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# Human rights and the Framework Convention on Tobacco Control: mutually reinforcing systems[1]

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## Abstract

*This article explores the connection between human rights and tobacco control, and in particular, the Framework Convention on Tobacco Control (FCTC). We address rights-based arguments used by the tobacco industry to argue against tobacco regulation. We demonstrate the weakness of these arguments, and that tobacco control and human rights are, in fact, not in conflict, but are mutually reinforcing. We also offer counter-arguments in favour of tobacco regulation based on international human rights obligations. Moreover, we argue that international human rights law and human rights bodies can provide tobacco control advocates with avenues for international monitoring and enforceability, which are lacking in the FCTC.*

## Introduction

The end of the twentieth century marked a shift in public and political perceptions about smoking tobacco. Litigation in North America exposed the industry's attempts to conceal the harmful effects of tobacco smoking, the deliberate manipulation of nicotine content and the toxicity of tobacco products. In reaction, developed countries in North America and Western Europe ramped up regulation. Although tobacco consumption still poses a major public health threat in these regions, the tobacco industry's response to increased regulation in developed countries has been to shift its focus to poorer regions in the world – to unexplored markets in Africa, Asia, Eastern Europe and Latin America (Bollyky and Gostin, 2010; Gostin, 2007a). This strategy has had devastating effects, as these are the world's poorest regions and are ill-equipped either to prevent smoking or to cope with its major health consequences.

The burden of the tobacco pandemic is not fairly distributed – tobacco consumption rates are much higher among poor communities both within and among states. According to the World Health Organization (WHO), 'it is the poorer and the poorest who tend to smoke the most. Globally, 84% of smokers live in developing and transitional economy countries' (WHO, 2004b, p. 3). These communities also bear most of the disease burden (Novotny and Carlin, 2005).[2] There

1 Some of the arguments developed in this article are based on a report drafted by the co-authors and staff of the O'Neill Institute for National and Global Health Law (2011). The authors would like to thank Maximiliano Levin, O'Neill Institute research assistant, for his research support. We would also like to thank the O'Neill Institute staff and fellows that reviewed early drafts of this article, in particular, Juan Carballo, Kate Stewart and Susan Kim.

2 One study shows that 'by 2030, 16% of all adult deaths [globally] will be directly caused by tobacco use, with 70% of these deaths occurring in low-income countries' (Novotny and Carlin, 2005, p. ii27).

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is a similar connection between education and tobacco consumption, as those with less education also tend to have considerably higher rates of smoking.[3] Tobacco consumption also has a harmful effect on household income and economic development. Poor smokers spend their scarce household income on tobacco, thus increasing their vulnerability.[4] According to PATH Canada, 'for the poor, daily spending on tobacco represents a daily drain on scant family resources. Yet in many countries it is precisely the poor who use tobacco the most. In Bangladesh, smoking rates are twice as high in the lowest income group as in the highest.'[5]

WHO's Tobacco Free Initiative draws the link between poverty and tobacco in the following terms:

> 'Together, tobacco and poverty create a vicious circle. In most countries, tobacco use tends to be higher among the poor. Poor families, in turn, spend a larger proportion of their income on tobacco. Money spent on tobacco cannot be spent on basic human needs such as food, shelter, education and healthcare. Tobacco can also worsen poverty among users and their families since tobacco users are at much higher risk of falling ill and dying prematurely of cancers, heart attacks, respiratory diseases or other tobacco-related diseases, depriving families of much-needed income and imposing additional costs for healthcare' (World Health Organization, 2004c).

In sum, smoking prevalence and the burden of tobacco-related diseases affect the poorest people in the world, and this adversely impacts economic development. Given the tobacco industry's efforts to capture more consumers in developing countries, states need to intervene to protect the human rights of their citizens against the negative effects that these strategies will have on their health, life and standard of living. Moreover, as the tobacco epidemic disproportionately affects poor people, tobacco control should be a state priority. The United Nations (UN) Independent Expert on Human Rights and Extreme Poverty urged the Human Rights Council to give priority 'to persons living in extreme poverty to ensure that they enjoy their civil and political rights and at the very least a minimum core content of all economic, social and cultural rights' (UN Human Rights Council, 2010, p. 53).[6]

The globalisation of the tobacco epidemic has led to intensified tobacco control worldwide.[7] For the second time in its history, the WHO used its treaty-making power to negotiate a treaty to establish standards for tobacco control regulation. In 2005, the Framework Convention on Tobacco Control

3 A study in Rio de Janeiro, Brazil, determined that 26 per cent of people with four or less years of schooling were smokers, while amongst people with nine or more years of schooling only 17 per cent smoke. The study concludes that this trend holds for all levels of income (World Health Organization, 2004a).

4 As stated by the WHO, 'addiction to nicotine drives [tobacco users] to spend money on tobacco, diverting critical resources that could otherwise be spent on vital necessities. In the case of the poorest, where a significant portion of their meagre income is required to buy food, expenditures on tobacco may make the difference between an adequate diet and malnutrition' (World Health Organization, 2004c). See also World Health Organization (2004b).

5 Programs for Assessment of Technology in Health (PATH) and Work for a Better Bangladesh, 'Tobacco and Poverty', available at http://wbb.globalink.org/public/poverty_factsheet.pdf. This pattern is also present in other countries such as Vietnam, in which 'national statistics show that annual household expenditure on tobacco is 1.7 times higher than expenditure on education, and 1.5 times higher than that for health'.

6 UN Human Rights Council 'Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona, on the Draft Guiding Principles on Extreme Poverty and Human Rights' (6 August 2010) A/HRC/15/41.

7 According to the WHO, the FCTC 'represents a paradigm shift in developing a regulatory strategy to address addictive substances; in contrast to previous drug control treaties, the WHO FCTC asserts the importance of demand reduction strategies as well as supply issues' (World Health Organization, 2003).

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(FCTC) entered into force. The FCTC imposes obligations on state parties in areas such as smoke-free environments, tobacco advertising, promotion and sponsorship, and health warnings. The FCTC plays a central role in linking tobacco control and human rights.

