwealth of Puerto Rico. See, *Ramirez de Ferrer v. Mari Bras*, 144 D.P.R. 141 (1997); *Pueblo v. Castro Garcia*, 120 D.P.R. 740 (1988); *R.C.A. v. Gobierno de la Capital*, 91 D.P.R. 416 (1964), and *Pueblo v. Figueroa*, 77 D.P.R. 188 (1954).

IV

The other point on which the First Circuit based its aforementioned decision of 1992 is the idea that Puerto Rico shares full economic integration with the United States, in equal terms to all other States of the Union. The supposed "logic" of this other finding is that since Puerto Rico has a comparable situation to that of a State of the Union with regard to "economic integration with the United States", the same limitations that apply to the States of the Union in terms of interstate commerce should apply to Puerto Rico. The problem with this other argument is that it is as false as the first, which was discussed in the previous paragraphs.

The idea that Puerto Rico shares a comparable situation to the States of the Union in terms of economic integration with the United States flies in the face of several realities that are well known to those dealing with these matters. To begin, Puerto Rico is not subject to the federal internal revenue laws as are the States of the Union. On the one hand, the residents of Puerto Rico do not pay income taxes, as do the residents of the States of the Union. The funds obtained from federal excise taxes collected in the United States corresponding to articles and materials manufactured in Puerto Rico – excise taxes on rum – are earmarked for our treasury, contrary to what happens with other federal excise taxes collected in the States of the Union on articles and materials manufactured in these States, that are treated as revenues of the federal treasury. Puerto Rico's aforementioned

special tax status, which in and of itself represents billions of dollars per year and benefits Puerto Rico's economy is not accessible to any State of the Union, and is clearly contrary to the foregoing false notion of equal "economic integration".

Another difference between the States of the Union and Puerto Rico in the economic aspect is that the *Interstate Commerce Act* of the United States expressly does not apply to the Island, although it regulates intensely several transportation aspects of the States of the Union. This situation is a serious problem for those who affirm that the Interstate Commerce Clause of the Constitution of the United States applies to Puerto Rico. It is clearly inconsistent, to say the least, to consider that the foregoing constitutional provision has been extended to the Island tacitly by Congress, but that one of the principal statues legislated by that very Congress under such provision, is not extensive to Puerto Rico. The other concurrent opinion issued in this case does not even attempt to sort out this tangle. Either way, the statute in question applies to the States of the Union, but not to Puerto Rico, which is part of the broad differences between the States and Puerto Rico with regard to economic affairs.

Another very particular difference must also be noted regarding tariffs on coffee. In accordance with Section 10 of Article I of the Constitution of the United States, the States of the Union are generally prohibited from imposing taxes on imports. However, Puerto Rico has been expressly authorized to impose

tariffs on imported coffee, although the States of the Union cannot do so. See 19 USC sec. 1319; *Miranda v People of P.R.*, 101 F 2d 26 (1938). This way, Puerto Rico can protect its own coffee industry from competition against imports of cheaper foreign coffees.

Also, with respect to internal revenues and tariffs on coffee, there are several other judicial and regulatory federal arrangements, also of an ***economic nature***, whose application to Puerto Rico is very different to that of the States of the Union. They are too extensive to mention here. Suffice it to say that it refers to matters of great economic importance regarding which the situation in Puerto Rico is notably different from that of any State of the Union. Thus, financial aid programs, including the food assistance program, Social Security, minimum federal wage, some banking and federal labor laws, laws dealing with customs tariffs, laws related to the admiralty and maritime transportation, and several regarding other matters apply or have historically applied differently in Puerto Rico as compared to the States of the Union. See, A.H. Leibowitz, *The Applicability of Federal Law to The Commonwealth of Puerto Rico*, 37 Rev. Jur. UPR 615 (1968).

With respect to the above, it is also necessary to take into consideration the repeated position of the Supreme Court of the United States validating the differential treatment of Congress with regard to Puerto Rico, as compared to the treatment given by Congress to the States of the Union regarding all these economic questions. The highest federal court

has expressly resolved ***that Congress does not have to give to Puerto Rico the same economic treatment it gives to the States***, legitimizing, thus, the important differences that exist or have existed between Puerto Rico and the States. Thus, the very Supreme Court of the United Slates has rejected the notion that the Island and the States of the Union share the same economic integration with the United States. Some of these decisions, to quote only the most recent, are *Harris v. Rosario*, 446 U.S. 651 (1980), where the Supreme Court of the United States determined that Congress was not obliged to treat Puerto Rico like a State in the Aid to Families with Dependent Children program; and *Califano v. Torres*, 435 U.S. 1 (1978), where the Supreme Court of the United States determined the same thing with respect to the Supplemental Security Income program (SSI).

It must be pointed out that the Supreme Court of the United States has upheld the validity of differential treatment for Puerto Rico not only when Congress has given the Island *less* benefits than those stipulated for the residents of the States of the Union, as in the two cases quoted in the previous paragraph, but also when the differential treatment has meant giving *more* authority to Puerto Rico than to the States of the Union, such as *West India Oil Co. v. Domenech*, 311 US 20 (1940), relative to the power to impose excise taxes on imports, in which the Supreme Court of the United States validated a power granted

by Congress to Puerto Rico that the States of the Union did not possess.

For all these reasons it cannot be truthfully affirmed that Puerto Rico is comparable to any State of the Union in terms of national economic integration. ***Puerto Rico, like the Unincorporated Territories, has always been subject to different important rules*** to those that apply to the States of the Union. Such different treatment has attempted to provide the necessary economic flexibility so that both Congress and Puerto Rico itself can successfully confront the significant material differences that have existed and still exist between the Island and the jurisdictions that are an integral part of the United States. It appears it is necessary to mention the well-known fact that, notwithstanding the economic progress Puerto Rico has experienced since the terrible years from 1898 to 1940, there is still an abysmal difference between its fragile economic situation and the very superior condition of the poorest State of the United States. It makes no sense, then, to attempt to impose an artificial limitation to the powers of Puerto Rico to confront its own economic problems, based on simple judicial whim. Neither the opinion of the First Circuit nor the other concurrent opinion in the case in caption have identified ***what purposes of public order they attempt to achieve with their muddled decree.*** What justification is there for their decision? Beyond their erroneous design, what is the reason for the inattention to the three precedents of this same Court? Who

does it harm if Puerto Rico has powers that the States of the Union do not have?

V

The questions put forth in the previous paragraph lead to one last critical point. The question of whether the Interstate Commerce Clause of the Constitution of the United States should be applied to Puerto Rico or not, like the more general question of what provisions of the Constitution of the United States should be extended to the Island, beyond those relative to the fundamental rights of individuals, ***is ultimately a Congressional prerogative***.

