

Tobacco Industry Strategy in Latin American Courts

A Litigation Guide

PREPARED BY **O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW**
SUPPORTED BY **CAMPAIGN FOR TOBACCO-FREE KIDS**

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GEORGETOWN LAW



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Guidelines for implementation of Article 11 of the WHO FCTC “Packaging and labelling of tobacco products” (decision FCTC/COP3(10)).

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WHO Framework Convention on Tobacco Control.

General Framework

A. Introduction

The ratification of the WHO Framework Convention on Tobacco Control (FCTC) by 15 countries in Latin America has played a central role in generating momentum for strong tobacco control laws at the municipal, provincial and national levels – even in the few countries that have not yet ratified the treaty.¹

The tobacco industry has correspondingly stepped up two related efforts. First, it is spending substantial resources to sway lawmakers against passing effective tobacco control laws. Second, where its efforts to dilute or weaken tobacco control laws fail, it turns to the courts, often deploying the same or similar arguments based on certain purported “rights.” These “rights” relate to the advertising and marketing of its products, the “rights” of citizens to consume those products in public or occupational spaces, and the “rights” of proprietors and employers to permit such consumption.

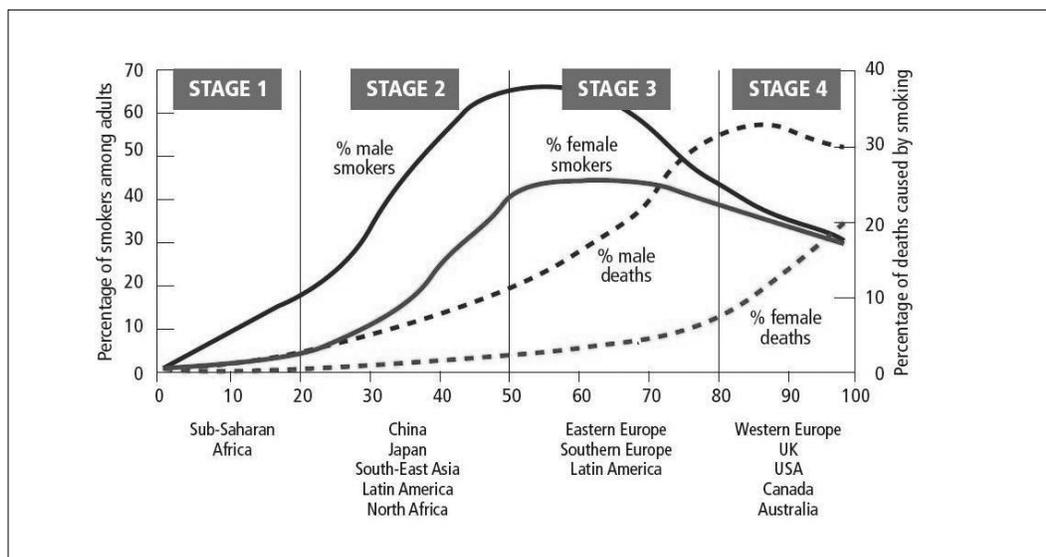
This guide provides a framework with which to analyze these asserted rights and mount effective responses to them. While our focus is on tobacco control litigators, we believe it will be a useful guide for lawyers within ministries of health and private practice attorneys seeking compensation for clients injured by tobacco products. In this guide, there is a focus on analyzing arguments connected to freedom of expression, as we found that it is the most common strategy for the tobacco industry in the region. In addition, other arguments analyzed include ones related to private property, economic freedom, the right to work and anti-discrimination. After that analysis, we suggest possible answers based on constitutional and human rights arguments.

As we explain below, there are important limitations to consider when using a general guide such as this one. Constitutional and statutory differences will require that the arguments be tailored to specific cultural, economic, legal and political circumstances. However, we believe that Brazil and the countries of Spanish-speaking Central and South America share sufficient legal and constitutional characteristics to warrant the development of a common litigation guide. Indeed, the tobacco industry has not hesitated to replicate arguments and strategies in a similar fashion, often citing in support of its arguments decisions from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

¹ The countries in Latin America that have ratified the FCTC are: Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

B. Background

Tobacco consumption poses a major public health threat worldwide, although the tobacco industry is increasingly focusing on developing countries as a result of strong tobacco control laws and higher taxes imposed in the wealthier countries of North America and Europe.² There are more than 120 million smokers in the Latin American region, over half of whom will die from a tobacco-related disease.³ Latin America has been broadly⁴ classified at Stage 2 of the tobacco epidemic, a stage marked by increasing smoking prevalence in men, a beginning increase in prevalence among women, and a smoking-attributable mortality rate for men that has not yet peaked.^{5 6}



Source: Lopez, Allen, et al., A descriptive model of the cigarette epidemic in developed countries. 3 *Tob. Control* 242-47 (1994).

In a recent study of smoking in developing countries, women in Latin America were projected to have higher levels of tobacco use than men. In five Latin American countries, at least a third of women had tried smoking, including three-quarters of women in Argentina and Uruguay, and

2 Bollyky, Thomas and Lawrence Gostin, The United States' Engagement in Global Tobacco Control: Proposals for Comprehensive Funding and Strategies, 301(23) *J. Am. Med. Ass'n.* 2637-38 (2010).

3 Fernando Muller and Luis Wehbe, Smoking and Smoking Cessation in Latin America: a review of the current situation and available treatments, 3 *Int'l J. COPD* 285 (2008).

4 Although some countries are considered to be at stage 3, overall Latin America as a whole can be considered to be at stage 2.

5 Menezes, Ana, et. al., Prevalence of smoking and incidence of initiation in the Latin American adult population: the PLATINO study, 9 *BMC Public Health* 151 (2009). Available at <http://www.biomedcentral.com/1471-2458/9/151>.

6 Lopez, Allen, et al., A descriptive model of the cigarette epidemic in developed countries. 3 *Tob. Control* 242-47 (1994). Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1759359/pdf/v003p00242.pdf>.

three-fifths of those in Ecuador.⁷ Demand in the region is expected to increase modestly, with most of the increase occurring in Brazil.⁸ A global effort to minimize the public health threat posed by tobacco consumption and exposure to tobacco smoke is required.

The WHO Framework Convention on Tobacco Control (FCTC) and the accompanying guidelines, which set forth minimum actions that governments must take to reduce tobacco use and protect populations from exposure to tobacco smoke, now play the major role in that global effort.⁹ The process leading to implementation of the FCTC itself has caused many governments and public health groups to become more knowledgeable about using law to protect public health. Ratification has been followed by many national laws that meet or even exceed the FCTC's requirements.

The tobacco industry, however, also continues to focus on the legislative process. As a result, many countries have failed to enact adequate legislation. For those that have passed tobacco control laws – strong or weak – the industry has turned to the courts in an effort to roll back legislative progress. Some countries, like Uruguay, have put in place highly effective tobacco control laws and have effectively defended their laws from industry attack. Others, like Brazil, have faced numerous legal challenges from the industry in their attempt to protect their citizens from the hazards of tobacco use and exposure to tobacco smoke.

This guide contributes to the global effort to reduce tobacco use through law by providing a roadmap to defend tobacco control laws from industry attack. From June 11-13, 2009, tobacco control advocates from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Panama, Peru, Uruguay and Venezuela gathered in Santiago, Chile, to discuss the legal environment for tobacco control in their respective countries, to identify common problems and to develop opportunities for cooperation and collaboration in the future. The ideas presented here trace their origins to this meeting, which showed the tremendous potential of regional and global cooperation.

7 Bloch, Michele, et al., Tobacco use and secondhand smoke exposure during pregnancy: an investigative survey of women in 9 developing nations, 98 Am. J. of Pub. Health 1833 (2008).

8 Food and Agriculture Organization of the United Nations, Higher world tobacco use expected by 2010 - growth rate slowing down. Available at: <http://www.fao.org/english/newsroom/news/2003/26919-en.html>.

9 The Conference of the Parties, the governing body of the World Health Organization's Framework Convention on Tobacco Control, has adopted guidelines for Articles 5.3, 8, 9, 10, 11, 12, 13 and 14 dealing with, respectively, protection of public health policy from tobacco industry interference; protection from exposure to tobacco smoke; regulation of the contents of tobacco products and regulation of tobacco product disclosures; packaging and labeling of tobacco products; education, communication, training and public awareness; comprehensive bans of tobacco advertising, promotion and sponsorship and demand reduction measures concerning tobacco dependence and cessation.

C. Potential Uses and Constraints of the Guide

This guide is primarily intended to assist attorneys in defending against arguments commonly deployed by the tobacco industry. The fact that it is defensive in nature should not deter lawyers from thinking creatively about how to use the responses to the tobacco industry's arguments affirmatively, to seek stronger tobacco control legislation and even to seek judicial remedies to safeguard the public's health. Advocates in Mexico, for example, challenged their national tobacco control law for inadequately protecting the rights to health, information and life guaranteed by the Mexican Constitution and required by the FCTC.¹⁰ Moreover, they argued that the new national tobacco control law amended previous health laws in a way that stripped away important powers that the Ministry of Health had previously used to regulate tobacco products. Although the Court ultimately dismissed the case due to procedural arguments before discussing the substantive issues, the case is significant because, by granting the petitioner standing to bring the case before the Court, it affirmed the existence of positive obligations, on the part of the State, that arise as a result of economic, social, and cultural rights.¹¹ Attorneys should carefully analyze their constitutions, national laws and the FCTC and accompanying guidelines when developing litigation strategies.