The UN has recently joined the global effort to build a stronger connection between tobacco control, non-communicable diseases (NCDs) and human rights. A UN High-Level Meeting on NCDs will take place in September 2011. The only other high-level UN summit devoted to a health issue was on AIDS, which transformed the global response to the HIV pandemic. NCDs advocates hope that the NCDs summit meeting will have the same kind of impact. The plan of action seeks to 'achieve a suggested global goal by 2040 of a world essentially free from tobacco where less than 5% of the population uses tobacco' (Beaglehole *et al.*, 2011, p. 1438). This strategy also calls for the immediate implementation of FCTC measures.

In reaction to these global responses to the tobacco pandemic, the tobacco industry has invoked the rhetoric of fundamental rights in resisting effective tobacco control laws and regulations (Jacobson and Soliman, 2002). In this article, we demonstrate the weakness of the industry's arguments, and that tobacco control and human rights are mutually reinforcing. We analyse in detail many of the typical arguments the industry has raised worldwide to attack smoke-free legislation and prohibitions of promotion, advertisement and sponsorship of tobacco products. We also offer counter-arguments based on international human rights obligations. Moreover, we argue that international human rights law and human rights bodies can provide tobacco control advocates, and the Framework Convention Alliance, with avenues for international monitoring and enforceability, which are lacking in the FCTC.

By examining emerging trends in tobacco control litigation, with a special emphasis on Latin American human rights cases, we expand the connections between human rights and tobacco control.[8] To maintain and build upon recent successes in global tobacco control, advocates must defend tobacco control measures against the industry's attacks by systematically asserting international human rights law. This article does not offer an exhaustive account of the relationship between tobacco control and human rights, but rather focuses on discrete connections.[9]

Part I of this article discusses the connection between tobacco control and human rights. It describes human rights obligations, vis-à-vis tobacco control, and examines in closer detail the connection between the FCTC and human rights. It also analyses ways to strengthen the connection between tobacco control and human rights, with a special emphasis on the role human rights can play to monitor and enforce the FCTC. Part II critically examines industry arguments against tobacco regulation while showing how they are flawed from a human rights perspective. We examine recent tobacco control cases that help exemplify this connection between tobacco control and human rights. Finally, we identify new areas of concern in tobacco control and human rights, such as industry arguments based on trade and investment law and connections with intellectual property rights.

## Part I: The relationship between tobacco control and human rights

In this part we analyse the connections between tobacco control and human rights. We start by suggesting that human rights discourse, as applied to tobacco control, needs to move away from a negative/positive rights human rights dichotomy and embrace a classification based on the type of

8 Although our article develops arguments based on international human rights law, which are – to some extent – applicable globally, we will analyse in detail recent decisions from Latin America.

9 For a more detailed account of the connection between human rights and tobacco control, see, for example, Crow (2004). See also Dresler and Marks (2006).

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state obligation (respect, protect, fulfil). This will better clarify the connections between these two fields and will help to advance tobacco control through a human rights approach. This part also analyses the human rights principles embedded in the FCTC. We draw connections between the right to health and the FCTC, arguing that the FCTC can inform the concrete content of the right to health. We will conclude by examining ways in which the human rights system can strengthen monitoring and enforcement of the FCTC.

## Respect, protect, fulfil and tobacco control

Human rights were traditionally classified into two broad categories: negative and positive rights (Ferrajoli, 2001; see also Alston, Goodman and Steiner, 2008). According to this classification, civil and political rights were considered negative rights, while economic, social and cultural rights were seen as positive rights. Negative rights were understood as imposing obligations on states to refrain from certain conduct (Alston *et al.*, 2008). On the other hand, positive rights require states to engage affirmatively in certain activities, and develop positive measures to comply with human rights obligations, including the expenditure of resources (Alston *et al.*, 2008). According to this twofold division, economic, social and cultural rights were 'perceived as "positive", vague and resource-demanding rights subject to progressive realization' (Koch, 2005, p. 82); i.e. economic, social and cultural rights were considered aspirational goals and not concrete, enforceable rights (Koch, 2005). In contrast, civil and political rights were perceived 'as "negative", precise and cost-free, capable of immediate implementation' (Koch, 2005, p. 82).

This positive/negative dichotomy, however, does not hold up under careful scrutiny. Some civil and political rights, usually understood as demanding only *abstention* from the state, also require *positive* actions. For example, the right to a fair trial (connected with the right to due process or natural justice), not only requires states to abstain from violating rights, but also requires states to devote resources to create a functioning judicial system that can guarantee a fair trial, including the right to counsel. The same applies to rights traditionally understood as positive, such as the right to education, which requires states to abstain from discriminating against minorities in, for instance, access to the public education system (Cabrera and Madrazo, 2010).

This twofold characterisation of human rights increasingly has been replaced with a threefold classification of human rights obligations (Koch, 2005). This threefold classification focuses on the type of state obligation and not on the nature of the right; therefore, it applies to civil and political, and economic, social and cultural rights (Koch, 2005).[10] According to this threefold typology, adopted by the Committee on Economic, Social and Cultural Rights (CESCR),[11] states have obligations to *respect*, to *protect* and to *fulfil* all human rights.

The *obligation to respect* requires states to refrain from directly (or indirectly) violating human rights or interfering with their realisation. States must abstain from developing policies, laws and regulations that negatively affect human rights. Moreover, states must refrain from engaging in any conduct that negatively affects human rights. Specific to tobacco control, states must refrain from actively promoting the use of tobacco products (Cabrera and Madrazo, 2010).

Second, the *obligation to protect* requires states to take measures to prevent third parties' interference with human rights. This obligation is essential for developing and expanding a

10 See also Koch (2003). For a more detailed account of obligations arising from economic, social and cultural rights, see Sepúlveda (2003).

11 The Committee on Economic, Social and Cultural Rights in its general comments has adopted Asbjorn Eide's tripartite classification of state obligations. What is noteworthy is that scholars have recently added other levels of state obligation, for example, obligation to facilitate (assist), to promote and provide (Eide), and obligation to ensure (Van Hoof). Steiner and Alston have also developed a five-level classification. See Sepúlveda (2003).