See, *Torres v. Puerto Rico*, *supra*, pp 469-470. It is an eminently political issue that is included, also, within the broad powers that the very Supreme Court recognized to Congress, even recently. *Harris* v. *Rosalie*, *supra*, pp. 653-656. For this reason, the decisions of the First Circuit submitting Puerto Rico *ex proprio vigore* to the limitations of the Commerce Clause in its "dormant" clause is an *ultra vires* act by that Court, a clearly inappropriate intervention of the court in a matter that lies beyond its authority. There is nothing in the legislative record that leads us even to suppose that Congress has had the intention to extend the aforementioned clause to Puerto Rico. Therefore, it is not possible to believe that the decisions of the First Circuit Court constitute only a statement of the Congress' intent. They constitute,

therefore, an inappropriate interference in an issue that is the clear and sole prerogative of Congress.

It is for these very reasons that I consider untenable the other concurring position in the case in caption echoing the federal appellate court, and mimicking its very mistaken and erroneous decisions regarding the matter.

[Signed: Jaime B. Fuster]
JAIME B. FUSTER BERLINGERI
ASSOCIATE JUDGE

[Translators Note: All pages except last, left margin, one set of initials – JBF]

CONCURRING OPINION OF
ASSOCIATE JUDGE MR. REBOLLO LOPEZ

San Juan, Puerto Rico, on May 16, 2007.

On July 13, 1978, Public Law No. 37 was passed to amend Public Law No. 143 of June 30, 1969, known as the Puerto Rico Beverages Act. Said amendment raised the taxes on beers sold and consumed in our jurisdiction and established a special exemption for beer manufacturers whose annual production does not exceed thirty-one million (31,000,000) gallons.

Some time later, the U.S. Brewers Association, an entity that at that time included 95% of beer manufacturers in the United States, filed a complaint before the local courts challenging the exemption

because, in their opinion, it violated Section 3 of the Federal Relations Act and the clause regarding equal protection under the law, Sect. 7, Article 2, of the Constitution of the Commonwealth of Puerto Rico. When it resolved the controversy, this court determined that the exemption did not violate the aforementioned provisions, because, among other things, it had a legitimate, non-discriminatory purpose, and because the classification established thereunder could benefit both local companies and foreign companies. *U.S. Brewers Assoc.* v. *Secretario de Hacienda,* 109, D.P.R. 456 (1980).

After two previous amendments with the sole purpose of raising the amount of the tax[1], the Legislature passed *Public Law No. 69 of May 30, 2002,* which amended sections 4002 and 4003 of the Puerto Rico Internal Revenue Code, 13 L.P.R.A. §§ 9521 and 9574. The purpose of the amendment, among others, was to raise the taxes on distilled spirits, wines, and *beer*s. Article 2 of Public Law No. 69 provided some relief by establishing a *staggered tax exemption* on all beers, malt extracts, and other analogous fermented or non-fermented products whose alcohol content did not exceed one and one half percent (1½%) per volume, manufactured or elaborated by individuals whose total production during the most recent tax

[1] See, Public Law No. 12 of June 10, 1981 and Public Law No. 22 of July 14, 1989.

year did not exceed thirty-one million (31,000,000) gallons measure.[2]

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[2] The aforementioned Article 2 provides as follows:

"(a) Instead of the tax established in sect. 9521(c)(2) and (3) of this title on all beers, malt extract, and other fermented or unfermented analogous products, whose alcohol content exceeds one and half percent (1½%) per volume to which sect. 9521(c)(2) and (3) of this title refers, that are produced or elaborated by individuals whose total production, if any, of said products in the most recent tax year has not exceeded thirty-one million (31,000,000) gallons measure, taxes will be collected as follows:

(1) Two dollars and fifteen cents ($2.15) for each gallon measure produced, up to nine million (9,000,000) gallons measure.

(2) Two dollars and thirty-six cents ($2.36) for each gallon measure produced in an amount greater than nine million (9,000,000), but less than ten million (10,000,000) gallons.

(3) Two dollars and fifty-seven cents ($2.57) for each gallon measure produced in an amount greater than ten million (10,000,000), but less than eleven million (11,000,000) gallons.

(4) Two dollars and seventy-eight cents ($2.78) for each gallon measure produced in an amount greater than eleven million (11,000,000), but less than twelve million (12,000,000) gallons.

(5) Two dollars and ninety-nine cents ($2.99) for each gallon measure produced in an amount greater than twelve million (12,000,000), but less than thirty-one million (31,000,000) gallons.

(b) Subject to the provisions of sects. 9575 to 9579 of this title, the benefits of this section will apply to any individual, in any tax year following the year when his total production of the products described in this paragraph, if any,

(Continued on following page)

Thus things, on June 13, 2002, the Puerto Rican Association of Beer Importers, Inc. (APIC, Spanish acronym) Heineken Brouwerijen B.V.; V. Suárez & Co, Inc.; Méndez & Co., Inc.; B. Fernández Hnos., Inc. and Ballester Hermanos, Inc. – hereinafter the petitioners – filed a petition for declaratory judgment before the Court of First Instance, Superior Court, San Juan Part against the Commonwealth of Puerto Rico, the Secretary of the Treasury, Cervecería India, Inc., and CC1 Beer Distributors, Inc., hereinafter the appellees. They requested that Article 2 of Public Law No. 69 of 2002 be declared unconstitutional, because, in their opinion, its purpose and effect was to benefit beers produced on the Island and adversely affect imported beers. They also requested that the declaratory judgment state that the foregoing Article 2 violated both the Interstate Commerce Clause of the Constitution of the United States[3] and Section 3 of the Federal Relations Act.[4] Finally, they requested that it grant a preliminary injunction preventing the Government of Puerto Rico from enforcing the aforementioned legal provision until the case was heard.

Subsequently, all the defendants requested the *dismissal* of the action filed, opposing the request for

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has not exceeded thirty-one million (31,000,000) gallons measure.

[3] Article 1, Sect. 8, Constitution of the United States of America.

[4] 48 U.S.C. § 741(a) and 1 L.P.R.A. Federal Relations Act § 3.

a preliminary injunction.[5] In essence they argued that, even if they accepted as true the facts alleged in the action filed, the plaintiff had not offered a claim to justify granting the remedies requested. They argued, in support of their request, that the decision in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* controlled the controversy in the present case; that the Interstate Commerce Clause had not been violated, because the exemption was totally neutral and did not discriminate against interstate or international commerce on its face or with regard to its purpose or effects; and that the Federal Relations Act had not been violated, because the Court had already decided on the legality of that provision.

After evaluating the positions of both parties in their respective writs and the arguments offered in the hearing to present arguments, the primary court issued a judgment *dismissing* the action filed by the plaintiffs. The court held that: 1) the decision of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* had resolved the plaintiffs' claim that Article 2 of Public Law No. 69, *ante,* violates Section 3 of the Federal Relations Act, *ante*; 2) that the argument that the challenged exemption violated the interstate and international Commerce Clause lacked merit because in *U.S. Brewers Assoc., ante,* this Court

[5] The defendants appeared in two different motions; on the one hand Cervecería India and its distributor, and on the other hand, the Commonwealth of Puerto Rico and the Secretary of the Treasury.

had decided, although it was not specifically stated, that said exemption had the legitimate purpose of distributing the tax load among all brewers according to their potential to generate earnings[6]; and 3) that the analysis demanded in the face of allegations of supposed violations of the interstate and international Commerce Clause, for the supposed discriminatory effect of some Act, revealed that the article challenged in this case was not discriminatory.