Different countries' judicial systems follow different procedural and substantive requirements. Terms may differ. An amparo in Mexico is roughly equivalent to a tutela in Colombia, although the remedies available may vary significantly.¹² The provisions and terminology contained in this guide, therefore, will need to be adapted to follow the pleading and procedure requirements for any given country.

This guide addresses arguments primarily made at the national level. In many countries, however, municipalities and provinces have also enacted effective tobacco control laws. In supporting

10 Complaint from Clínica de Interés Público del Centro de Investigación y Desarrollo de la Educación, Clínica de Interés Público del Centro de Investigación y Desarrollo de la Educación v. Cámara de Senadores del Congreso de la Unión, Juzgado Primero de Distrito en Materia Administrativa en el Distrito Federal [Administrative Trial Court] (Mex.) (2008).

11 Mexican Supreme Court of Justice, *Jorge Francisco Balderas Woolrich*, revised amparo 315/2010 against 1791/2008, decided 28/03/2011, rapporteur José Ramón Cossío Díaz, pg. 8.

12 Carlos Sanchez Mejorada, *The Writ of Amparo*, 243 *Essential Human Rights* 107 (1946). An amparo is an individual action in a court for the protection of a constitutional right. Amparos also protect the constitution by ensuring that its principles are not violated by statutes or actions of the state. In general, an amparo action is intended to protect rights other than physical liberty. It may therefore be invoked by any person who believes that any of his or her rights implicitly or explicitly protected by the constitution (or by applicable international treaties) is being violated, although the scope of the writ varies in the jurisdictions where it is available: Argentina, Brazil, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay and Peru. Instead of the amparo writ, Colombia uses a system named *Acción de Tutela*. The legal procedure resembles the amparo but it also functions as a preliminary injunction for any individual at imminent risk of loss due to a state action.

development of these municipal and provincial laws, advocates should keep in mind that the FCTC encourages States to adopt stronger measures than those set forth in the treaty. Arguments should be made that leave municipalities and provinces free to adopt stronger laws than the national law provides, as is the case for Argentina, Brazil and Mexico.¹³ Similarly, advocates should be prepared to defend municipal and provincial, not just national, laws from industry attack. In some countries, the tobacco industry has successfully lobbied to include provisions that “preempt” local or provincial laws, particularly for advertising, tobacco product labeling, and smoke-free public places. While this guide does not specifically address “preemption,” some arguments may be found in the pleadings complementing this document.

Before filing or defending a tobacco industry suit, it is crucial to evaluate all applicable domestic and international law. Some issues, like the right to health or the right to work, will be embedded in various statutes, court decisions and regulations which may provide support for the arguments outlined here; or, they will provide challenges that must be considered. For example, provisions for protection from exposure to tobacco smoke in the workplace might be covered in workplace safety regulations. Similarly, consumer, environmental, public health, or other laws may regulate tobacco products and their use. These issues may also be regulated by international treaties ratified by a specific country, for example, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Because this guide cannot be fitted to every country's pleading and procedural systems or account for certain legal idiosyncrasies, any pleadings or arguments developed using this guide should be reviewed by in-country lawyers to ensure that all applicable legal requirements are met. For the purposes of supplementing this guide, court documents related to the most important tobacco control cases in the region will be made available at the O'Neill Institute for National and Global Health Law's website. The suit brought forth by the tobacco industry in Argentina against the Santa Fe Province can be found there, as can the *amparo* calling for stronger protections for the right to health in the Mexican tobacco control law. Amicus curiae presented by the O'Neill Institute and other institutions in cases in Brazil, Mexico and Peru, and court decisions involving tobacco control cases in Guatemala, Colombia, Mexico and Peru will also be found on the website. This section of the O'Neill Institute's website will be updated on an ongoing basis in order to generate, in conjunction with this litigation strategy guide, useful tools for responding to tobacco industry suits and for advancing the legal framework for tobacco regulation and protection of health. This guide is not intended to provide legal advice.

¹³ Article 2.1 of the FCTC provides that “In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.”

D. General Doctrine: The Balancing of Rights and the Public Health Hazard Posed by Tobacco

In the court documents we have analyzed, even the industry concedes that smoking is a behavior that carries risks that the state should regulate;¹⁴ it just argues that the regulation should be minimal.¹⁵ That concession opens the door to winning arguments based on a “proportional” response to the major threat of tobacco use. Specifically, complete bans on smoking in all indoor public places, workplaces, and on public transport, at a minimum, are not only proportionate to the harms caused by exposure to tobacco smoke, but also necessary to provide effective protection against a leading public health hazard. Public health safeguards, moreover, are required by Article 8 of the FCTC and guaranteed under many states’ constitutional rights to health, life, a safe environment, or other fundamental interests.¹⁶

This guide focuses on fundamental rights (human rights) arguments. “Tobacco control policies, as public health policies, should take into account international human rights obligations. Integrating a human rights approach in tobacco control has many advantages. Human rights law is one of the most powerful legal tools that can be used both domestically (in-country) and internationally. Moreover, human rights are also widely used in political discourse and they usually influence policy debates.”¹⁷ In a recent case before the Constitutional Tribunal of Peru, for instance, in affirming the constitutionality of a progressive tobacco control law approved by the Peruvian Congress, the Court linked human rights obligations to the Framework Convention on Tobacco Control, presenting the FCTC as a legal standard for interpreting these obligations.¹⁸ Along the same lines, a recent resolution from the Pan American Health Organization (PAHO) urges States to “strengthen the technical capacity of the health authority to provide support for the formulation of health policies and plans consistent with the applicable international human rights instruments related to health.”¹⁹ Tobacco industry claims of illegal/unreasonable restrictions on its corporate interests should be analyzed from this perspective.

14 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F. p. V., *Nobleza Piccardo S.A.I.C. Y F. v. Provincia de Santa Fe*, 188/2006, Supreme Court of Argentina.

15 *Id.*

16 The Guideline on Protection from Exposure to Tobacco Smoke Article 6, Article 23, and Article 4 (a) & (b) (decision FCTC/COP2(7)).

17 Cabrera, Oscar and Alejandro Madrazo. *Human Rights as a Tool for Tobacco Control in Latin America*. 52 *Salud Publica de Mexico* 288 (2010).

18 Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3° de la ley N. 28705 – Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011. Section 6, paragraph 65.

19 Pan American Health Organization, CD50.R8, 62nd session of the Regional Committee, October 2010, p. 1-b.

The evidence regarding tobacco smoke's toxic and carcinogenic effects on smokers and non-smokers is incontrovertible and widely accepted.²⁰ This extensive body of evidence itself is of legal significance in some jurisdictions. Brazil, for example, recognizes the toxic and carcinogenic effects of tobacco smoke under the doctrine of *fato notório*, that is, a fact that does not need to be proved in court. Moreover, there is little or no redeeming social value for tobacco consumption. Therefore, any balancing or proportionality tests applied to tobacco regulation are likely to weigh heavily in favor of more far reaching restrictions, more regulation and less misleading information than is now disseminated by the industry.²¹

Many Latin American constitutions explicitly embrace a social rather than an individualistic approach to protecting rights. For example, Article 44 of the Guatemalan Constitution states that “[s]ocial interests prevail over individual interests.”²² In the context of tobacco control, provisions like these can be interpreted as placing a higher state interest in the protection of the public's health rather than competing individual rights (rights that according to Guatemalan legislation and judicial decision may be limited).

This guide is divided into sections describing the major arguments that the tobacco industry commonly asserts when challenging laws requiring protection from tobacco smoke; restricting advertising, sponsorships, and other forms of promotion; defining requirements for tobacco product labeling and packaging; and, other product regulation. In some cases, it may be appropriate to use this guide as a roadmap in constructing opposing briefs or assisting in the search for applicable law. Ultimately, we advocate the use of the industry's strategy against it: under any reasonable understanding of “proportionality,” the interests of the public in being protected from the inherent dangers of tobacco smoke in indoor public places and workplaces and on public transport, at a minimum, outweigh whatever interests the industry has in marketing and encouraging the consumption of a lethal product.²³

20 See e.g. U.S. Dep't of Health & Human Services, Office of the Surgeon General, *The Health Consequences of Smoking: A Report of the Surgeon General*, May 27, 2004. Available at: <http://www.surgeongeneral.gov/library/smokingconsequences/>.

21 Complaint from Clínica de Interés Público del Centro de Investigación y Desarrollo de la Educación, p. VII.

22 Constitution of Guatemala, Art. 44: “Rights Inherent in the Human Person. The rights and guarantees granted by the Constitution do not exclude others which, even though they are not expressly mentioned in it, inhere in the human person. Social interest prevails over individual interest.”

23 Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae supporting respondents p. 3., *Confederação Nacional da Indústria v. Presidente da República*, ADI/3311, Supremo Tribunal Federal [Supreme Court] (Braz.).