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human rights approach to tobacco control. Governments have a legal obligation, enshrined in human rights law, to regulate the tobacco industry to prevent the industry from interfering with the right to health and other human rights. For example, governments must ban misleading advertisement of tobacco products (light, mild, etc.) in order to protect the right to health, right to information and rights of consumers (Cabrera and Madrazo, 2010).

Finally, the *obligation to fulfil* requires governments to adopt all appropriate legislative, administrative, budgetary and other measures needed for the realisation of human rights (Cabrera and Madrazo, 2010). This obligation requires governments to enact comprehensive tobacco control legislation that guarantees the right to heath. In addition to enacting legislation, governments must create an infrastructure for the effective implementation of such legislation, including enforcement and monitoring mechanisms. The obligation to fulfil helps create the conditions for individuals to enjoy the human right to health (Jacobson and Soliman, 2002).[12]

In many developed countries such as the United States, this robust understanding of economic, cultural and social rights is often greeted with scepticism. The US Bill of Rights, for example, consists mainly of individual rights, whereby the government recognises an obligation to respect individual rights against government intrusion, but says very little of positive obligations (Jacobson and Soliman, 2002). As a result, Americans are, for the most part, less comfortable with the state actively promoting certain rights rather than just assuring that it is not affecting its citizens' ability to exercise their rights (Jacobson and Soliman, 2002).

The tobacco industry has used this sentiment to its advantage, arguing that smoking is an individual choice and government should not be allowed to dictate when and where people smoke (Jacobson and Soliman, 2002). The tobacco industry has used these arguments in an attempt to rally public opinion against laws establishing smoke-free environments, and other similar restrictions (Jacobson and Soliman, 2002). This strategy has had some success, as it has allowed the tobacco industry to dictate the terms of the debate, putting tobacco control advocates on the defensive (Cabrera and Madrazo, 2010).

The tobacco industry has tried to export these arguments to other parts of the world. However, in contrast to the United States, many younger constitutional democracies (in Africa, Latin America and Eastern Europe) explicitly recognise socio-economic rights for their citizens and impose concurrent obligations on the state to fulfil those rights (Jacobson and Soliman, 2002).[13] Moreover, in some countries where such rights are not explicitly recognised in the constitution, courts have interpreted other rights, such as the right to life, more broadly to encompass affirmative entitlements, such as the right to health.[14]

While the industry has succeeded in increasing scrutiny of tobacco control laws, the industry itself has largely escaped scrutiny over its own human rights violations (Crow, 2005). The tobacco industry has 'asserted [their] own rights with great success', but an examination of the industry's

12 In addition, Gostin and Lazzarini (1997, p. xiv) have noted that 'human rights embody a set of fundamental claims to life, liberty and equality of opportunity'. This definition requires governments to provide adequate resources, 'conducive to the public's health and well-being'.

13 A more detailed analysis of how the industry has tried to use these arguments will be developed in the following section.

14 For example, in India there is no positive right to health in the constitution. However, the constitutional article on the right to life (Article 21) has been interpreted so as to encompass the right to live with dignity. This interpretation has allowed for the domestic enforcement of health-related claims, using the umbrella of the right to life. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 1981 S.C.R. 516, 528, the Supreme Court of India said that the right to life is 'the most precious human right and which forms the ark [sic] of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person'.

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role in human rights violations exposes major abuses (Crow, 2005, p. ii15). The tobacco industry, although a non-state actor, violates many fundamental rights, such as the right to a healthy workplace, the rights of children and the rights to health and life.

Recent developments on human rights obligations of non-state actors show that they bear responsibility. For instance, a 2011 UN report stated that the responsibility to respect human rights requires that business enterprises

> '(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.'[15]

These emerging debates could influence the way in which tobacco control and human rights relate to each other.

In sum, two changes in human rights discourse advances tobacco control efforts. First, human rights scholarship and jurisprudence has increasingly moved away from the rigid division between negative and positive rights, towards an understanding based on the type and nature of states' obligations. Second, the tobacco industry has been able to co-opt human rights language by emphasising state interference with individual rights. Such strategies put tobacco control advocates on the defensive, requiring them to argue that other rights must be balanced against (and ultimately outweigh) individual rights. Modern tobacco control strategies would be better served by highlighting the responsibility of the state to respect, protect and fulfil the right to health, right to life and other related human rights, and by emphasising the human rights violations perpetrated by the tobacco industry.

## The FCTC and human rights

As of January 2011, 172 countries had ratified the FCTC (World Health Organization, 2011b). This means that the FCTC covers approximately 87 per cent of the world's population.[16] The FCTC and its accompanying guidelines, issued by the Conference of the Parties, set forth minimum standards of measures governments must implement to reduce the harmful effects of tobacco products.[17] The FCTC has generated global momentum for increased regulation of tobacco. The process leading to FCTC implementation at country level has pushed governments and public health groups to better understand the role that law can play in protecting the public's health (O'Neill Institute for National and Global Health Law, 2011, p. 11).

Although the FCTC is a binding treaty for state parties, it is uncertain whether it is directly enforceable law in domestic courts. The text of the FCTC is often vague and defers to domestic law, which makes enforceability at the domestic level even more challenging (Cabrera and

15 On 21 March 2011, the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, presented the final report that summarises his work from 2005 to 2011. On 16 June 2011, the Human Rights Council adopted the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'.

16 Framework Convention Alliance (2010) 'Updated Status of the WHO FCTC Ratification and Accession by Country', available at: www.fctc.org/index.php?option=com_content&view=article&id=401:updated-status-of-the-who-fctc-ratification-and-accession-by-country-afghanistan-and-cote-divoire&catid=173:general&Itemid=200.

17 O'Neill Institute for National and Global Health Law (2011, p. 8). To date, the Conferences of the Parties have issued interpretative guidelines to several articles of the FCTC (Articles 5.3, 8, 9 and 10 – partial guidelines – 11, 12, 13 and 14). The binding nature of these guidelines is still the subject of debate, and escapes the scope of this article.

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Madrazo, 2010). This is in part because the FCTC establishes a broad frame – a set of minimum requirements – that state parties can develop and implement in different ways, i.e. the FCTC gives a 'margin of appreciation' for state parties' implementation.