Dissenting from the decision of the primary court, the defendants petitioned to the Court of Appeals, through a petition for certiorari. They argued, in brief, that the court of instance had erred when it dismissed the action filed without accepting as true the facts alleged in the complaint, and by not receiving the evidence offered with respect to the discriminatory purpose and effects of the exemption. They also argued that the court of instance had incorrectly interpreted the case *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* by deciding that the challenged exemption did not violate Section 3 of the Federal Relations Act or the aforementioned inter-state and international commerce act.

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[6] The primary court made this decision because, among other things, "the decisions of whether the intent of the Puerto Rico Legislature against imported beers was discriminatory, and whether the Act applies only to local companies and, therefore, has a discriminatory effect, is the same regardless of whether the claim is for a violation of Section 3 of the Federal Relations Act and equal protection under the law, or for an alleged violation of the interstate and international Commerce Clause."

The Court of Appeals *confirmed* the decision of the primary court. In essence, the intermediate appellate court held that the primary court acted correctly in dismissing the action filed, because it did accept as true the facts correctly alleged in the complaint and that the rest of the "facts" stated therein were conclusions of law or speculative statements. As regards the alleged offerings of evidence, the intermediate appellate court concluded that the primary court did, in fact, accept them as true, but even so, this did not merit granting a remedy in favor of the defendants. Finally, the aforementioned appellate court determined, that, pursuant to the *stare decisis* doctrine, the decision of this Court in *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante,* applied to the controversy herein with respect to Section 3 of the Federal Relations Act, and that it did not have protectionist purposes that would make it invalid in the light of the interstate and international Commerce Clause of the Constitution of the United States.

Dissenting, the plaintiffs petitioned this Court, through a petition for certiorari. They argue that the judgment issued by the intermediate appellate court should be revoked because said court erred when it:

> . . . confirmed the dismissal of the Sworn Petition without accepting as true the facts in the complaint while accepting as true others that did not arise from the complaint, contrary to the dismissal norm under Rule 10.2 of Civil Procedures and its interpretative case law.

> . . . decided that Article 2 does not violate Sect. 3 FRA or the Commerce Clause, erroneously applying the decision in *US. Brewers Assoc.* v. *Secretario de Hacienda,* 109 D.P.R. 456 (1980).
>
> . . . restricting its analysis regarding the purpose of Article 2 to the text of Public Law No. 69, therefore ignoring the interpretation rule established by this Honorable Court.

I

A

To begin, we will briefly discuss the first finding of error, regarding the alleged inappropriateness of the dismissal based on the provisions of Rule 10.2 of Civil Procedures.

As is well known, the purpose of the pleadings is to notify, in broad terms, the claims and defenses of the parties. *Alamo Perez* v. *Supermercado Grande,* 158 D.P.R. 93 (2002); *Banco Central Corp.* v. *Capitol Plaza, Inc.,* 135 D.P.R. 760 (1994). This is why Rule 6.1 of Civil Procedures, 32 L.P.R.A. App. III, R. 6.1 only requires that the pleadings in a complaint include a brief and simple description of the claim showing that the petitioner is entitled to a remedy, and a request for the remedy to which he believes he is entitled. See: José Cuevas Segarra, Tratado de Derecho Procesal Civil, Publicaciones J.T.S., Volume I, 2000, p. 202-208.

In spite of this, Rule 10.2 of Civil Procedures, 32 L.P.R.A. App. III, R. 10.2 establishes, as grounds for a party to request the dismissal of a complaint filed against it, that the pleadings fail to state a claim upon which relief can be granted. We have repeatedly decided that when a request for dismissal under the aforementioned grounds is made, the court must accept as true the pleadings in the complaint and consider them as favorably as possible for the plaintiff. *Garcia Gomez* v. *E.L.A.,* res. February 24, 2005, 2005 TSPR 14.

For a defendant to prevail in a motion for dismissal under the aforementioned civil procedure principle, he must show that, without a doubt, the plaintiff is not entitled to any remedy under any rule of law that may be proven to support his claim, even if the complaint is interpreted as liberally as possible in his favor. Regardless of the above, this doctrine applies only to claims that are argued correctly and clearly and are conclusively stated, that on their face do not give rise to doubts. *Pressure Vessels P.R.* v. *Empire Gas, P.R.,* 137 D.P.R. 497, 504-505 (1994). In other words, only claims that are put forward correctly will be accepted as true, and any conclusions of law or arguments expressed in such a way that its contents appear to be hypothetical will not be considered. Cuevas Segarra, *op. cit.,* p. 272.

An analysis of the sworn petition submitted by the petitioners in the present case shows that basically they argued that the tax exemption granted to beer distributors that produced less than 31,000,000

gallons was unconstitutional because it violated the Interstate Commerce Clause of the Constitution of the United States and Section 3 of the Federal Relations Act. In support of the above they made a series of arguments that attempt to establish the discriminatory effects of the exemption. Some of these arguments are:

> "*Paragraph 18*: This action attempts to annul – as they are contrary to the Federal Relations Act and the Commerce Clause of the Constitution of the United States – those sections that create an exception to the tax rate in favor of a private Puerto Rican manufacturing company, in detriment of international and interstate commerce and the proprietary interests of other companies, local, of the United States, or foreign, which are suffering and will continue to suffer irreparable damage . . .
>
> *Paragraph 19*: In effect, and as argued below, the discrimination of the legislation in question is such that it practically eliminates the right of consumers to purchase the beer they prefer and promotes a state-sanctioned monopoly in favor of one sole producer and its exclusive distributor.
>
> *Paragraph 38*: All the plaintiffs are affected by the tax, because the special law does not apply to them.
>
> *Paragraph 39*: By information and belief, only the local producer, Cervecería India, and its distributor for Medalla Light, its principal

product, will benefit from the special exemption, that is, they are now subject to paying only the $2.15 excise tax that applied to them under the previous law. This is so because the total production of the local beer does not exceed 9 million gallons and has not done so for years.

Paragraph 43: Although neither the measure nor its preliminary recitals express on their face a discriminatory or protectionist intent that is unconstitutional and statutorily prohibited, in practice, it has one, without a doubt.

Paragraph 44: An examination of the legislative history, of the statements submitted before the legislature, and of the legislative debates and other public statements by the legislators, will clearly reveal that, in spite of the executive's and the legislature's initial reticence to perpetuate the discrimination created by the special exemption, neither the measure nor the budget pending approval would have obtained the necessary votes had the excessive preference proposed by this measure, with the only purpose of benefiting the local brewery, not been granted. See the statement of the Executive Vice-President of Cervecería India of April 8, 2002; the Statement of the Mayor of Mayaguez in support of the petitions for preferential treatment towards the local brewery, among others.

Paragraph 46: Article 2 of Public Law No. 69 of May 30, 2002; 13 L.P.R.A. § 4023, because of its effects and application, creates a restriction that is forbidden to interstate commerce; by promoting an irrational, restrictive, and unfair discrimination in favor of one sole local producer, and in detriment of the free flow of commerce.