Tobacco Industry Arguments and Effective Counter-Arguments

A. Commercial Speech

The Framework Convention on Tobacco Control calls for packaging and labeling restrictions accompanied by requirements for health warnings and other messages, as well as a comprehensive ban on tobacco advertising, promotion and sponsorship.²⁴ The tobacco industry has made extensive use of arguments based on constitutional and international human rights sources to assert the substantial protection of social and political speech. While these protections are ordinarily intended to apply to expression necessary for the functioning of a democratic society, the tobacco industry has used these arguments to assert the right of businesses to encourage the consumption of their (legal) products or to distinguish their brand from rivals' products. Indeed, the industry recently asserted virtually identical arguments to this effect in both Argentine and Brazilian courts.²⁵

As a general answer to such an argument, advocates should take into account that commercial speech is not protected by freedom of expression (which falls under the category of political rights and has a special protection in many jurisdictions). Commercial speech is an element of commercial freedom, a private right that can be limited by the State based on the inherent powers of the state to protect the public's health and safety. Below, we outline the arguments used by the tobacco industry and the appropriate responses based on the state's affirmative obligation to protect health, which outweighs the lesser protections that commercial speech enjoys. The first part of this section focuses on the main argument that commercial speech is not part of freedom of expression. The second part analyzes subsidiary arguments connected to the right to free speech. Finally, the last part of this section references other rights that outweigh the limited protection afforded to commercial speech.

24 WHO (FCTC), Arts. 11, 13, WHA Res. 56.1, WHO Document A56/8, Annex (May 21, 2003). Moreover, Articles 11 and 13 are the only articles which set deadlines for compliance. Article 11 requires "Parties within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure" that the requirements for compliance with Article 11 are met. For Article 13, the period is 5 years.

25 Unconstitutionality Claim Brief from Nobleza Piccardo S.A.I.C. Y F., p. 8.2.4; Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae supporting respondents, p. 2.

I. Main Response: Commercial Speech is Not Part of the Right to Free Speech but Rather It is An Element of Commercial Freedom.

1. **Industry Argument: Advertisement and marketing are protected forms of speech.** The tobacco industry argues that freedom of speech also extends to its right to advertise its products through the mass media.²⁶ According to the industry, a given advertising strategy is a manifestation of freedom of speech and is, therefore, entitled to constitutional protection.²⁷ This protection, the argument goes, includes speech through broadcasts, regardless of their content or purpose to obtain a profit.²⁸
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Response: Commercial speech is less protected than political or social speech.

The advertisement of commercial products for financial gain, if protected at all, deserves significantly less protection than the expression of ideas or opinions.²⁹ Freedom of expression is intended to protect the assertion of concerns, opinions, or ideas (e.g., political, cultural, artistic, or social) in order to ensure that the government does not directly or indirectly restrict personal or community expression.³⁰ This right is grounded on the imperative that government has the responsibility to cultivate both a full range of ideas and the free flow of information. This dissemination of ideas and information allows individuals to make informed decisions about their personal lives, thus ensuring self-government for and by the people.

The publication of commercial advertisements, although it allows individuals to meet their needs by gathering information about goods and services, is not comparable to either the exchange of ideas, information or communications between more and less informed individuals, or to the communication of social, political or artistic discourse.³¹ Moreover, large corporations, such as those in the tobacco industry, have large sums of money at their disposal that can be used to overwhelm the marketplace with distorted ideas. For this

26 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F., p. 8.2.4.

27 *Id.*

28 *Id.*

29 *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561 (1980); *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *Breard v. City of Alexandria*, 341 U.S. 622 (1951) and *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971). In this latest case, the idea that expression proposing a commercial transaction is a different order of speech was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

30 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

31 Gostin, Lawrence, *Public Health Law, Power, Duty, Restraint*, p. 379 (University of California Press, 2nd ed. 2008).

reason, commercial speech is entitled to much lower-level protection than political, social or artistic expression. The protection of commercial speech, rather than arising from freedom of expression, is derived more from economic freedom, a right that can be restricted to a greater degree if it is in the public's interest and for the common good. In the case of tobacco, considering the product's addictive nature, rather than contributing to the realization of the republican ideal of self-government, its public advertisement may actually frustrate this goal by diminishing the autonomy of addicted individuals. Activities that pose a social risk should be particularly regulated by the State³² and this is certainly the case for tobacco consumption. Most importantly, the State has the undisputed power and duty to safeguard the population's health and safety. Thus, the State may undoubtedly regulate commercial speech which is designed to increase the use of a product that is known to cause suffering, illness, and early death.

The purpose of social and political speech is to enrich the democratic debate and enable individuals to express themselves artistically, culturally and socially; commercial speech, on the other hand, serves a single purpose (to satisfy business-related interests) inconsistent with this principle. The only goal of the industry's speech is to obtain a profit, and thus it does not enrich the democratic debate.

- **Argentina:** Commercial speech has been defined as “expression of ideas relating to only the issuer's economic interest and audience,” which is related simply to a “commercial contract proposal.”³³ The three elements that comprise this form of expression are: 1) identifying a particular product; 2) advertising that product; and 3) aiming for financial gain as a result of the advertisement. Commercial speech is a manifestation of the underlying economic activity, and therefore may be regulated to the same extent as that activity.³⁴
- **Mexico:** Commercial speech is a combination of messages that proposes to its recipients the performance of a commercial transaction and therefore its production may be regulated within much broader limits than if it dealt with a case of exercising

32 Uprimny, Rodrigo and Camilo Castillo, *Constitución, democracia y tabaco en Colombia*, Centro de Estudios de Derecho, Justicia y Sociedad (DeJusticia), Bogotá, 2009, p. 10.

33 See *R. R., A. c. Diario Clarín S.A. y otros*, Civil National Chamber of Appeal, Chamber L (Buenos Aires, Argentina, 2003) and National General Attorney opinion (S.C. R. N° 1312, L XL), accepting a lawsuit to avoid the publication of explicit sexual advertisements in newspapers accessible to children.

34 Brief as Amicus Curiae supporting respondents Provincia de Santa Fe p. 4.1.B., *Nobleza Piccardo S.A.I.C. Y F. v. Provincia de Santa Fe*, 188/2006, Supreme Court of Argentina.

the freedom of expression on political matters. Under most circumstances, commercial speech is outside the sphere of protection of freedom of expression since it only complements the free exercise of a business activity.³⁵

- ↘ **United States:** The US Supreme Court clearly distinguished the protection given to the expression of political and social ideas from the protection given to commercial speech in the case *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*³⁶ The Court established a different test to determine whether restrictions to commercial speech are lawful; under this test, the government still bears the burden of proof, but the state has much greater latitude to impose restrictions on commercial speech:

“For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest”³⁷ (...) “The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”³⁸

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- 2. **Industry Argument: Because of the importance of freedom of speech, the State must not be allowed to pass *a priori* judgment on the value of any speech.** The tobacco industry further asserts that freedom of speech is basic to a well-functioning democracy. Robust protection of speech expands the amount of information available to consumers, protects democratic institutions by permitting criticism and enriches the cultural practices of all people. Because of its importance, the State must not be permitted, according to the industry, to prohibit *a priori* the contents of advertising or publications.³⁹ Speech may only be limited or prohibited if it can be shown that the speech injures a very narrow class of State interests.⁴⁰ The industry asserts that its speech does not harm these State interests.

35 Amparo in review 91/2004. Crédito Afianzador, S.A. de C.V., Compañía Mexicana de Garantías, October 20, 2004. Unanimity of votes. Speaker: José Ramón Cossío Díaz. Secretary: Raúl M. Mejía Garza.

36 *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 561 (1980).

37 *Near v. Minnesota*, 283 U.S. 697 (1931).

38 *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999).

39 *Id.*

40 Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe p. 4.1.B., *Nobleza Piccardo S.A.I.C. Y F. v. Provincia de Santa Fe*, 188/2006, Supreme Court of Argentina.

Response: Because commercial speech is less protected than political, cultural, or social speech, normal restrictions on a *priori* speech restraint are not applicable. Normally, principles of freedom of expression require that States refrain from restricting cultural, social and political speech *a priori* – passing judgment on the value or interest in speech before the publisher or speaker has had the opportunity to present the view.⁴¹ If it is sufficiently threatening, the State may impose civil or criminal liability on the publisher or speaker rather than preventing the speech. Because advertising and commercial speech are not as protected as other forms of speech, they may be restricted *a priori*.⁴² The state’s goal, moreover, is to target commercial advertising and promotion specifically designed to sell a product known to be highly dangerous.

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3. **Industry Argument: The right to free speech is enshrined in the American Convention on Human Rights and National Constitutions.** Article 13 of the American Convention on Human Rights imposes a prohibition against censorship of speech, regardless of how commendable the purposes sought by such measures may be.⁴³ “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”⁴⁴ Most national constitutions in Latin America also provide protections for freedom of speech. For example, in Argentina, the right is protected under Articles 14 and 32 of the Constitution.⁴⁵

41 U.S. v. Robert J. Stevens, 130 S. Ct. 1577, 78 USLW 4267, 38 Media L. Rep. 1577, 10 Cal. Daily Op. Serv. 4819 (2010); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd. 502 U.S. 105, 112 S.Ct. 501 (1991). “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, ideas, subject matter or its content.” *Stilp v. Contino*, 629 F.Supp.2d 449 (2009). “Government restrictions on speech based on its content are presumptively invalid and subject to strict scrutiny.”

42 *Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (Puerto Rico’s “substantial” interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries; *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (holding that requirements that advertisers disclose more information than they otherwise choose to are upheld “as long as [they] are reasonably related to the State’s interest in preventing deception of consumers); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney’s contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2379 (1995) (upholding a 30-day ban on targeted, direct-mail solicitation of accident victims by attorneys); see *The World Cigarette Pandemic-Part II*, 85 N.Y. State J. Med. 391 (1985); and Taylor, Peter, *Smoke Ring: The Politics of Tobacco* (London: Bodley Head, 1984), pp. 277-79.