The relationship between the FCTC and human rights can be examined from two different perspectives. First, we can address the concrete human rights references and provisions included in the FCTC. In doing this, we can examine the influence that human rights discourse has on the FCTC. Second, we can examine how the FCTC impacts human rights. We will explore how the FCTC, as an international treaty, can be used to inform human rights obligations, such as the right to health.

In the following part we explain in detail the references to human rights contained in the FCTC. Notably, there are few concrete human rights references in the text of the treaty, besides those in the FCTC's preamble (to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as to the Convention on the Rights of the Child (CRC) and to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)) (Taylor, 2005). Beyond these non-binding references, the FCTC contains virtually no references to human rights (Taylor, 2005). Furthermore, Allyn Taylor, the senior legal adviser to the FCTC negotiations, has detailed the 'absence … of any meaningful discourse on the intersection between human rights and public health during the course of [the FCTC] negotiations' (Taylor, 2005, p. 329). Despite the lack of human rights language in the FCTC, the treaty can be used to promote human rights in tobacco control if argued creatively. Several commentators have argued that the FCTC 'recognizes the importance of the human rights regimens' (Novotny and Carlin, 2005; see also Crow, 2004).

## Human rights provisions in the FCTC

### *Preamble: 'priority to the right to protect public health'*

The use of tobacco products is significantly detrimental to the public's health. In both developed and developing countries, millions of people die every year from tobacco-induced diseases, such as lung and throat cancer and cardiovascular disease (Ezzati and Lopez, 2003). Despite this well-known fact, many governments, under pressure from tobacco industry lobbyists, have failed to enact adequate measures to prevent the spread of tobacco addiction. These governments' failures violate their citizens' rights to health and life (Crow, 2005).

Throughout the FCTC, there is an explicit priority to protect the public's health. From the very first line of the FCTC's Preamble, the treaty asserts a determination 'to give priority to the right to protect public health' (World Health Organization, 2003, Preamble). A central priority of the FCTC is to protect the right to health from third parties that may be endangering that right. When tensions arise between the right to health and other rights or interests, the FCTC prioritises the protection of public health. One clear example comes from Article 8's protection from exposure to tobacco smoke in public places. By restricting smoking in public locations, the state specifically protects smokers and non-smokers alike from the harm that second-hand smoke represents. Similarly, Article 9 promotes public health rights by requiring the regulation, testing and monitoring of tobacco products. Such regulations are expected to protect consumers from the product manipulation that the tobacco industry has practised for decades in numerous countries (Cabrera and Madrazo, 2010).

### *Right to access information*

The FCTC places a strong emphasis on the right to access information.[18] Tobacco companies have aggressively advertised and promoted their products. These methods range from deceptive packaging and labelling practices, to sponsoring sports matches and music concerts to targeting

18 It is important to highlight that in some human rights systems, such as the Inter-American Human Rights System, the right to information is understood as the positive manifestation of the right to freedom of expression.

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deliberately children and adolescents, and to downplaying the risks of tobacco smoking (Crow, 2005). All of these methods focus on manipulating information about tobacco products, a practice that the FCTC seeks to eliminate.

Several sections of the FCTC protect the right to access information. Article 10 creates an obligation for states to 'adopt and implement effective measures for *public disclosure of information* about the toxic constituents of the tobacco products and the emissions that they may produce'. Similarly, Articles 11 and 12 provide strong protections for the right to access information. Article 11 requires governments to adopt regulations ensuring that 'tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions' (World Health Organization, 2003, Article 11). Meanwhile, Article 12 calls for 'broad access to ... education and public awareness programs on the health risks ... to tobacco smoke' (World Health Organization, 2003, Article 12). These provisions promote several different aspects of the right to access to information, but they all protect this right, using strong and unambiguous language.

By protecting the right of access to information, the FCTC invokes a right that is widely recognised in the human rights sphere. This right has been articulated in the constitutions of many countries.[19] It was also recognised in the early history of the UN. In 1946, the General Assembly resolved: 'Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.'[20] At a regional level, in a 2003 Resolution, the General Assembly of the Organization of American States recognised the importance of access to information.[21] In this Resolution, the General Assembly reaffirmed the statement of Article 13 of the American Convention of Human Rights[22] in that everyone has the freedom to seek, receive and impart information. As discussed later, this right, in combination with the right to health, should more than counteract the tobacco industry's arguments over its right to freedom of expression.

## FCTC and human rights: a two-way relationship

Although technically not a human rights treaty, the FCTC has important implications for international human rights law. By ratifying the FCTC, member states acknowledge that the tobacco pandemic is a major threat to public health and that the FCTC is the minimum standard to protect the public's health. The FCTC creates a floor of a set of minimum tobacco control measures state parties must implement. This requires states to develop laws and policies at the domestic level that meet these minimum international standards, and in doing so states protect the right to health. By setting concrete standards against which state action can be measured, the FCTC informs the content of the right to health (Cabrera and Madrazo, 2010).

As an international treaty, the FCTC can be used as a standard to measure whether states are fulfilling their obligations derived from the right to health, as they exist under international

19 Cheryl Bishop, 'Access to Information as a Human Right: Analysis of the United Nations Human Rights Committee', paper presented at the annual meeting of the International Communication Association, Dresden International Congress Centre, Dresden, Germany, 2006, available at: www.allacademic.com/meta/p91640_index.html.

20 UN General Assembly, 'Resolution 59(1)', 65th Plenary Meeting (14 December 1946).

21 General Assembly of the Organization of American States, 'Resolution AG/Res. 1932 (XXXIII-O/03)' (10 June 2003).

22 American Convention on Human Rights, 'O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123' (18 July 1978) Article 13: '1. 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 (...).'

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human rights law. The FCTC establishes the specific content of the minimum obligations of these states with regard to the control of tobacco. If a state fails to implement the minimum tobacco control measures outlined in the FCTC, it could be found in violation of its obligations under the right to health (Cabrera and Madrazo, 2010).