Paragraph 47: The total burden of the increase – although on its face the Law appears to apply equally to Puerto Rico and United States companies – in effect falls totally on Puerto Rican distributors that sell beers manufactured in the United States, with the forbidden purpose of making the importing, marketing, and sale of United States beers more difficult.

Paragraph 50: Article 2 of Public Law No. 69 of May 30, 2002, 13 L.P.R.A. § 4023, because of its effects and application, creates a restriction that is forbidden to international commerce, by promoting an irrational, restrictive, and unfair discrimination in favor of one sole local producer, and in detriment of the free flow of commerce.

Paragraph 51: The total burden of the increase – although on its face the Law appears to apply equally to Puerto Rico and United States companies – in effect falls totally on Puerto Rican distributors that sell beers manufactured outside Puerto Rico, with the forbidden purpose of making the

> importing, marketing, and sale of United States beers more difficult.
>
> *Paragraph 55*: Article 2 of Public Law No. 69 of May 30, 2002, 13 L.P.R.A. § 4023, because of its effects and application, as previously argued, violates the clear and transparent provisions of Article 3 of the Federal Relations Act.

Although the arguments transcribed above are not a model of perfection, a simple perusal is sufficient to note that they may be considered to be well made arguments for the purpose of granting the remedy requested. In fact both the court of instance and the intermediate appellate court went on to analyze the essential arguments made by the petitioners and finally found that they lacked merit.

Let us now evaluate the validity of the principal argument of the petitioners, that *Article 2 of Public Law No. 69 of May 30, 2002, discriminates against interstate and international commerce and therefore violates the Interstate Commerce Clause or Section 3 of the Federal Relations Act*.

B

The Constitution of the Commonwealth of Puerto Rico provides that "the power of the Commonwealth of Puerto Rico to levy and collect taxes and to authorize their imposition and collection by municipalities shall be exercised as determined by the Legislature and shall never be surrendered or suspended." 1

L.P.R.A. Art. VI, § 2. Said taxing authority is fundamental to the life of the State and, therefore, the government's fiscal authority is constitutionally broad and encompassing. *Cafe Rico, Inc.* v. *Municipio de Mayaguez,* 155 D.P.R. 548 (2001); *Continental Insurance Company* v. *Secretario de Hacienda,* 154 D.P.R. 146 (2001); *F.D.I.C.* v. *Mun. de San Juan,* 134 D.P.R. 385 (1993); *Coca-Cola Bottling* v. *Srio. de Hacienda,* 112 D.P.R. 707 (1982); *U.S. Brewers Association* v. *Secretario de Hacienda,* 109 D.P.R. 456 (1980).

Nevertheless, the aforementioned broad authority gives way before constitutional or other types of limitations. One of these limitations is established by Section 3 of the Federal Relations Act, 1 L.P.R.A, which in its relevant part states as follows:

> " . . . the internal revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such Legislature may direct, on the articles subject to said tax, as soon as they are manufactured, sold, used, or brought into the Island; Provided, *that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico . . .* " (Emphasis provided).

Likewise, the Interstate Commerce Clause of the Constitution of the United States establishes that:

> Congress shall have Power to impose and collect Taxes, Duties, tariffs, and Excise taxes . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . Art. I Sec. 8 Constitution of the United States of America, 1 L.P.R.A.

The purpose of this constitutional principle was to grant to Congress the power to regulate both interstate and international commerce. Therefore, it has been said that it is the principal source of congressional powers. Laurence H. Tribe, *I American Constitutional Law,* 3d Ed., New York, Foundation Press, 2000 pp. 801-808.

On the other hand, and in spite of the fact that the Constitution of the United States nowhere limits State interference with interstate commerce,[7] since 1852 the Supreme Court of the United States has interpreted that the Commerce Clause also contains an implicit limitation to the power of the States to regulate interstate and international commerce, even in the absence of express federal legislation in this respect. See, *Cooley* v. *Board of Wardens,* 53 U.S. 299 (1852); Tribe, op cit. This aspect of the Commerce Clause is called the "dormant or negative aspect". *United States* v. *South-Eastern Underwriters Ass'n.,* 322 U.S. 533, 552 (1944); *Southern Pacific Co.* v.

[7] Tribe, *op. cit.,* p. 1029.

Arizona, 325 U.S. 761 (1965). This negative aspect prevents the States from risking the welfare of the Nation "by plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." (Quotations omitted.) *Am. Trucking Ass'ns* v. *Mich PSC,* 545 U.S. 429 (2005).

With respect to the application of the Commerce Clause in our jurisdiction, this court has stated, both before and after the approval of our Constitution that said clause is not applicable to the Commonwealth of Puerto Rico. *Ballester Hnos.* v. *Tribunal de Contribuciones,* 66 D.P.R. 460 (1946); *R.C.A.* v. *Gobierno de la Capital,* 91 D.P.R. 416 (1964); *South Puerto Rico Sugar Corporation* v. *Comisión de Servicio Publico,* 93 D.P.R. 12 (1966). Some of the arguments we have outlined to reach this conclusion are, the Unincorporated Territory status of Puerto Rico before the Constitution was approved, and the different profiles assumed in the commercial relations between Puerto Rico and the United States and among the States of the United States.

In spite of the above, *in the more recent decisions we have distanced ourselves from this position and have noted that this controversy has not been fully resolved*.[8] Specifically in *Marketing and Brokerage*

[8] It should be noted that in *South P.R. Sugar Corp.* v. *Comisión de Servicio Publico de Puerto Rico*, 93 D.P.R. 12 (1966), we indicated that the tariff imposed by the Commission was

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Specialists, Inc. v. *Secretario de Agricultura,* 118 D.P.R. 319 (1987), we indicated that at this time it was not necessary to determine if the Interstate Commerce Clause in its "dormant state" applied to Puerto Rico. Likewise, in *Gómez Hermanos* v. *Secretario de Hacienda,* 114 D.P.R. 367 (1983), to determine the validity of a local tax, we used the requirements that the federal case law had adopted to evaluate the origin of State tax laws given the Commerce Clause. Finally, in *Banco Popular* v. *Mun. de Mayaguez,* 126 D.P.R. 653 (1990), although we did not solve the controversy using the analysis created for the "dormant aspect" of the Commerce Clause, *we did describe a part of it as if it were fully applicable in our jurisdiction to the point that we indicated that the law challenged therein could be unconstitutional based on said analysis*.[9]

The case herein gives us an opportunity to resolve definitely the *question regarding whether the Commerce Clause, in its "dormant state", is applicable to Puerto Rico.* Therefore, before going on to discuss the merits of the arguments of the petitioners in the present case we will discuss the aforementioned question. Let us see.

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valid even if the Interstate Commerce Clause was applicable to Puerto Rico in the same way as to the States of the Union.

[9] In spite of that, the validity of the challenged law was upheld based on a reasonable interpretation that rectified the possible defects it could have. See, *Banco Popular* v. *Mun. de Mayaguez, ante.*

i

An exhaustive study of case law – both local and federal – and of constitutional legal scholars shows that the foregoing question has not been widely discussed and, therefore, there is a scarcity of legal sources to help us solve it. However, it arises from existing sources that with the passage of time several arguments have been outlined in favor and against the application of the Commerce Clause to our jurisdiction.