43 Unconstitutionality Claim Brief from Nobleza Piccardo S.A.I.C. Y F., p. 8.2.4.

44 Organization of American States, American Convention on Human Rights Art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

45 Constitution of Argentina Art. 14 “All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for

Response: As stated above, commercial speech should not be considered protected by freedom of expression. This should be the main argument developed in response to industry arguments based on freedom of expression. As mentioned above, commercial rights can be limited and regulated by the State and as commercial speech is part of commercial freedom (and not part of the right to freedom of expression) it can be limited and regulated by the State.

As a subsidiary argument, to be used only in cases/countries where commercial speech is considered covered/protected by the freedom of expression perspective, the right to freedom of expression can be limited under certain circumstances. The American Convention on Human Rights, the International Covenant on Civil and Political Rights as well as most national constitutions allow for limitations on the right to free speech where it endangers the public's health and safety. For the highest forms of speech – ideas and opinions – the American Convention on Human Rights explicitly permits the imposition of liability to ensure “protection of (. . .) public health or morals.” (art. 13). Under the International Covenant on Civil and Political Rights (ICCPR), freedom of expression is subject to necessary restrictions based on grounds such as public health (art 19).⁴⁶ Many national constitutions acknowledge the important limitations to free speech based on public health.⁴⁷

↳ **Brazil:** Article 220 of the Citizens' Constitution preserves Brazilians' “thought,” “creation” and “expression” but in paragraph 4 limits “commercial advertising of

useful purposes; to profess freely their religion; to teach and to learn.”; Art. 32 “The Federal Congress shall not enact laws restricting the freedom of the press or establishing federal jurisdiction over it.”

46 International Covenant on Civil and Political Rights, Art. 19, 999 U.N.T.S. 171 (1966) “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

47 Authority from American, British and Canadian courts supports exceptions to commercial free speech for protection of public health. “Given the enormous health risks and economic costs to society caused by smoking tobacco and a substantial weight of expert opinion as to the effects of advertising, I believe [Britain's 2002 Tobacco Advertising and Promotion Act] to have been a responsible and proportionate step.” *R and others v The Secretary of State for Health* [2004] EWHC 2493. Moreover, the evidence establishes that tobacco advertising leads to an increase in tobacco consumption. Even American law, which is more focused on preserving the “marketplace of ideas” permits the state to regulate commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or require the disclosure of beneficial consumer information. 44 *Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). It is the State's interest in protecting consumers from “commercial harms” that provides “the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.” *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993).

tobacco . . .” because it constitutes “publicity of products, practices and services which may be harmful to health or to the environment.”

- ✎ **Guatemala:** Articles 43 and 44 of the Guatemalan Constitution limit industry, commerce and labor to the extent that their activities impinge on other social interests. Article 44 specifically states that “[s]ocial interests prevail over individual interests.”⁴⁸ Any individual right like that of a corporation advertising its product must be balanced against other collective and constitutionally enshrined rights, such as the right to health (Articles 93-95).

2. Subsidiary Responses Connected to the So-Called Freedom of Expression for the Tobacco Industry

1. **Industry Argument: Consumers have a right to information.** Consumers have the right to suitable and accurate information and to the protection of their freedom of choice including information provided by manufacturers and retailers.⁴⁹ Because tobacco products are legal, the industry asserts that they are therefore authorized to provide truthful information about the legal products they sell.
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Response: Consumers have the right to accurate information, such as the price and contents of a product. Tobacco advertising goes well beyond objective information such as process and ingredients, but is designed to market a hazardous product through the dissemination of inaccurate and distorted information. There is no use of tobacco that does not harm the user and those exposed to their tobacco smoke. Advertising which emphasizes the association between tobacco and social success, personal or sexual satisfaction necessarily obscures the risks, including of addiction and death, of tobacco use. Consumers’ right to truthful information, therefore, requires a comprehensive ban on advertising, promotion and sponsorship as well as packaging and labeling restrictions. In many countries, consumers’ right to accurate information is constitutionally enshrined. This right to information should be limited to objective truthful information such as price and full disclosure of ingredients as well as health risks.

- ✎ **Argentina:** Section 42 of the Argentine Constitution provides that “consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment.”

⁴⁸ Constitution of Guatemala, Art. 44: “Rights Inherent in the Human Person. The rights and guarantees granted by the Constitution do not exclude others which, even though they are not expressly mentioned in it, inhere in the human person. Social interest prevails over individual interest.”

⁴⁹ Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae supporting respondents, p. 2.

↘ **Mexico:** The legal challenge filed against the national tobacco control law included a claim on the right to accurate information. The right to information is found in Article 6 of the Constitution: “the right to information shall be *guaranteed* by the State.” Article 28 of the Constitution requires that: “the law shall protect consumers.” Read together, these articles place upon the State the duty to protect citizens through the disclosure of full, truthful and timely information on the harmful health effects of smoking and exposure to secondhand smoke. As a result, in order for the State to fulfill its obligation of protecting smokers’ and non-smokers’ health, it is not enough to adopt measures that protect non-smokers from tobacco smoke exposure. The right to access of information requires that the State ensure – “guarantee” – that people are properly informed about smoking’s effects.⁵⁰ This requirement was clearly spelled out in a recent case before the Constitutional Court of Mexico. In its decision regarding the *Balderas Woolrich* case, the Court stated, “the protection of health is tied to the satisfaction of the right to information and consumer protection. It is not enough to adopt measures that protect non-smokers from exposure to smoke: rather there must be appropriate information about the effects of tobacco consumption. Thus, the State has a triple mandate: to protect individuals from advertising, to ensure that these same individuals receive adequate information, and to thus avoid promoting the expansion of the epidemic.”⁵¹

2. **Industry Argument: Advertising and marketing do not increase consumption.** The tobacco industry consistently argues that tobacco products are “mature” products, as opposed to new or nontraditional products, so the function of advertising does not include making the products known or increasing their overall consumption.⁵² Rather, the argument goes, the importance of advertising this type of product stems from distinguishing a brand from that of the competitor.⁵³ The purpose of such distinction is to attract clients that already consume the products of the competition, while at the same time maintaining the clients that use their own products.⁵⁴ This argument is often combined with the argument that the right to commercial free speech should be permitted because businesses have a right to distinguish themselves from their competitors.

50 Mexican Supreme Court of Justice, *Jorge Francisco Balderas Woolrich*, revised *amparo* 315/2010 against 1791/2008, decided 28/03/2011, rapporteur José Ramón Cossío Díaz, pg. 42.

51 Mexican Supreme Court of Justice, *Jorge Francisco Balderas Woolrich*, revised *amparo* 315/2010 against 1791/2008, decided 28/03/2011, rapporteur José Ramón Cossío Díaz, pg. 12.

52 Unconstitutionality Claim Brief from Nobleza Piccardo S.A.I.C. Y F., p. 7.1; Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae supporting respondents, p. 2.

53 Unconstitutionality Claim Brief from Nobleza Piccardo S.A.I.C. Y F., p. 7.1.

54 *Id.*

Response: Tobacco advertising increases consumption and aims to develop new smokers. The purpose of tobacco advertising, promotion and sponsorship is to increase consumption and attract new smokers.⁵⁵ Tobacco advertisements are designed to associate tobacco with sexual and social success, athleticism, courage and independence, attributes that easily fascinate adolescents.⁵⁶ Scientific studies have provided unambiguous evidence that the more exposed to tobacco advertising young people are, the more likely they are to use tobacco.⁵⁷ People who start smoking in youth are more likely to become addicted to nicotine very early in life.⁵⁸ Unable to quit, they become heavy users and continue using tobacco throughout their lives.⁵⁹ Laws that restrict tobacco advertising have proven an effective means to reduce consumption. Jurisdictions with comprehensive advertising, promotion, and sponsorship bans witness declines in consumption.⁶⁰

Along with the nature of advertising, which demonstrates its goal of attracting new smokers, and the success of advertising in increasing tobacco consumption, the scale of tobacco advertising demonstrates the main intent of the industry's marketing efforts. Even if efforts to capture the small segment of smokers who are open to brand-switching represent a part of industry expenditures, the sheer size of its total expenditures belies the industry's argument that the purpose of its advertising is to encourage tobacco users to switch brands.

55 US Surgeon General. Reducing tobacco use: A report of the Surgeon General. Chapter 5 Regulatory efforts. 2000. Available at: http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/chapter5.pdf; Tye, Joe, et al., Tobacco Advertising and Consumption: Evidence of a Causal Relationship, 8 J. Public Health Pol. 492, 494 (1987).

56 Levy, David, et al., The effects of tobacco control policies on smoking rates: a tobacco control scorecard. 10 J. Public Health Manag. Pract. 338-53 (2004).

57 DiFranza, Joseph, et al., Tobacco promotion and the initiation of tobacco use: assessing the evidence for causality. 117 Pediatrics 1237-48 (2006). Available at: <http://pediatrics.aappublications.org/cgi/content/full/117/6/e1237>; Lovato, Chris, et al., Impact of tobacco advertising and promotion on increasing adolescent smoking behaviours. Cochrane Database of Systematic Reviews 2003:CD003439. Available at: http://www.mrw.interscience.wiley.com/cochrane/clsystrev/articles/CD003439/pdf_fs.html.