The ICESCR plays an essential role in building this connection. In its General Comment 14, the Committee on Economic, Social and Cultural Rights (the treaty monitoring body in charge of interpreting and monitoring the implementation of the ICESCR) analysed and developed the content of the right to health (ICESCR, Article 12). In this general comment, the Committee defined concrete state obligations arising from the right to health. The Committee clearly articulated the connection between tobacco control and the obligation to protect the right to health when it stated that:

> '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 discourage production, marketing and consumption of tobacco.'[23]

The FCTC can also help inform the content of other human rights, for instance, 'the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular … (b) Safe and healthy working conditions', as established in Article 7 of the ICESCR. Tobacco smoke contains thousands of known chemicals, of which at least 250 are highly toxic to human health and wellbeing (World Health Organization, 2007). In response to this, the WHO established a permissible limit of 'zero' on human exposure to second-hand smoke. The WHO's policy recommendations for protection from exposure to second-hand smoke state that there is *no safe level* of Environmental Tobacco Smoke (ETS) exposure, and, therefore, the only effective way of protecting individuals from the harmful effects of second-hand smoke is an absolute ban on smoking in workplaces and other public areas (World Health Organization, 2007). Pursuant to Article 8 of the FCTC, state parties have a duty to protect their inhabitants from undue, involuntary exposure to second-hand tobacco smoke (World Health Organization, 2003, Article 8). The FCTC sets a legal minimum standard regarding what 'safe and healthy working conditions' means in relation to exposure to second-hand smoke.

Human rights bodies have been expanding the connection between the FCTC and human rights obligations, and have stressed that tobacco control is an integral component in the protection of the right to health. In 2009, in the periodic review of Brazil, the CESCR expressly commented on the relationship between the right to health and tobacco control. The 'CESCR expressly welcomed the Brazilian government's ratification of the FCTC' (Cabrera and Madrazo, 2010, p. S293). However, the CESCR expressed concern that it was 'still permissible to promote the use of tobacco through advertising in the State party [Brazil] and that … smoking is permitted in areas specially designed for the purpose' (CESCR). In this instance, the Committee connects tobacco control measures, smoke-free places (FCTC Article 8) and banning advertising, promotion and sponsorship of tobacco products (FCTC Article 13). The CESCR used the FCTC as a standard to measure Brazil's compliance with its right to health obligations.[24] Finally, the CESCR concludes by recommending

23 UN Economic and Social Council [ECOSOC] Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc. E/C.12/2000/4.

24 Linking tobacco control and human rights at the international human rights level can have a positive impact on domestic tobacco control. See Cabrera and Madrazo (2010). In Brazil, for instance, the General Attorney issued statements for two tobacco related cases in which it highlights the need for taking into account the CESCRs recommendations with regard to smoke-free environments. Constitutionality Claim 4306 and 4351, April 2010.

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that Brazil 'take measures to ban the promotion of tobacco products and enact legislation to ensure that all enclosed public environments are completely free of tobacco'.[25]

Other UN bodies have also followed the CESCR in linking tobacco control and human rights. In the periodic review of Argentina, the CEDAW Committee (the body in charge of monitoring the implementation of CEDAW) addressed the connection between tobacco control and gender. When reviewing Argentina's implementation and compliance with Article 12 of CEDAW (women and health), the CEDAW committee required the government to provide concrete information on the connection between tobacco control and women, and enquired about government gender-sensitive tobacco control policies. In its concluding observations, the CEDAW Committee expressed concern 'about the widespread use of tobacco among women in Argentina and the serious health impact of tobacco on women. The Committee is particularly concerned that women are often targets in tobacco advertising campaigns, which encourage and increase the usage of tobacco among women, resulting in tobacco related diseases and deaths.'[26] Notably, Argentina is one of the few countries in Latin America that has not yet ratified the FCTC. The CEDAW Committee acknowledged this, but urged Argentina to ratify and implement the FCTC, and to 'put in place legislation aimed at banning smoking in public spaces and restricting tobacco advertising'.[27]

Using the UN system to promote tobacco control also provides an opportunity to monitor the implementation of the FCTC. The FCTC lacks formal monitoring mechanisms and does not have an avenue for civil society to formally participate and inform the status of the FCTC implementation at the domestic level. In contrast, UN treaty-based bodies have formal mechanisms to monitor the implementation of UN treaties, which allow civil society to inform the process. There are several ways in which civil society organisations can participate, and one of the most widely used is by submitting shadow (alternative) reports. Those reports highlight human rights violations of the state and provide an alternative account of governments' implementation of human rights treaties.

Brazil's review by the CESCR provides a good illustration to build this connection between tobacco control, the FCTC and human rights. International organisations, academic and civil society organisations, in partnership with local NGOs, filed a shadow report entitled 'Preventing and Reducing Tobacco Use in Brazil: Pending Tasks'.[28] This report builds a connection between the right to health (Article 12 ICESCR), tobacco control and the FCTC. The Committee used the arguments developed in the report to evaluate the government's tobacco control actions. Moreover, some of the recommendations issued by the CESCR are based on arguments developed in the shadow report, and connected with the FCTC (Articles 8 and 13). In sum, when evaluating Brazil's compliance with Article 12 of the FCTC, the CESCR was expressing a clear vision of

25 Committee on Economic, Social and Cultural Rights. Concluding observations: BRAZIL. Geneva: ICESCR, available at http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm (accessed May 2009).

26 Committee on the Elimination of Discrimination against Women(2010), 'Concluding Observations for Argentina, Section 39', available at: http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm.

27 *Ibid*., Section 40. The CEDAW Committee's work on gender and tobacco was informed by a shadow report drafted by civil society organisations; see O'Neill Institute for National and Global Health Law, Campaign for Tobacco-Free Kids, Alianza Libre de Humo Argentina, Fundación InterAmericana del Corazón Argentina (2010) 'Shadow Report to the Periodic Report by the Government of Argentina: Challenges in the Prevention and Reduction of Women's Tobacco Use in Argentina', available at: CEDAW Committee website http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm and O'Neill Institute website www.law.georgetown.edu/oneillinstitute/global-health-law/global-tobacco_control.cfm.

28 O'Neill Institute for National and Global Health Law, Campaign for Tobacco-Free Kids, Aliança de Controle de Tobagismo, (2009) *Shadow Report to the Periodic Report by the Government of Brazil: Preventing and Reducing Tobacco Use in Brazil: Pending Tasks*, available at: CESCR website http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm and O'Neill Institute website www.law.georgetown.edu/oneillinstitute/global-health-law/global-tobacco_control.cfm.