Among the more convincing arguments *against* its application are that: 1) The Constitution of the United States in full has never applied to Puerto Rico because it has never been considered a State; 2) the relationship between Puerto Rico and the United States, since 1952 is unique, therefore, Puerto Rico cannot be catalogued either as a State or as a Unincorporated Territory as regards the foregoing clause; 3) neither in the Constitution of Puerto Rico or in Public Law No. 600, or in the Federal Relations Act, is it established that said clause would apply to Puerto Rico, and, therefore, it was not a part of the pact between the United States and Puerto Rico. See, *Sancho* v. *Bacardi Corp.,* 109 F.2d 57 (1st Cir. 1940) (repealed for other reasons in *Bacardí Corp.* v. *Domenech,* 311 U.S. 150 (1940); *Mora* v. *Torres,* 113 F. Supp. 309 (P.R. Dist. 1953); *R.C.A.* v. *Gobierno de la Capital, ante.*

On the other hand, the most persuasive arguments in favor of the application of the Commerce

Clause to Puerto Rico are: 1) that it applies to Puerto Rico through the Territorial Clause; 2) that the intention of Congress in allowing the approval of the Constitution of the Commonwealth of Puerto Rico was to organize a local government, and, therefore, its adoption never altered the applicability of U.S. Laws and federal jurisdiction to Puerto Rico; 3) the broad powers of Congress to regulate commerce in general, including that of Puerto Rico; 4) the clear applicability to Puerto Rico of the principle of uniform commerce and common market. See *Starlight Sugar Inc.* v. *Soto,* 253 F 3d 137 (1st Cir. 2001); *Sea Land* v. *Municipality of San Juan,* 505 F. Supp. 533 (P.R. Dist. 1980); Raul Serrano Geyls, *Derecho Constitucional de Estados Unidos y Puerto Rico,* Vol. I, Continuing Education Program of the Universidad Interamericana de Puerto Rico, San Juan, Puerto Rico, 1992, p. 341.[10]

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[10] With the passage of time, the controversy regarding this matter has limited itself to the possible application of the dormant aspect of the Commerce Clause, and the controversy regarding the application of the Commerce Act with respect to the power of Congress to regulate interstate commerce has been set aside. As to that, we find the following expressions of the First Circuit Court of Appeals in *Trailer Marine Transport Corp.* v. *Rivera Vazquez,* 977 F 2d 1 (1st Cir. 1992) to be extremely relevant:

> "Both the Supreme Court and this court have long held or assumed that Congress has power under the Commerce Clause to regulate commerce with Puerto Rico. See *Secretary of Agric.* v. *Central Roig Refining Co.,* 388 U.S. 604, 616 (1950) (Sugar Act of 1948 applied

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Most of the foregoing arguments have their origin in several decisions of the U.S. District Court for the District of Puerto Rico and of the First Court of Appeals. At the beginning, both courts had determined that the Commerce Clause did *not* apply to Puerto Rico. *Mora* v. *Torres, ante, Buscaglia* v. *Ballester,* 162 F. 2d 805 (1st Cir. 1947) and *Lugo* v. *Suazo,* 59 F. 2d 386 (1st Cir. 1932). Subsequently, these courts *changed their mind* and decided that *it was fully applicable to the Commonwealth of Puerto Rico.*

The first case that decided in favor of the application of the foregoing clause was *Sea Land Services, Inc.* v. *San Juan,* 505 F. Supp. 533 (1980). On that occasion, the U.S. District Court of Puerto Rico concluded that the authority granted to Congress through the Territorial Clause[11] meant that the Commerce Clause was applicable to Puerto Rico *both in the positive aspect and the dormant aspect.* The court added that the reasons that led the constituents to approve the Commerce Clause are equally applicable to commercial relations between Puerto Rico and

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to Puerto Rico through the Commerce Clause); *Puerto Rico Tel. Co.* v. *F.C.C.,* 553 F.2d 694, 701 (1st Cir. 1977) (Federal Communications Commission regulations applied via the Commerce Clause to government-owed telephone company in Puerto Rico). Thus, in one aspect, the question "whether the Commerce Clause applies to Puerto Rico has been settled in the affirmative for many years . . . "

[11] Article IV, Sect. 3 of the Constitution of the United States.

the States or foreign countries and to resolve that the aforementioned clause does not apply to Puerto Rico would provoke rivalries with the States and prevent regulatory uniformity in cases where Congress might deem it relevant.

In spite of the previous determination, it was not until 1992 that the First Circuit Court of Appeals had the opportunity to change its pronouncements in *Buscaglia* v. *Ballester, ante,* and *Lugo* v. *Suazo, ante,* among others, regarding the non-applicability of the Commerce Clause to Puerto Rico. Said opportunity arose in *Trailer Marine Transport Corp.* v. *Rivera Vazquez,* 977 F 2d 1 (1st Cir. 1992), in which the foregoing court indicated among other things that:

> "*Puerto Rico today certainly has sufficient actual autonomy to justify treating it as a public entity distinct from Congress and subject to the dormant Commerce Clause doctrine.* In the Supreme Court's words, 'the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union . . . ' *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 594, 96 S.Ct. 2264, 49 L.Ed. 2d 65 (1976)". (Emphasis supplied).

This court *also* stated:

> "The central rationale of this dormant Commerce Clause doctrine, as the Supreme Court has explained, is the dominant purpose of the Commerce Clause to foster economic

> integration and prevent local interference with the flow of the nation's commerce. *This rationale applies with equal force to official actions of Puerto Rico. Full economic integration is as important to Puerto Rico as to any state in the Union.* In a different context, the Supreme Court has flatly rejected the notion that Puerto Rico may erect an 'intermediate boundary' separating it from the rest of the country. There is no reason to believe that Congress intended to authorize Puerto Rico to restrict or discriminate against cross-border trade and ample reason to believe otherwise." (Omitted quotations) (Emphasis supplied).

To reach this decision, the First Circuit also based itself on case law pronouncements made by other Circuits. Among them, that made by the Ninth Circuit in *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (1951), in which it was determined that the dormant Commerce Clause doctrine was applicable to the then territory of Alaska and that of the Third Circuit in *JDS Realty Corp.* v. *Government of Virgin Islands,* 824 F. 2d 256, 259-60 (1987), which did the same thing for the current territory of the Virgin Island.

As to those decisions – those relative to Alaska and the Virgin Island – we must underscore, beyond the differences between the type of relationship they have with the United States as compared to Puerto Rico, the language contained in Anderson, in the sense that:

> "But we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce. The words 'all rightful subjects of legislation' describing the extent to which the legislative power of the Territory should extend, 48 U.S.C.A. 77, do not include the imposition upon commerce such as that here involved of burdens which a State might not create under like circumstances. 'All rightful subjects of legislation' must be held to refer to matters local to Alaska." *Anderson* v. *Mullaney, ante*, p. 128.