58 Krugman, Dean, et al., Understanding the role of cigarette promotion and youth smoking in a changing marketing environment. 10 J. Health Commun. 261-78 (2005). Available at: <http://www.informaworld.com/smpp/ftinterfac-e~content=a714034939~fulltext=713240928>.

59 Wellman, Robert, et al., The extent to which tobacco marketing and tobacco use in films contribute to children's use of tobacco: a meta-analysis. 160 Arch. Pediat. Adol. Med. 1285-96 (2006). Available at: <http://archpedi.ama-assn.org/cgi/content/full/160/12/1285>.

60 Blecher, Evan, The impact of tobacco advertising bans on consumption in developing countries, 27 J. Health Econ. 930 (2008).

3. Other Rights Outweigh Any Limited Protection for Commercial Speech

Individual rights mutually restrict one another. When in conflict they ought to be harmonized in a way that maximizes protection of all rights.⁶¹ Under this analysis, freedom of commercial speech should be significantly restricted in order to maximize the rights to health, life and a clean environment.⁶²

1. Right to Health

- a. *Positive Right to Health.* Many countries' constitutions (e.g. Brazil, Guatemala and Mexico) establish a positive right to health which must be balanced against the limited protection provided to businesses to advertise their products. Other countries' constitutions have been found to include a right to health through court interpretation, for example because the constitution incorporates human rights treaties, providing constitutional level status to the rights and guarantees in these treaties.⁶³ Because the tobacco epidemic is spread through misinformation, bans on tobacco advertising (or restrictions in the limited number of jurisdictions where a complete ban may not be constitutionally permissible), promotion, and sponsorship are well within the state's obligations to protect the right to health.⁶⁴ The public health threat posed by tobacco consumption and exposure to tobacco smoke is so conclusively established by the evidence that advertising bans are justified by the state's duty to protect the public health.⁶⁵
- b. *The Right to Health is Fundamental to the Exercise of Speech.* Good health has a great impact on people's ability to exercise informed political and social speech – the intended targets of freedom of expression.⁶⁶
- c. *Duty to Protect Health from Infringement or Interference by Third Parties.* The International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes a duty on State parties to take all necessary measures to protect the public health (art. 12).⁶⁷ According to the U.N. Committee on Economic, Social and Cultural Rights,

61 Nogueira, Humberto, *El Derecho a la Información en el Ámbito del Derecho Constitucional Comparado en Iberoamérica y Estados Unidos*, 48 *El Derecho a la Información y Derechos Humanos UNAM* (2000).

62 *Id.*

63 Argentinean National Chamber, *Viceconti, Mariela Yestado Nacional s/Acción de amparo*, 02/05/1998.

64 Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae Supporting Respondents, p. 6.

65 Brief as Amicus Curiae supporting respondents Provincia de Santa Fe. p. 4.1.B., *Nobleza Piccardo S.A.I.C. Y F. v. Provincia de Santa Fe*, 188/2006, Supreme Court of Argentina.

66 *Id.*

67 International Covenant on Economic, Social and Cultural Rights Art. 12, 993 U.N.T.S. 3 (1966) “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve

General Comment No. 14, The right to the highest attainable standard of health (Art. 12 of the ICESCR), “the right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfill (. . .) The obligation to protect requires States to take measures that prevent third parties from interfering with Article 12 guarantees” (para 33).⁶⁸ The General Comment further state that “violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States.”⁶⁹ In addition, “violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as (. . .) the failure to protect consumers and workers from practices detrimental to health, e.g. by (. . .) *the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances.*”⁷⁰

2. Right to Life

The Right to Life is Fundamental to the Exercise of Speech. The right to life is a requirement for the exercise and enjoyment of all other rights guaranteed by the Constitution and international treaties.⁷¹ Preservation of health is part of the right to life, thus the State is under the obligation to undertake positive actions to secure individual and community health in order to secure the right to life.⁷² Given the tremendous harm that tobacco causes to health and to life, regulating tobacco is a necessary aspect of protecting the right to life and, consequently, to making possible people’s enjoyment of all other rights as well.

the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

68 Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health*, p. 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) “The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees.”

69 *Id.* p. 48.

70 *Id.* p. 51 (emphasis added).

71 Campodónico v. Ministerio de Salud y Acción Social p. 15, 823/1999, Supreme Court of Argentina.

72 ECOSOC, “Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.” In Argentina, “the right to life is the first right of human beings, which is recognized and guaranteed by the Constitution . . . the preservation of health includes the right to life . . . so that there is an urgent requirement for public authorities to guarantee it by performing positive actions.” Amicus Brief in Support of the Attorney General of Santa Fe.

3. Rights of the Child

- a. Because of the evidence showing that children and adolescents are particular targets of the tobacco industry,⁷³ and because they are particularly susceptible to its advertising and marketing practices, international and domestic law offering special protection for children provides an additional argument in support of a comprehensive ban on tobacco advertising, promotion, and sponsorship.
- b. *The Convention on the Rights of the Child*: All countries in Latin America have ratified the Convention on the Rights of the Child. Article 17 (e) of the Convention on the Rights of the Child establishes that “States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall: (...) (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.”⁷⁴ The Convention’s committee has recognized the necessity to control the information that children and adolescents receive on dangerous products like tobacco.⁷⁵ The Committee has also stated that the States Parties should protect adolescents against information that might be hurtful to their health, recommending to regulate or to prohibit information on tobacco.⁷⁶ Tobacco publicity is primarily aimed at adolescents because that is the group in which tobacco consumption begins.⁷⁷ Moreover, tobacco advertisement does not inform consumers

73 Biener, Lois, and Michael Siegel, Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference, 90 Am J Public Health 410 (2000), “we do not attribute the effect of tobacco marketing to merely seeing cigarette advertisement...but the images they have come to represent through advertising campaign are particularly attractive to adolescents who are looking for an identity the images are carefully designed to offer.” Beguinot, Emanuella, et al., Tobacco advertising through French TV in 2005: frequent illicit broadcasting; its impact on teenagers and young adults, 32 J. Public Health 184-90 (2009) “Recruiting new smokers is the main objective of tobacco advertising and sponsorship, by creating a spontaneous positive association between cigarette smoking and perceived image in young people’s mind.”

74 Convention on the Rights of the Child Art. 17 (e), 1577 U.N.T.S. 3 (1989).

75 U.N. Committee on the Rights of the Child, *General Comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child*, p. 10, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) “The right of adolescents to access appropriate information is crucial if States parties are to promote cost-effective measures, including through laws, policies and programmes, with regard to numerous health-related situations, including those covered in articles 24 and 33 such as family planning, prevention of accidents, protection from harmful traditional practices, including early marriages and female genital mutilation, and the abuse of alcohol, tobacco and other harmful substances.”

76 *Id.* at 25 “States parties are therefore urged to regulate or prohibit information on and marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents.”

77 Gostin, Lawrence, Global Regulatory Strategies for Tobacco Control, 298 J. Am. Med. Ass’n 2057 (2007) “Advertising, Promotion, and Sponsorship. For tobacco companies to remain profitable, they must recruit new smokers to replace those who quit or die. Because most longterm smokers begin before 18 years of age, the youth market is most valuable. The industry spends inordinately on advertising, promotion, and sponsorship, and

on the product itself and the harmful effects; rather, it induces an action that threatens health, the environment and life.⁷⁸

From a constitutional perspective it is possible to present the following provisions:

- i. Brazil:* The Brazilian Constitution, enacted on October 5, 1988, determines that health is a social right⁷⁹ and that it is the duty of the family, the society and the State to ensure to children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression.⁸⁰
- ii. Mexico:* The Mexican Constitution specifically guarantees to children the satisfaction of their needs for health and education for a comprehensive development.⁸¹

B. Right to Economic Freedom

Many constitutions provide for liberty of industry, commerce, and work while establishing that such freedoms can be limited by laws for reasons of social and national interest.⁸² The tobacco industry has invoked these provisions to argue, for example, that advertising restrictions and bans, and restrictions and bans on smoking in public places and workplaces, decrease competition and harm the exercise of lawful economic activity.⁸³ As with arguments based on commercial free speech, these protections fail any test of proportionality due to the overwhelming interest in protecting the public health from tobacco use and exposure to smoke.⁸⁴

the United States alone spent \$13.11 billion in 2005. In developing countries, multinational companies advertise to induce experimentation among nonsmokers and stimulate consumer demand for international brands instead of local products. Simultaneously, companies promote “youth smoking prevention” campaigns as part of “corporate social responsibility,” although they are ineffective and undermine effective tobacco control. While aggressively courting youth culture, the industry takes credit for youth prevention.”

78 Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae Supporting Respondents, p. 6.

79 Constitution of Brazil of 1988, Art. 6.

80 *Id.*, Art. 227

81 Constitution of Mexico, article 4, para. 6.

82 Constitution of Guatemala, Art. 43: “Freedom of Industry, Trade, and Work. The freedom of industry, trade, and work is recognized, except for limitations which for social motives or national interest are imposed by law.”

83 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F., p. 8.2.5.