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tobacco control as necessary for the right to health. The UN human rights system (through its treaty monitoring bodies) can provide an avenue for finding states accountable for their failures to implement the FCTC.

## Part II: Strengthening the relationship between human rights and tobacco control: mutually reinforcing frameworks

The tobacco industry often uses fundamental rights arguments to challenge tobacco control policies (Katz, 2005, pp. ii33–34). The regulation of tobacco products involves complex trade-offs in terms of various rights. Strict regulation of marketing and consumption, for instance, can conflict with property rights and freedom of expression; and stringent smoking laws could be seen to conflict with the right to autonomy and self-determination (what the tobacco industry has tried to label as 'freedom to smoke').

In combating the tobacco industry's claims over fundamental rights, it is important to examine which, if any, industry claims have merit. The 'freedom to smoke' or 'right to smoke', for instance, has no basis in law; all states reserve the right to ban or regulate substances that are addictive and harmful to their populations. Other claims, such as those related to commercial freedom, do have some basis in law, but are not definitive. Using an analytical framework (proportionality) to measure how different rights interact with one another and to determine which right should prevail in case of conflict is the key to determining how human rights should be used to advance tobacco control efforts. In any analysis balancing the rights of industry against the rights of individuals, it is necessary to remember that there is 'little or no redeeming value for tobacco consumption', meaning that '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' (O'Neill Institute for National and Global Health Law, 2011, pp. 12–13).

For example, while most countries protect different types of expression, few if any courts afford commercial speech the same level of protection as other forms of expression, such as political and artistic expression. Even if commercial speech were considered as a protected category under the right to freedom of expression, this freedom could be limited to safeguard a compelling state interest in public health.[29] Governments have a right to limit speech that is harmful, with promotion of tobacco widely considered to fall within this category.[30]

The following sections provide examples of how the industry has characterised tensions between human rights and tobacco control measures, in the context of smoke-free areas and comprehensive bans on advertising, promotion and sponsorship of tobacco products. We provide a concrete account of industry arguments, which, for the most part, do not have a solid grounding under human rights law.

### Smoke-free places

In challenging tobacco control laws, one of the most frequently made fundamental rights arguments by the tobacco industry is that 'smoke-free area' measures violate the right to private property (Cabrera and Madrazo 2010).[31] The right to property argument has also been used to challenge bans

29 Courts have found that the freedom of expression provisions of national constitutions can be limited in some instances. See generally *Chaplinsky v. New Hampshire*, 315 US 568 (1942) (establishing that 'fighting words' are not protected speech under the First Amendment of the United States Constitution). See also, Education for Freedom, 'Limits of Freedom of Expression', available at: www.freedomforum.org/packages/first/curricula/educationforfreedom/supportpages/Lo4-LimitsFreedomSpeech.htm.

30 See generally *Chaplinsky v. New Hampshire*, 315 US 568 (1942); *Miller v. California*, 413 US 15 (1973).

31 In 2007, industry lawyers fought Mexico's attempted regulations, arguing that the proposed tobacco regulation would amount to a violation of the right to property: Cabrera and Madrazo (2010).

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on advertising, promotion and sponsorship and to challenge health warnings on cigarette packages. However, here we mainly focus on how this argument has been used to challenge smoke-free measures.

The tobacco industry has used a few variations of how the right to property is infringed by bans on indoor smoking, none of which withstand a thorough examination from a human rights law perspective. To begin with, the right to property is not absolute. Although recognised in international human rights law, the right to property can be limited or restricted by the state, in particularly to protect other fundamental rights.[32] Most states use some form of balancing test to determine whether a regulation is an acceptable limitation of property rights.

The Inter-American Commission on Human Rights recently identified the elements of the proportionality test. The Commission held that in order for a restriction to be lawful and not an arbitrary interference in the right, restrictions must comply with the following requirements: they must (1) have been 'imposed through a law'; (2) respond 'to a legitimate aim to raise a social interest or to preserve the general well-being in a democratic society'; and (3) be 'proportional in the sense of being reasonable to obtain this aim and, in any case, of not sacrificing the essence of the right . . .'.[33]

Well-drafted tobacco control laws fully meet this proportionality test. The 'lawfulness' prong is the easiest hurdle; if the regulation is passed in compliance with a state's regular law-making process, this requirement is fulfilled.[34] In tobacco control laws, 'legitimate aims' and 'proportionality' tests are not difficult to meet either. Tobacco control laws aim to further the right to life, to a safe and clean environment, and to the preservation of health, all of which advance 'legitimate' social purposes (O'Neill Institute for National and Global Health Law, 2011). Further, many countries have ratified and incorporated the FCTC into their domestic legislation, adding a further legal *obligation* to enact strong tobacco control laws (O'Neill Institute for National and Global Health Law, 2011). The proportionality test is a factual one, but as long as the tobacco restrictions do not harm the 'essence of the right to property', the limitations on the right are lawful.[35]

In measuring these balancing tests as they relate to smoke-free areas, it is important to remember the real harm caused by second-hand tobacco smoke. Government agencies and scientists have warned that there is 'no safe level of exposure to second-hand smoke',[36] and, according to a recent Pan American Health Organization (PAHO) report, 'there is no level of exposure at which [second-hand smoke] has been found to be harmless to humans' (Pan American Health Organization, 2006, p. 7.). There is no controversy in the medical and scientific communities over this issue. Organisations such as the WHO, PAHO and the US Surgeon General have categorically stated that exposure to second-hand smoke creates a serious risk to long-term health. The California Environmental Protection Agency (Cal EPA) estimated that in the US alone second-hand smoke causes 3,400 lung cancer deaths and between 23,000 and 70,000 heart disease deaths annually.[37] The World Health Organization's most recent estimates put the global death toll from tobacco at six million annual deaths (World Health Organization, 2011a, p. 1).

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

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

34 *Ibid.*

35 *Ibid.*, pp. 118, 125.