In subsequent decisions, the First Circuit of Appeals has reiterated, with no further explanations, the applicability of the Commerce Clause to Puerto Rico. To such effects, see, *United Egg Producers,* et al. v. *Department of Agriculture,* 77 F. 3d 567 (1st Cir. 1996); *Starlight Sugar, Inc.* v. *Soto, ante.* Finally, it must be noted that as recently as April 2005, the above federal court resolved the case *Walgreens Co.,* v. *Rullan,* 405 F. 3d 50 (1st Cir. 2005), where it *reiterated* this decision when it determined that a local law requiring certificate of necessity and convenience from any person interested in acquiring or building a health establishment on the Island – including pharmacies – violated the dormant aspect of the Commerce Clause of the Constitution of the United States and was, therefore, invalid. Said decision was appealed, through petition for certiorari before the United States Supreme Court on November 4, 2005.

Subsequently, on January 9, 2006, the Supreme Court *denied* the requested appeal. See, *Perez Perdomo* v. *Walgreen Co.,* 126 S. Ct. 1059, 163 L.Ed. 2d 928 (2006).

Certainly, all the foregoing arguments are highly persuasive and include political aspects that should be resolved in a forum other than the courts. However, we believe that, given the particular circumstances of our relationship with the United States, *the arguments in favor of the application to Puerto Rico of the Commerce Clause, in its dormant state, are more persuasive than those against it*.

First, it is an undisputable fact that the relationship of Puerto Rico and the United States is *sui generis*[12] – that it cannot be catalogued as Incorporated Territory or Unincorporated Territory – and that whatever the relationship, Congress has the authority through the Territorial Clause – to regulate both interstate and international commerce in Puerto Rico. Based on the above, it would be incorrect to address the controversy regarding the applicability of the dormant aspect of the Commerce Clause to our jurisdiction under the simple assertion that the Commerce Clause does not apply, on its own merits, to Unincorporated Territories.

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[12] *Califano* v. *Torres,* 435 U.S. 1 (1978); *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976).

Thus, although there is a special and unique relationship between the United States and Puerto Rico, there should be *no* doubt that in terms of the self-governing powers granted to them, the Commonwealth of Puerto Rico and the States of the Union are extremely similar. See, *Examining Bd. of Eng'rs* v. *Flores de Otero, ante*, p. 595 and *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 671 (1974). *Certainly, Puerto Rico is not a country or an independent territory and cannot have the freedom to pass laws that upset the stability of interstate commerce.* See, *Trailer Marine Transport Corp.* v. *Rivera Vazquez, ante.*

In addition to the above, we believe that there are other arguments to support with equal forcefulness the application of the dormant aspect of the Commerce Clause in our jurisdiction. To such effects, we emphasize the expressions of the First Circuit Court of Appeals in *Trailer Marine Transport Corp. v. Rivera Vazquez, ante,* relative to the fact that full-economic integration – the *fundamental purpose of the Commerce Clause* – is as essential to Puerto Rico as to any State of the Union. In other words, there is *no* valid judicial reason to support – in the absence of federal legislation – the right of Puerto Rico to discriminate against the products of other States or foreign products, in order to benefit their own.

Certainly, there should be no doubt in anyone's mind that – at least in commercial aspects – the United States have broad powers to avoid what the Supreme Court of the United States has denominated

" . . . the tendencies toward economic Balkanization that has plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm* v. *Heald,* 544 U.S. 460, 472 (2005), quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979).

Finally, in the absence of an express provision excluding Puerto Rico from the application of the dormant aspect of the Commerce Clause,[13] there is *no* reason to believe that Congress authorized Puerto Rico to discriminate against interstate and international commerce. Equally, it would be risky to uphold the contrary when the Federal Relations Act has a provision preventing the Legislature of the Commonwealth of Puerto Rico from establishing " . . . *any distinction between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico . . .* " Section 3 of the Federal Relations Act, *ante.*

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[13] The only reference to the exclusion of Puerto Rico with respect to any legislation relative to interstate commerce is in Section 38 of the Federal Relations Act that provides that the Interstate Commerce Clause will not be applicable to Puerto Rico. However, said article cannot prohibit more that what it expressly provides, and therefore it cannot be granted the capacity to prevent the application in our jurisdiction of a constitutional provision like the Interstate Commerce Clause. For similar expressions, see *Sea Land* v. *Municipality of San Juan ante,* quoting Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to the Commonwealth of Puerto Rico?* 39 Rev. Jur. U.P.R. 169 (1969).

In view of the above, *it is our belief that the dormant state doctrine of the Commerce Clause of the Constitution of the United States applies to the Commonwealth of Puerto Rico as determined by the Supreme Court of the United States.*

C

Now then, having stated the above, we must now ask ourselves what analysis is required in the face of a violation of this doctrine.

As previously mentioned, the dormant or negative aspect of the Commerce Clause prevents a State from passing laws that affect interstate or international commerce to the detriment of foreign products or to benefit local products – even in the absence of related federal legislation. In other words, and as expressed by the Supreme Court of the United States, "[t]he negative or dormant implication of the Commerce Clause prohibits state [. . .] regulation [. . .] that discriminates against or unduly burdens interstate commerce and there by 'imped[es] free private trade in the national marketplace'" *General Motors, Corp.,* v. *Roger W. Tracy,* 519 U.S. 278 (1997). (Quotations omitted).

As pointed out by well-known scholars Rotunda and Nowak, the dormant aspect of the Commerce Clause seeks to prevent the States from imposing economically protectionist measures. They also indicate that it is irrelevant whether the advantage is to local merchants or to local consumers and that

both situations violate the negative aspect of the Commerce Clause. Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law,* West Group 3rd Ed., Bol. 2 Sect. 11.1 p. 133 (1999).

The current focus of the Supreme Court of the United States, according to the well-known scholar Laurence H. Tribe, is directed at giving more emphasis to the question regarding whether the statute in controversy discriminates against interstate or international commerce. Laurence H. Tribe, *op cit.* p. 1059. Thus, a State law that discriminates against interstate commerce, whether on its face or because of its effects, will be invalidated unless the State can show that the statute has a legitimate local purpose and that said purpose cannot be achieved with non-discriminatory measures. *Ibid.*

Now then an Act that is not discriminatory on its face or because of its effects, but which indirectly affects interstate commerce can be invalidated if the burden of this tax on commerce is clearly excessive in relation to the putative local benefits. *Oregon Waste Sys.* v. *Dept. of Envtl. Quality,* 511 U.S. 93, 99 (1994)[14].

With respect to the specific aspect of State tax legislation, the Supreme Court of the United States has established a *cardinal rule,* consistent with the Commerce Clause that provides that no State may

[14] "[. . .] the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

impose a tax that discriminates against interstate commerce by providing a direct commercial advantage to local companies. *Bacchus Imports* v. *Diaz,* 468 U.S. 263, 268 (1984) quoting *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 329 (1977) and *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458 (1959).