84 Universidad de San Carlos de Guatemala brief as Amicus Curiae opposing claimant Guatemala Chamber of Commerce p. III, Partial General Unconstitutionality, 2158-2009, Constitutional Court of Guatemala “No article of the Law bans or even restricts the manufacture, production, distribution and marketing of tobacco products, because its aim is not to regulate those activities, but rather to regulate where the consumption of tobacco prod-

1. **Industry Argument: Advertising restrictions violate the freedom of commerce.**

According to the tobacco industry, legislation that regulates or forbids the advertisement of tobacco thwarts the economic initiative, restricting legal activities, the free circulation of goods and generating, overall, an environment in which economic development cannot be naturally pursued.⁸⁵ It does so by violating commercial rights like the right to contract, the right to not contract, the right to exercise commerce and industry, the right to advertise and sponsor events, etc.⁸⁶

Response: Right to commerce is not substantially affected by tobacco control laws. The legislature is free to regulate rights and freedoms, as long as those rights and freedoms' most essential features are not infringed.⁸⁷ Advertising laws and smoke free laws do not interfere with the economic activity itself, that is, the activities of buying, producing, selling, importing and exporting tobacco, cigarettes, cigars and other products.⁸⁸ Individuals and corporations are free to manufacture, sell and consume tobacco products subject only to the State's reasonable authority to protect the public health as described below.⁸⁹ Firearms, prescription medications, and even consumer products (e.g., toys) are also subject to substantial regulation due to the hazards they pose.

This reasoning was embraced by the Colombian Constitutional Court in a recent case in which the Court ratified the constitutionality of a law establishing a total ban on tobacco promotion and sponsorship. According to the Court, such a measure lies within the limits of the State's capacity to intervene in the economy by imposing prohibitions on activities to promote the consumption of a certain group of goods, without affecting tobacco products' manufacture or distribution. Thus, the Court concludes that the law does not *per se* affect economic freedom.⁹⁰

2. **Industry Argument: Restricting consumption violates the freedom of commerce.**

Even if legal measures do not prohibit the manufacturing, production, distribution or commercialization of tobacco products, prohibiting consumption is a limitation or restriction on economic freedom.⁹¹

ucts is allowed in order to protect the right to life and health of non-smokers, as well as the smoker himself."

85 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F., p. 8.2.5 (citing the Constitution of Argentina articles 14 and 33).

86 *Id.*

87 Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 4.2.

88 *Id.*

89 *Id.*

90 Colombian Constitutional Court, Expediente D-8096 - Sentencia C-830/10, October 20, 2010.

91 Complaint from Guatemalan Chamber of Commerce p. V.-) A), Partial General Unconstitutionality, 2158-2009, Constitutional Court of Guatemala.

Response: The freedom of commerce is limited by the State's obligation to protect other rights. Tobacco control laws do not prohibit the manufacture, production, distribution or commercialization (with the exception of advertising and marketing restrictions) of tobacco products, because their objective is not to regulate those activities.⁹² The objective is to regulate tobacco consumption to protect the right to health and life of consumers and non-smokers.⁹³

- a. *The right to commerce is not an absolute right.* The right to commerce and economic freedom must be balanced with citizens' right to health, life, information and security.⁹⁴ Given the overwhelming evidence that tobacco consumption jeopardizes these rights, the right to commerce in this sector is correspondingly limited.⁹⁵
- b. **Colombia:** The Constitutional Court has stated that "(...) the Constitution does not guarantee the same level of protection for private initiatives as for other kinds of economic activity. Thus the essential nature of the commercial freedom varies considering the type of activity."⁹⁶ This tribunal has decided a case that directly addresses the right to commerce issue, clearly establishing that commercial freedom is an instance in which public interests outweigh private interests. The Court stated:
 - i. "(...) it is undeniable that individual freedom in the economic field, although protected by the Constitution, is also limited by the prevalence of the general interest (Article 1, Colombian Political Constitution), by the State's intervention and regulation capacity (Articles 333, 334 and 335 CPC) and by the reasonableness and proportionality principles developed by this Court. In addition, the Court emphasizes that it is precisely within the economic field in which the general interest clearly outweighs the private interest (Articles 1 and 58, CPC), considering that it is only by limiting economic freedoms in a reasonable and proportionate fashion, that the State will be able to contribute to the achievement of a fair economic, political and social order (preamble) and to fulfill the so-called second generation Human Rights or welfare Human Rights"⁹⁷
- c. **Peru:** The Constitutional Tribunal recently held that limitations on the rights to commerce and economic freedoms may be permissible if the limitations are proportionate to the right being protected (i.e. the right to public health, in this particular instance). Consequently, the Court rejected a challenge to the

92 Universidad de San Carlos de Guatemala, brief as Amicus Curiae opposing claimant Guatemalan Chamber of Commerce, Partial General Unconstitutionality, 2158-2009, Constitutional Court of Guatemala, p. III.

93 *Id.*

94 Constitutional Court of Guatemala, Cámara de comercio de Guatemala v. Gobierno de Guatemala Docket 2158-2009 (2010).

95 Brief as Amicus Curiae supporting respondents Provincia de Santa Fe, p. 4.2.

96 Colombian Constitutional Court. Decision C-176, 1996. Unofficial translation for this guide.

97 Colombian Constitutional Court. Decision C-265, 1994. Unofficial translation for this guide.

constitutionality of the country's reformed Law 28705, the Law for the Prevention and Control of Tobacco Consumption Risks, which imposes an absolute ban on smoking in all health and educational establishments, public institutions, indoor work spaces, enclosed public spaces and any means of public transport. Although the Court found that the 100% smoke free law does infringe upon the rights to commerce and economic freedom, it deemed the measure to be permissible because the limited rights are not absolute, and the law itself passes the proportionality principle test. The Court held that the measures imposed by Law 28705 are proportional because they have a constitutionally valid goal, are the ideal means to reach that goal, are necessary, and finally, are strictly proportional.⁹⁸

- d. **Guatemala:** Articles 43 and 44 of the Guatemalan Constitution limit industry, commerce and labor to the extent their activities impinge on other social interests. Article 44 specifically states that “[s]ocial interests prevail over individual interests.”⁹⁹ Restrictions on industry, commerce and labor are justified by the interest in the right to health (Articles 93-95).

C. Right to Property

The right to private property is enshrined in the American Convention on Human Rights as well as national constitutions.¹⁰⁰ The tobacco industry argues that tobacco control laws that restrict advertising or prohibit indoor smoking are unconstitutional because they limit or prohibit smoking in private property like workplaces, restaurants, bars and hotels.¹⁰¹ In their view, private citizens are free to do whatever they want in their own property.¹⁰²

Although constitutionally protected, the right to property is not an absolute right. The conduct of

98 Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3° de la ley N. 28705 Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011. section 3, paragraph 28.

99 Constitution of Guatemala, Art. 44: “Rights Inherent in the Human Person. The rights and guarantees granted by the Constitution do not exclude others which, even though they are not expressly mentioned in it, inhere in the human person. Social interest prevails over individual interest.”

100 Organization of American States, American Convention on Human Rights, Art. 21 “Article 21. Right to Property 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”

101 Many tobacco control laws provide exemptions for these industries, however. Complaint from the Guatemalan Chamber of Commerce, p. V.-) A).

102 *Id.*

illegal activities within private property has always been subject to state regulation.¹⁰³ Moreover, the state regulates legal activities within the workplace and imposes requirements on employers. For example, emergency exits and safety regulations requirements are imposed on privately owned workplaces. Additionally, when applying the balancing test to solve the possible conflict between the right to private property and the right to health, it is easy to conclude that the larger interest of protecting the health of workers and the public should prevail over the smaller interest of avoiding limitations on the right to property.¹⁰⁴

1. **Industry Argument: The Right to Property is enshrined in the American Convention on Human Rights and National Constitutions.** Article 21 of the American Convention on Human Rights and most national constitutions guarantee the right to property.¹⁰⁵ The tobacco industry relies on the following constitutional provisions, for example:

✎ **Argentina:** Section 14: “All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; *to make use and dispose of their property*; to associate for useful purposes; to profess freely their religion; to teach and to learn.”¹⁰⁶

Section 17: “Property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated (...)”¹⁰⁷

✎ **Brazil:** The Constitution of Brazil guarantees the “right of property” but subjects it to a “procedure for expropriation for public necessity or use, or for social interest, with fair and

103 Constitution of Guatemala, Art. 40: “Expropriation. In specific cases, private property can be expropriated for reasons of duly proven collective utility, social benefit, or public interest. Expropriation will have to be subject to the proceedings indicated by the law, and the affected property will be appraised by experts taking its actual value into account. Compensation will have to be made in anticipation [ser previa] and in legal tender, unless another form of compensation is agreed upon with the interested party. Only in cases of war, public disaster, or serious disruption of peace can there be occupation or interference with property or expropriation without prior compensation, but the latter will have to be done immediately following the end of the emergency. The law will establish the norms to be followed with enemy property. The form of payment of compensation for the expropriation of idle land will be determined by law. In no case will the deadline to make such payment effective exceed 10 years.”

104 See e.g. Siegel, Michael, Involuntary Smoking in the Restaurant Workplace, 270 J. Am. Med. Ass’n 490, 490 (1993).

105 Organization of American States, American Convention on Human Rights, Art. 21.

106 Constitution of Argentina, Article 14 (emphasis added).

107 Constitution of Argentina, Article 17.

previous pecuniary compensation, except for the cases provided in this Constitution.” Article 5, XXII and XXIII, and Article 170, II and III, also subject the right of property to its social function (*função social da propriedade*).

- ✎ **Guatemala:** Article 39 of the Guatemala Constitution provides that private property is guaranteed as a right inherent to the human person. Every person may freely dispose of their property in accordance with the law. The Guatemalan Constitution (art. 40) provides for an expropriation (i.e., “takings”) procedure, which means that the property right is not understood to be absolute.