36 US Surgeon General. 'The Health Consequences of Involuntary Exposure to Tobacco Smoke: There is No Risk-Free Level of Exposure to Secondhand Smoke', Factsheet (4 January 2007), available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

37 California Environmental Protection Agency (2005) 'Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant', page 13, available at www.arb.ca.gov/regact/ets2006/isor.pdf.

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Despite these data, second-hand smoke continues to be a problem in the developing world. A recent study in seven Latin American countries found second-hand smoke in 94 per cent of the public locations surveyed, with second-hand smoke found not only in bars and restaurants, but also in schools, government buildings and other places where smoking was prohibited by law (Navas-Acien *et al.*, 2004).

In weighing the balancing test in the right to property, it is important to recall these figures. Smoking carries no social benefits, but it causes a plethora of social harms. It is difficult to think how a regulation might have a more clear-cut 'legitimate aim'. This legitimacy of purpose leads to a second fundamental point regarding smoke-free area laws: states are not merely permitted, but are required, to enact laws to protect their citizens from the harm of second-hand smoke.

As described above, governments' attempts to reduce second-hand smoke exposure through smoke-free area laws do not violate owners' rights to property. Indeed, under a human rights framework, governments may violate numerous other human rights by *failing* to enact smoke-free area laws and allowing continued exposure to the harm of second-hand smoke. Exposure to second-hand smoke poses a violation of numerous fundamental rights enshrined in international law, including: the right to health; the rights of the child; the right to equal protection; the right to just, equitable and satisfactory conditions of work; and the right to a healthy environment (Pan American Health Organization, 2006, pp. 16–18).

In courts from Peru and Uganda to India, judges have found that second-hand smoke violates fundamental rights such as the right to health, the right to life and the right to a safe, clean environment. These courts have ordered governments to enact stricter tobacco control regulations (Pan American Health Organization, 2006, p. 14). For instance, and with regard to the right to just, equitable and satisfactory conditions of work, in a 2002 Canadian case, the Ontario Workplace Safety and Insurance Board awarded a non-smoking waitress compensation as a result of her contracting terminal lung cancer due to daily exposure to second-hand smoke during her employment (Laghi, 2002). Similar cases in the US have also found a causal connection between smoke-filled workplaces and lung cancer.[38]

Such cases support the argument that there are strong rights-based arguments in favour of smoke-free areas. Although the tobacco industry claims that smoke-free areas are a violation of property rights, a workers' rights argument powerfully counteracts that claim. This argument could be more persuasive to advance policy debate, as public opinion is sympathetic to arguments that support regulation whose purpose is to protect non-smoking citizens from the hazardous effects of second-hand smoke (Katz, 2005, pp. ii33–34).

Related to claims that smoke-free areas violate property rights, the tobacco industry has also asserted that they violate the rights to commerce and economic freedom. Mexico's federal tobacco law, approved in February 2008, has been challenged by numerous restaurants, hotels and other service providers with close ties to the tobacco industry on the grounds of undue restrictions on the right to commerce and other fundamental rights (Cabrera and Madrazo, 2010). Similarly, the Chamber of Commerce in Guatemala challenged the Guatemalan Smoke-Free Places law on the grounds that it restricted economic freedom (Cabrera and Madrazo, 2010).

The right to economic freedom is wide-ranging and many constitutions afford a freedom for industry, commerce and work (O'Neill Institute for National and Global Health Law, 2011). The tobacco industry has invoked these provisions to argue, for example, that restrictions on smoking in public places are harmful to competition and to the exercise of lawful economic activity.[39] But,

38 Clifford Douglas (2004) 'The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure', A Law Synopsis by the Tobacco Control Legal Consortium, available at: www.wmitchell.edu/tobaccolaw/resources/douglas.pdf.

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

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similarly to the arguments developed above, these arguments fail any balancing test due to the overwhelming interest in protecting the public's health from tobacco use and exposure to second-hand smoke.[40]

This line of argument does not look promising for the tobacco industry. In a 2010 decision, the Guatemalan Constitutional Court upheld a smoke-free law, basing its decision, in part, on the Guatemalan government's obligation to protect the right to health and the right to life.[41] The Constitutional Court resorted to these rights as enshrined in both Guatemala's constitution and in the international human rights treaties that Guatemala had ratified, such as the ICESCR.[42] In an inclusive and comprehensive definition of the right to health, the Guatemalan Court states:

> 'A safe household, a clean environment, proper nutrition and correct information on the prevention of diseases are the bases of a healthy life. The right to health also implies that the people have control over their body and health. The right to health compels the States to generate conditions in which all may live as healthily as possible. Such conditions include the guaranteed availability of health services, healthy and safe working conditions, adequate housing and nutritional foods.'[43]

In this case, the tobacco industry overstates the reach of freedom of commerce. Freedom of commerce can be limited by the state's obligation to protect other rights. When addressing the argument brought up by the chamber of commerce regarding the unreasonable limitation to the right to freedom of commerce, the Constitutional Court of Guatemala states that such violation does not exist. The Court holds that the challenged law does not prohibit the manufacture, production, distribution or commercialisation of tobacco products; its objective is not to regulate those activities.[44] The purpose of the law is to regulate tobacco consumption to protect the right to health and life of consumers and non-smokers.[45] Therefore, the essential content of the right to economic freedom is not unreasonably affected.

The Guatemalan Constitutional Court carried out a thorough analysis of the arguments raised by the chamber of commerce in challenging the smoke-free law. The Court resorted to international

40 Brief for Universidad de San Carlos de Guatemala as Amicus Curiae Opposing Claimant Cámara de Comercio de Guatemala, p. III, Partial General Unconsitutionality, 2158-2009, Corte de Constitucionalidad de la República de Guatemala [Constitutional Court] (Guat.) ('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 products is allowed in order to protect the right to life and health of non-smokers, as well as the smoker himself.').