With the passing of time, the doctrine regarding the analysis of the foregoing State laws has been expressed as follows: a State tax – facing a challenge based on the Commerce Clause – will be considered valid if: 1) there is a substantial link between the activity subject to taxation and the State that imposes it; 2) the tax is equally or proportionally distributed; 3) *the tax in question does not discriminate against interstate commerce*[15]; 4) the tax is, adequately related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274

[15] This third element has been analyzed according to the traditional approach used when a law is challenged for allegedly violating the dormant aspect of the Interstate Commerce Clause. Tribe, op. cit., p. 1106. That is, a State law that discriminates against interstate or international commerce – whether on its face or because of its effects – is virtually invalid or invalid *per se. Chemical Waste Management* v. *Hunt,* 504 U.S. 334 (1992); *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.,* 476 U.S. 573 (1986); *Pike* v. *Bruce Church. Inc.* 397 U.S. 137 (1970). See also, Tribe, *op cit.* p. 1059.

(1977); see, also, *Iberia* v. *Secretario de Hacienda,* 135 D.P.R. 57 (1993).[16]

As to said criteria, it has been held that *the third requirement is dominant,* and both the first and the fourth are meant to show that the State has sufficient relation to the activity it proposes to tax. Finally, the second criterion is meant to make sure that the taxes do not obligate interstate commerce to pay more that what corresponds to it. Tribe, *op cit.* p. 1106-07.

D

After describing the rule of law regarding the dormant aspect of the Commerce Clause, we now go on to jointly analyze findings of error two and three. Essentially, the petitioners argue that Article 2 of Public Law No. 69, *ante,* discriminates against interstate commerce both in terms of its purpose and because of its effects and, therefore, violates the Commerce Clause and Section 3 of the Federal Relations Act.

In the first place we must resolve, without further analysis, the possible argument that Public Law No. 69, *ante,* challenged herein is discriminatory on its face, *emphasizing* that in the sworn petition submitted before the primary court, the very petitioners admit that the aforementioned Law is *not*

[16] This test also incorporates due process requirements. See, Tribe, *op cit.* p. 1106.

discriminatory. Likewise, we point out that in the case herein, there is no dispute in the sense that the challenged law applies equally to local, State, or international companies, since the companies mentioned must pay a tax that will depend on their *volume of production,* regardless of their place of origin.

In spite of this, the petitioners argue that both the primary court and the intermediate appellate court erred because they did not use the legislative history of Public Law No. 69, *ante,* to determine that the measure had a *discriminatory purpose* or, in other words, that it was discriminatory on its face.

Regarding this position, it must be pointed out that on several occasions we have resolved that "if [a] law lacks preliminary recitals, or if having them, they *do not include the legislative intent,* it is useful to consult other documents such as the reports of the commissions that studied the bill of law and the debates held when the measure was discussed on the floor, as they appear in the Legislative Diary." *Vicenti Damiani* v. *Saldaña Atha,* 157 D.P.R. 38 (2002); *Chevere* v. *Levis Goldstein,* 150 D.P.R. 525 (2000). In other words, *the norm as to how the legislative intent of a statute should be analyzed* is to look for it in the preliminary recitals, and only when there are no preliminary recitals, or when the *legislative intent is not stated there,* may other documents be consulted.

And it cannot be otherwise, since interpreting the legislative intent of a law based on documents other

than the preliminary recitals – when such intent is contained therein – would be to affirm *sub-silentio* that the legislature "says one thing, but means another." Equally, it is not the same thing to interpret a statute in order to be able to apply it, than to interpret the statute in order to determine the legislator's intent when he approved it. As to said alternative, the following expressions of the Supreme Court of the United States are revealing:

> "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.* We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it." (Emphasis supplied) *United States* v. *O'Brien,* 391 U.S. 367, 383-384 (1968).

This court has made similar statements regarding the use of the statements of the legislators during the legislative debate when interpreting a law. To such ends, we have stated that: "it is a generally accepted rule that the statements of a legislator on the floor of the legislative body to which he belongs, are not sufficiently representative of the collective intent of the body that approves the statute." *Vazquez* v. *Secretario de Hacienda,* 103 D.P.R. 388, 390 (1975). In addition it has been reiterated that the laws "must be interpreted based on what the Legislature did, and not on the basis of what it failed to do, or on the individual actions of one of its members." *Elicier* v. *Sucesion Cautifio,* 70 D.P.R. 432, 437 (1949).

Having said the above, we analyzed the preliminary recitals of Public Law No. 69, *ante,* to determine if it is necessary to find other elements to establish the intent of the legislators when they passed it. The foregoing preliminary recitals in its relevant part provides as follows:

> "The tax measures established by this measure should not affect other areas of the country's economic base. For this reason, in the case of beer, the mechanism endorsed by the Supreme Court of Puerto Rico in U.S. *Brewers Association v. Secretario de Hacienda*, 103 D.P.R. 456 (1980), is used to guarantee that the industries that produce less can continue to operate unchanged. In such cases, as its productive capacity increases, and as a result, its financial stability, its responsibility to the treasury increases. In the

> face of this, *it is the public policy of the Commonwealth of Puerto Rico to ensure that small breweries do not receive the burden of the new excise tax increase until their annual production and financial capacity justify it* . . . " (Emphasis supplied).

An analysis of the text quoted above, shows clearly and transparently that the intent of the Legislature when it passed said Act was to approve a new excise tax while guaranteeing, on the other hand, that small breweries could continue to operate without receiving the burden of the tax until their annual production justified it. Let us remember, "when the law is clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of fulfilling the spirit thereof." Article 14 of the Civil Code, 31 L.P.R.A. § 14; *E.L.A.* v *Rodriguez Santana,* res. of February 24, 2005, 2005 TSPR 13.

In accordance with the above, we believe that the Court of First Instance and the Court of Appeals *acted correctly* when they resolved that the Legislative intention that led to the passing of Public Law No. 69 is *not* discriminatory on its face, since it clearly arises from its preliminary recitals. Likewise, and contrary to the arguments of the petitioners, we believe that to arrive at this conclusion it was *not* necessary to examine the expressions of several legislators during the legislative debate process.

On the other hand, the petitioners hold that the challenged law has a *discriminatory effect* on interstate commerce. They base their argument on *Bacchus*

Imports v. *Diaz, ante,* a case in which the Supreme Court of the United States voided a law of the State of Hawaii that established a tax on alcoholic beverages with the sole exceptions of two beverages produced only in that state.[17]

In examining the purpose of the aforementioned legislation, the Supreme Court of the United States stated that "examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce." *Ibid.* p. 270. Regardless of the above, the principal federal court stated that: "Likewise, the effect of the exemption is clearly discriminatory, in that *it applies only to locally produced beverages, even though it does not apply to all such products.* Consequently, as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect." *Ibid*, p. 271.

As may be appreciated from the above, the Supreme Court of the United States declared that the challenged law was unconstitutional on its face – in its purpose – and because of its effects. It is based on the former that the petitioners outline their argument that Public Law No. 69, *ante*, is discriminatory

[17] These beverages were Okolehao, a drink manufactured from the root of a native Hawaiian plant, and fruit wines.

because of its effects. However, we believe that the decision in *Bacchus, ante,* regarding the discriminatory effects of the law is *not* applicable to the present case.