Response: The American Convention on Human Rights and national constitutions limit the right to property in the interests of society. In general, private property interests are subordinate to larger social interests including the preservation of the public health.

The Inter-American Commission on Human Rights recognizes numerous exceptions to the right to property:

- *Limitation of property rights is permissible to guarantee other rights.* Article 21 of the American Convention on Human Rights explicitly subjects the right to property to potential limitations in protection of the interest of society, by saying that “the law may subordinate” the use and enjoyment of the right to property “to the interest of society.”¹⁰⁸ The Inter-American Court of Human Rights has recognized that “[t]he social role of the property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, can limit or restrict the right to property, always respecting the cases contained in Article 21 of the Convention and the general principles of international law.”¹⁰⁹
- *Limitation of property rights is permissible where the act is lawful, related to a legitimate state interest and proportional to the aim of the state interest.* The Inter-American Commission on Human Rights has said that it can be determined if a statute “constitute[s] an arbitrary interference in the right to property of the alleged victims, from the following test: i) If the restriction was imposed through a law; ii) If the restriction responded to a legitimate aim to raise a social interest or to preserve the general well-being in a democratic society; and iii) If the restriction were proportional in the sense of being reasonable to obtain this aim and, in any case, of not sacrificing the essence of the right (...).”¹¹⁰ A statute that meets this test is a permissible restriction on the right to property. An application of this test is provided below, and demonstrates how tobacco control laws meet this test.¹¹¹

108 Organization of American States, American Convention on Human Rights, Art. 21

109 *Salvador Chiriboga v. Ecuador*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 179 (2008), p. 60.

110 *Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social v. Perú*, Case 12.670, Inter-Am. C.H.R., Report No. 38/09 (2009), p. 112.

111 See *Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social v. Perú*, (Carozza con-

The test under the American Convention on Human Rights:

Lawfulness

- As long as the statute has been passed according to the regular process established in the internal law of each country, as has consistently been the case with tobacco controls, this requirement is deemed fulfilled.¹¹²

Legitimate Aim

- Constitutions and international law establish legitimate aims.
“The right to life is essential to the exercise and enjoyment of any other right guaranteed in the Constitution and international treaties.”¹¹³
“The preservation of health is part of the right to life; thus, there is an immediate obligation for public authorities to guarantee it through positive actions.”¹¹⁴
- Article 3 of the WHO FCTC establishes that “the objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”¹¹⁵
- Thus, any effort to limit exposure to tobacco environments by creating smoke free places, banning publicity, and other efforts in order to protect citizens, especially youth, from exposure to tobacco smoke or from starting to smoke is not only a legitimate aim, but also an obligation of the country.¹¹⁶

Proportionality

- This is a factual determination; however, as long as the essence of the right to property (i.e., the right to use real property, the right to sell it, etc.) is not affected, the restrictions imposed by the statute cannot be considered a taking or an infliction of the right to property.¹¹⁷ Tobacco control measures do not affect the essence of this right, and are reasonable measures to achieve state aims of protecting the rights to life and health. They are thus permissible under this test.

National Constitutions allow exceptions to the right to property as outlined above.¹¹⁸ Moreover,

curing, p. 3) for an alternative test.

112 *Id.* p. 113.

113 Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 3.1.

114 Argentinean Supreme Court, Campodónico v. Ministerio de Salud y Acción Social, 823/1999.

115 FCTC, Art. 3.

116 *Id.*

117 Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social v. Perú, p. 118, 125.

118 That is the case of the National Constitution of Guatemala in its article 40, as cited before. Another example

some countries' constitutions recognize ownership of property as a privilege granted by the State, subject to public interest. In Mexico, "the property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation . . . The State will always have the right to impose on private property constraints dictated by 'public interest.'"¹¹⁹

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1. **Industry Argument: Advertising restrictions and prohibitions on indoor smoking violate the right to private property.** The tobacco industry would have it that the owner of the property should be able to determine — for good reasons, bad reasons, or no reason at all — whether to allow or prohibit smoking. Customers or employees who object may go elsewhere. They would not be relinquishing any right that they ever possessed. By contrast, according to the tobacco industry, when a businessperson is forced to effect an unwanted smoking policy on his or her own property, the government violates property rights.¹²⁰ Any limitation to the free exercise of the right to property, particularly private businesses, after the implementation of tobacco control laws, violates the right to property.¹²¹
-

Response: The right to property can be limited based on superior collective interests. Places open to the public – such as businesses and workplaces – have more restrictions than purely private places (such as one's home), and thus the State may intervene in a more active manner in their regulation. The State is in charge of regulating places open to the public, including consumers and employees, taking into account values such as security, sanitation or health. The criteria used by an individual making decisions regarding private property open to public use is thus not absolutely discretionary. Such a strict conception of private property can only be justified for actions within the intimate sphere, which imply a reserved field in which the state has less authority to intervene, and fewer possibilities to do so.

2. **Industry Argument: The imposition of advertising bans and smokefree laws constitutes an unlawful expropriation of property.** Statutes that contemplate imposing excessive fines violate the right to property because they could be considered takings.¹²² The tobacco industry additionally argues that regulation of tobacco products, their advertising and consumption, decrease revenue and raise costs.

Response: Fines are not takings. A fine is not a taking; it is another form of regulation

would be the Brazilian Constitution which establishes the social purpose of property as one of the general principles of economic activities in its article 170.

119 Constitution of Mexico, Art. 27.

120 Levy, Robert, Bloomberg Smokes Out Property Rights. Available at: <http://www.cato.org/research/articles/levy-021009.html>.

121 Unconstitutionality Claim Brief from Nobleza Piccardo S.A.I.C. Y F., p. 8.2.5.

122 Universidad de San Carlos de Guatemala brief as Amicus Curiae opposing claimant Guatemalan Chamber of Commerce, p. III.

meant to secure the reasonable State interest served including deterring offenses which are foreseeable and avoidable by the potential offender.¹²³ With regards to the additional argument that regulations decrease revenue and raise costs, that is not a strong reason to oppose them. Many governmental regulations bring about higher costs, such as emergency exits for stores or safety requirements for work environments. In this case, the decreased revenue and the heightened costs are accepted consequences of a reasonable intervention on the right to property in order to protect public health.

3. **Industry Argument: Advertising and packaging and labeling restrictions “expropriate” the value of the tobacco manufacturer’s brand.**

Response: The value of a tobacco product’s “brand” does not outweigh the State’s regulatory authority to protect consumers from messages or images that may lead to a false impression that one tobacco product is less harmful than another. The European Union, for instance, enacted a Directive in which its Article 7, entitled Product Descriptions, is worded as follows: “with effect from 30 September 2003, and without prejudice to Article 5(1), texts, names, trademarks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products.” The validity of this directive was questioned by British American Tobacco Ltd and Imperial Tobacco Ltd in the case C-491/01. In its decision in 2002, the European Union Court of Justice stated that the restriction did not affect trademark rights in their substance. The purpose of such a regulation was to protect public health as signs suggesting that certain tobacco products are less harmful can increase tobacco consumption. The proportionality of this measure was defended by the Court as follows:

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“As paragraphs 131 and 132 above make clear, the only effect produced by Article 5 of the Directive is to restrict the right of manufacturers of tobacco products to use the space on some sides of cigarette packets or unit packets of tobacco products to show their trademarks, without prejudicing the substance of their trade mark rights, the purpose being to ensure a high level of health protection when the obstacles created by national laws on labelling are eliminated. In the light of this analysis, Article 5 constitutes a proportionate restriction on the use of the right to property compatible with the protection afforded that right by Community law. (...)”

153

“In light of the foregoing, it must be held that the restrictions on the trade mark right which may be caused by Article 7 of the Directive do in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of that right.”¹²⁴

123 *Id.*

124 The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd. C-491/01 (2002). 150 and 153.

D. Right to Non-Discrimination – Equality Before the Law

The tobacco industry and affiliated industries have argued that certain aspects of tobacco control laws single them out for discriminatory treatment in violation of their right to non-discrimination.¹²⁵ The initial problem with this position is that corporations are judicial fictions in most countries and therefore do not enjoy protection from non-discrimination which is intended to protect actual human beings,¹²⁶ and even then under only certain protected grounds (race, religion, national origin, sex, etc.). Regulation of disparate industries supplying different products will require disparate regulation. It is important to stress that the state can, and must, regulate products differently depending on the risk they pose to the public and the best way to ameliorate that risk. Moreover, individuals' right to be protected to the greatest extent from the harms of tobacco consumption outweighs claims related to discriminatory treatment.¹²⁷

In this subsection, the two main arguments from the tobacco industry (discrimination against certain bars or restaurants and discrimination in the advertisement regulation) are analyzed together as the responses to be given are applicable to both of them.

1. **Industry argument: Smoke free legislation discriminates against the hospitality, restaurant and bar industries.** The tobacco industry argues that legislation that aims to create smoke free environments impermissibly violates the equality before the law guarantee established in Article 24 of the American Convention on Human Rights and many national constitutions.¹²⁸

2. **Industry argument: Advertising restrictions discriminate against the tobacco industry.** Legislation that aims to regulate tobacco advertisement impermissibly violates the equality before the law mentioned in the previous paragraph as there are not similar restrictions for other industries.