First, the laws involved in both cases are *clearly different.* While *Bacchus, ante,* attempted to protect the Hawaiian liquor industry exclusively by exempting from the application of the tax several beverages that were produced only in Hawaii, the case in caption attempts to guarantee that the industries that produce less – *regardless of their place of origin* – may absorb the tax imposed without ceasing operations. It arises from the very law that in order to comply with this purpose the Legislature of Puerto Rico established a staggered tax exemptions system that attempts to allow the companies' liability to the treasury to increase gradually as their economic stability increases.[18]

As we saw, in *Bacchus, ante,* the Supreme Court of the United States gave special emphasis to the fact that the only beverage that benefited from the exemption was the Hawaiian one, *this is not the situation of the case herein.* The record of the case before our consideration shows that *the very petitioners*

[18] We must emphasize that the Legislature has broad discretion in the tax area and that "traditionally, 'classifications' have been a method to adjust the tax programs to local needs and uses in order to achieve an equitable distribution of the tax burden." *U.S. Brewers Assoc.* v. *Secretario de Hacienda, ante*; *Miranda* v. *Sec. de Hacienda,* 77 D.P.R. 17 (illegible), 178 (1954).

admit that there are foreign beers, such as Mike's Hard Lemonade and Cruzan Island Cocktails that benefit from the special exemption and others such as Samuel Adams and Bacardi Breezers that had been eligible or discontinued production, whereby the local beer industry is not the only one benefiting from the exemptions offered by said statutes.

In addition, it is an undisputed fact that the approved exemptions apply and may apply equally to local, State or foreign breweries allowing the tax level to vary *depending on their annual production*. That is, a brewery that is benefiting today from some of the exemptions imposed, may benefit the following year from a smaller exemption or none, depending on changes in production. Likewise, it would not be risky to affirm that small foreign breweries may take advantage of the aforementioned benefit if they should decide to sell their products in Puerto Rico.

In other words, resolving that the effect of Article 2 of Public Law No. 69, *ante*, is discriminatory against interstate commerce requires a determination that said law has the effect of prohibiting entities outside Puerto Rico from taking advantage of its benefits, which as we have seen is not correct.

Likewise, although it is true that the Commerce Clause in its dormant state prohibits the States from passing financial laws that discriminate against foreign products for reason of origin, we cannot affirm that said clause prohibits a State from passing a law that, in technical terms, applies differently to several

products or manufacturers. Of course, that will be so as long as said difference has nothing to do with the place of origin of the products, but rather with common or neutral aspects that may vary from company to company regardless of their place of origin. In this regard the following statements of the Supreme Court of the United States are relevant: "[T]he Commerce Clause *is not violated* when the differential treatment of two categories of companies *results solely from differences between the nature of their business,* not from the location of their activities." *Kraft General Foods. Inc.* v. *Iowa Department of Revenue and Finance,* 505 U.S. 71, 78 (1992).

For said reasons, we believe that Article 2 of Public Law No. 69, *ante, does not discriminate against interstate commerce,* because of its application or effects. Now, our analysis does *not* end here. As previously mentioned, the state tax laws, in addition to not being discriminatory, must comply with other criteria to survive a challenge under the Commerce Clause. These criteria are: 1) the tax applies to some activity that has a substantial link to the State; 2) the tax is fairly distributed; and 3) it is appropriately related to the services provided by the State.

The petitioners have outlined no argument directed to showing that Article 2 of Public Law No. 69, *ante*, does not comply with some of the aforementioned criteria. Notwithstanding the above, it is clear that the tax established by Public Law No – 69 – and, therefore, the challenged exemption – applies to an activity with substantial links to Puerto Rico and is

related to services provided by it, that is, the authorization to sell alcoholic beers in our jurisdiction. In addition, it is fairly distributed because the exemption diminishes as the company produces more.

Finally, we must mention that when a State law imposing a tax for allegedly discriminating against *international* commerce is challenged the following criteria must also be analyzed: 1) "whether the tax notwithstanding apportionment, creates a substantial risk of international multiple taxation"; and 2) "whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.* v. *County of Los Angeles,* 441, U.S. 434, 451 (1979).

As to the first criterion, the Supreme Court of the United States has indicated that a State tax will be validated unless there is an unavoidable risk of double taxation. *Barclays Bank PLC* v. *Franchise Tax Board,* 512 U.S. 298 (1994); *Container Corp. of America* v. *Franchise Tax Board,* 463 U.S. 159 (1983). It is obvious that the tax that gives rise to the exemption challenged herein *does not* pose the risk of double taxation, since it falls only on beverages sold in Puerto Rico.

As to the second criterion, it intends to prevent the distortion of the Congressional interest to establish uniformity in commercial relations with other countries. Said criterion presupposes that Congress has clearly stated its intent to create the aforementioned

uniformity. *Barclays Bank PLC* v. *Franchise Tax Board, ante,* In the present *case* there is no Congressional intent to maintain the aforementioned uniformity and, in addition, there are a number of States with different laws that impose different taxes on beers and other beverages.[19]

We believe, we repeat, that Article 2 of Public Law No. 69, *ante, does not* violate the Interstate Commerce Clause, because it: 1) does not have a discriminatory purpose; 2) does not have a discriminatory effect; 3) applies to an activity that has a substantial link to Puerto Rico; 4) is fairly distributed; 5) is adequately related to services offered by the State; 6) does not constitute a substantial risk of multiple taxation; and 7) does not affect any possible interest of the U.S. government to maintain uniformity with international commerce.[20] To conclude, we

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[19] See as example: Wyo Stat. § 12-3-101 (Wyoming; W. VA. Stat. § 11-16-13 (West Virginia); 72 P. S. § (illegible) (Pennsylvania; N.M. Stat. Ann. § 7-17-2 (New Mexico); Wis. Stat. § 139.02(1) (Wisconsin); and Tex. Alco. Bev. Code § 203.01 (Texas).

[20] The petitioners also argued that Article 2 of Public Law No. 69, *ante,* violates Section 3 of the Federal Relations Act, *ante.* Certainly, given our opinion with regard to the Commerce Clause, *it is unnecessary to address this argument, since the analysis required by the Commerce Clause is, at least, more strict than that required by Section 3 of the Federal Relations Act, ante.* Thus, we believe that an Act that survives the analysis required by the Commerce Clause – as is the case of Article 2 of Public Law No.69, *ante* will necessarily survive a challenge under Section 3 of the Federal Relations Act.

believe that both the Court of First Instance and the Court of Appeals acted correctly when they dismissed the sworn petition that gave rise to the case in caption.

For all of the above, we *concur* with the Judgment issued by the Court in the present case.

[Illegible signature]
FRANCISCO REBOLLO LOPEZ
Associate Judge

[Translators Note: All pages except the last, left margin, one set of initials – FRL]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Sonia Crescioni of legal age, single, resident of San Juan, P.R., professional interpreter/translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally revised the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities

In San Juan, Puerto Rico, today, June 29, 2007.

/s/ Sonia Crescioni
Sonia Crescioni
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