Response: Corporations are not Persons for purposes of claims of non-discrimination. Corporations and other business entities exist by virtue of a gratuitous act of the state. Human beings are rights-holders per se and therefore the right to non-discrimination that applies for human beings cannot apply to business entities, the legal status of which is an artifact of the law.¹²⁹ Many constitutions prohibit discrimination on the basis of race, religion,

¹²⁵ Complaint from Guatemalan Chamber of Commerce, p. IV.

¹²⁶ Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae Supporting Respondents, p. 3.

¹²⁷ *Id.*

¹²⁸ Organization of American States, American Convention on Human Rights, Art. 24.

¹²⁹ Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae supporting respondents, p. 3.

national origin, etc. but not corporate status. In many countries within the Central and South America region, clear provisions on non discrimination exist and apply to human beings as the object of such protection.¹³⁰ There is therefore no basis in law for the industry's argument.

- ✎ **Argentina:** Section 75.22 provides that international treaties have constitutional hierarchy (that is, are of equal status to constitutional provisions) and complement the rights and guarantees contained in the constitution. Article 26 of the International Covenant on Civil and Political Rights provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and requires that the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Section 16 of the constitution states that “all inhabitants are equal before the law.” The use of the term “inhabitants” in the rest of the section (for example, prohibiting personal entitlements and admissibility for employment) can only logically be understood to apply to human beings, not corporations. Thus, the non-discrimination guaranteed in Argentina's constitution has no bearing on differential treatment of different industries.
- ✎ **Belize:** Section 16 expresses discrimination as meaning affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- ✎ **Guatemala:** Article 4 provides for freedom and equality for all, in dignity and rights and must not be subject to any condition that impairs their dignity.
- ✎ **Brazil:** Article 3. IV: The fundamental objectives of the Federation Republic of Brazil are to promote the well being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination. In addition, Article 5 provides that all persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property...
- ✎ **Costa Rica:** Article 33. All persons are equal before the law and there shall be no discrimination against human dignity.¹³¹

130 Argentine Constitution, Article 75.22, 1994; Belizean Constitution, Section 16.3, 1981; Guatemalan Constitution, Section 4, 1985; Costa Rican Constitution, Section 33, 1949 and Brazilian Constitution, Section 3.IV, 1988.

131 As amended by Law No. 4123, May 31, 1968.

Response: Even if corporations are proper rights-holders for purposes of non-discrimination claims, the discrimination is a lawful exercise of the State's interest in protecting public health. Analytically, a general equal protection clause means:

If there is no sufficient reason for an unequal treatment, then equal treatment is mandatory;¹³² and

If there is a sufficient reason to order an unequal treatment, then unequal treatment is permissible.¹³³

1. **The State has a compelling interest in unequal treatment of businesses for the purpose of securing the public health against the hazards of tobacco smoke.** The obligation of States to protect the right to life and the right to health as described above is not only a sufficient reason to order an unequal treatment for the advancement of the protection of such rights, but also an obligation of the States.¹³⁴ The legislature does not act arbitrarily when enacting these statutes; rather, it acts according to its international obligations and according to the norms and values of the Constitution.¹³⁵ Unequal treatment for the creation of tobacco free environments and for banning the advertisement of tobacco products is therefore required under international and internal law.¹³⁶ Unless a constitution has a specific clause that guarantees the equality of advertisement possibilities to all industries, or that guarantees the equal possibility to carry out any type of activity in any place, the statutes under review are legitimate actions of the State's interest in securing other human and constitutional rights.¹³⁷
2. Advertising restrictions and smoke free public places are the only action possible to secure the State's interest in securing the public health; the action is therefore proportional and reasonable.¹³⁸ In the case of smoke free environments, the total prohibition of smoking in certain places is proportional or narrowly tailored to the interest of protecting the population from exposure to hazardous tobacco smoke, and protecting from harm caused by third parties.¹³⁹ In upholding the constitutionality of Law 28705, which placed an absolute ban on smoking in all health and educational establishments, public institutions, indoor work spaces, enclosed public spaces and any means of public transport, the Peruvian Constitutional Tribunal,

132 Alexy, Robert, *Teoría de los Derechos Fundamentales* (Ernesto Garzón Valdés trans., Centro de Estudios Políticos y Constitucionales 2001) (1986), p. 408.

133 *Id.* In the United States, where corporations do have rights against non-discrimination, the standard is that the state action must be narrowly tailored to fit a compelling state interest.

134 *Id.*

135 Complaint from Guatemalan Chamber of Commerce, p. IV.

136 *Id.*

137 Alexy, Robert, *Teoría de los Derechos Fundamentales* (Ernesto Garzón Valdés trans., Centro de Estudios Políticos y Constitucionales 2001) (1986), p. 408.

138 Brief for Universidad de San Carlos de Guatemala as Amicus Curiae Opposing Claimant Cámara de Comercio de Guatemala, p. III.

139 Complaint from Clínica de Interés Público del Centro de Investigación y Desarrollo de la Educación, p. VIII.

quoting an *amicus* brief submitted by the O’Neill Institute for National and Global Health Law, the Campaign for Tobacco-Free Kids and the Framework Convention Alliance, stated that “the legislative measure in question is ‘not only constitutionally valid, but also necessary from an International Human Rights Law perspective due to the obligation to protect the right to health of citizens.’” Thus, any restrictions on economic or commercial freedoms in this case were deemed to be proportional to the State’s obligation to protect the public’s right to health.¹⁴⁰ In the case of advertisement prohibitions, the measure is proportional to the interest of protecting adolescents and the population in general from starting tobacco consumption.¹⁴¹ Also, it is proportional to the advancement of the State’s interest in deterring increases in consumption.¹⁴²

E. Right to Work

Industry Argument: Smoke free legislation unreasonably affects the right to work. Absolute smoking bans in the work place violate the smoker’s right to work.

Response: Many Latin American constitutions protect the freedom to work while establishing that laws can also limit this freedom for reasons of social and national interest.¹⁴³ As established above, protecting public health is a compelling national interest, and even one required by states’ obligations to protect the rights to health and life. In any case, tobacco laws do not interfere with the right to work. Rather, such laws regulate workplace conditions, and do not stop anyone from working, or working in a particular job. In such a context, the right to work is not affected. Tobacco control laws are not related to smokers’ right to work. These laws only impact smokers’ ability to smoke in certain locations, and they do so to protect workers’ health, in accordance with objectively proven facts regarding the deleterious effects of secondhand smoke. Because these laws regulate general workplace conditions as opposed to individual behavior, they do not discriminate against specific individuals. These laws do not prevent individuals who smoke from working, nor from working in particular jobs. They merely regulate smoking in the workplace. In this case, it is not necessary to apply the balancing test. There is no direct conflict between the right to work and the provisions banning smoking in the workplace.

140 Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3° de la ley N. 28705 Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011. Section 6, paragraph 81.

141 Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 4.1.B.

142 Brief from IDEC – Instituto Brasileiro de Defesa do Consumidor as Amicus Curiae Supporting Respondents, p.3.

143 Constitution of Guatemala, Art. 43: “Freedom of Industry, Trade, and Work. The freedom of industry, trade, and work is recognized, except for limitations which for social motives or national interest are imposed by law.”

In fact, in its recent decision regarding the constitutionality of Law 28705, the Peruvian Constitutional Tribunal held that absolute smoking bans are the only method of effectively protecting the right to health, and that they do so at no cost to smokers' right to work. In this case, the Court held that the establishment of smoking areas designed specifically for smokers would neither protect the right to health, nor reduce the health consequences of smoking to the degree required by Article 3 of the FCTC.¹⁴⁴ Furthermore, the Court found that smoking cannot be considered a valid work risk because it is not a necessary component of any occupation, and the creation of special smoking areas might even create smoking incentives.¹⁴⁵ Thus, rather than infringing on smokers' right to work, the failure to institute an absolute ban on smoking in the work place would result in a violation of both smokers' and nonsmokers' rights to be free from exposure to secondhand smoke in the workplace.

Thus, because many constitutions provide for a right to safe working conditions, smoke-free laws are necessary to implementing this right and effectively protecting co-workers from the effects of secondhand smoke. It is clear that *without* restrictions on smoking in the workplace, it could affect the rights of non-smokers to work in a place that is healthy and safe. This is true for all workers who may become very ill or die early from workplace exposure to tobacco smoke, but it applies even more forcefully to workers with respiratory and other conditions.

- **Mexico:** The constitution requires employers to organize their establishments “in such a way as to ensure the greatest possible guarantee for the health and safety of workers as is compatible with the nature of the work.”¹⁴⁶
- **Argentina:** The constitution requires that the law ensure “dignified and equitable working conditions.”¹⁴⁷

144 Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3º de la ley N. 28705 Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011. Section 8, paragraph 97.

145 Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3º de la ley N. 28705 Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011. Section 8, paragraph 112.

146 Constitution of Mexico, Art. 123 (XV).

147 Constitution of Argentina, Art. 14 bis.

Conclusion

This guide has sought to provide answers to the tobacco industry's efforts to undermine tobacco control efforts by judicially challenging tobacco regulation. The industry has raised arguments in court about infringement on its "rights" to promote and commercialize their products, citizens' "rights" to consume those products in public places or work environments, and the "rights" of employers and workers to allow such consumption. The arguments developed in the guide can be used to respond to lawsuits presented by the industry. These same arguments could be used to sue both the government and the industry to ensure that their behaviors are in compliance with human rights standards regarding the highest attainable standards of physical and mental health, using the FCTC as a reference.

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