41 Decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010). See also Cabrera and Madrazo (2010).

42 Decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010). See also Cabrera and Madrazo (2010). Similarly, in Mexico, the Supreme Court has recently rejected challenges brought up by bars and restaurants against smoke-free laws. As an example, one of these cases is the following: '*Amparo en revisión 136/2010 ponencia: sin turno a ponencia tema: prohibición de venta de productos derivados del tabaco en los establecimientos mercantiles del distrito federal argumenta violación a los artículos 1°, 5°, 14, 16, 21 y 28 constitucionales.*'

43 Free translation, decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010).

44 Free translation, decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010); Brief for Universidad de San Carlos de Guatemala as Amicus Curiae Opposing Claimant Cámara de Comercio de Guatemala, p. III.

45 Free translation, decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010); Brief for Universidad de San Carlos de Guatemala as Amicus Curiae Opposing Claimant Cámara de Comercio de Guatemala, p. III.

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human rights treaties, such as the ICESCR, but more importantly it expressly referred to the FCTC, and to Article 8 of the FCTC, to develop its reasoning. The Court clearly understood the relationship between different rights, e.g. the right to freedom of commerce and the right to health, and correctly applied a proportionality test.

## Bans on advertising, promotion and sponsorship

Many states have enacted legislation to ban advertising, promotion and sponsorship by the tobacco industry, as the FCTC requires. The tobacco industry has strategically challenged these bans on several grounds based in individual rights rhetoric – both the rights of smokers and the industry's investment, trade, property and speech rights. Below, we focus on commerce and free expression, showing why tobacco industry claims fail under a proportionality test.

As with smoke-free place laws, the tobacco industry argues that bans on advertising, promotion and sponsorship infringe upon its right to freedom of commerce.[46] However, commerce arguments are not entirely accurate, as the essence of the right to commerce and economic freedom remain unaffected by tobacco control. The existence of a right does not render a country unable to regulate any aspect touching on that right, provided the regulation does not infringe upon the most essential features of the right.[47]

Advertising laws do not interfere with the economic activity itself, that is, buying, producing and selling tobacco products.[48] Corporations remain free to engage in these activities, but the state retains the power to regulate those activities to protect the public's health (Gostin, 2008, p. 26). Similar levels of commercial regulation exist for other legal, but dangerous, products, including firearms, alcohol and prescription drugs[49] (although tobacco is certainly the most hazardous consumer product, without any beneficial effect). Notably, the FCTC embraced this reasoning, at it does not call for a ban on tobacco, but rather requires strict regulation. The FCTC calls for states to intervene and regulate tobacco products to create a 'passive market', one which is 'regulated and discouraged' (Uprimny and Castillo, 2009, p. 5).

In 2010, the Colombian Constitutional Court embraced this reasoning in D-8096 - Sentence C-830/10, where the Court upheld the constitutionality of a total ban on tobacco promotion and sponsorship. The tobacco industry claimed that the regulation was unlawful state interference with the individual right to property and freedom of commerce. According to the Constitutional Court, the state has the capacity to intervene in commerce by regulating promotion of a product without impacting the manufacturing or distribution of the product. The Court determined that a ban on promotion and sponsorship did not directly affect economic freedom.[50] This decision follows a 1994 precedent, in which the Court emphasised the importance of the state obligation of actively promoting citizens' rights: '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

46 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F.

47 Decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010); Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 4.2.

48 Decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010); Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 4.2.

49 Decision of the Constitutional Court of Guatemala, Guatemala Chamber of Commerce v. Government of Guatemala DOCKET 2158-2009 (2010); Brief as Amicus Curiae Supporting Respondents Provincia de Santa Fe, p. 4.2.

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

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economic, political and social order (preamble) and to fulfill the so-called second generation human rights or welfare human rights.'[51]

Corporate rights to economic freedom, commerce and property are not absolute. The state retains the power and duty to regulate corporate freedoms to safeguard the health, safety and wellbeing of the population. Where the tobacco industry uses fundamental commercial rights rhetoric to attempt to thwart sound tobacco regulation required by international law, tobacco control advocates must assert the more compelling human right to health, bolstered by FCTC obligations.

In addition to arguing that regulation of advertising, promotion and sponsorship violate the right to commerce, the tobacco industry argues that it impermissibly restricts the freedom of expression. Commercial speech, however, also is not absolute, and has a lower level of protection than political, artistic and social discourse.[52]

The tobacco industry argues that the fundamental right of freedom of expression protects its ability to advertise and promote tobacco products through the media and other outlets. Despite the clearly commercial purpose of the message, the industry argues that its communications to consumers are protected under international human rights law and national constitutions.[53] In making such arguments, the industry conflates its advertising with the social and political speech traditionally protected as a fundamental right.

The industry raised these free-speech claims in Argentina and Brazil (O'Neill Institute for National and Global Health Law, 2011). But these claims misrepresent the principle of freedom of expression as enshrined in human rights law and national constitutions. Free speech on matters political, social and artistic expression is protected because of its importance to society and democracy. In contrast, commercial speech intended to promote a product does not have the same fundamental connection to a functional democratic society. The purpose of tobacco promotion is to obtain a profit for the company and not to add to the free exchange of ideas. Although commercial speech allows individuals to gather information about goods and services, it is not the same as an exchange of information and ideas in a democracy, ranging from politics and society to art and culture (O'Neill Institute for National and Global Health Law, 2011). As such, commercial speech shares a greater connection with commercial freedom than with freedom of speech, and courts are willing to provide less protection to commercial speech than to other forms of expression.[54]

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51 Colombian Constitutional Court. Decision C-265,1994 [unofficial translation].

52 In the following paragraphs we will argue that commercial speech should not be understood as a category protected under the right to freedom of expression, but should be regarded as a manifestation of the right to commercial freedom. However, we could also argue that even if commercial speech is considered a protected form of expression, the freedom of expression can be limited under certain circumstances. In this sense, Article 19 of the ICCPR enshrines the right to freedom of expression, but clearly states that the right is not absolute when stating '... [the right to freedom of expression] 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.' Although outside the scope of this section, one could develop a strong argument supporting that the protection of the public's health, e.g. achieved through the enactment of a full ban on the advertising, promotion and sponsorship of tobacco products, could justify a limitation on the right to freedom of expression. For a more detail analysis of this argument see O'Neill Institute for National and Global Health Law (2011).

53 Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C. Y F., p. 8.2.4; Brief for IDEC – Instituto Brasileiro de Defensa do Consumidor as Amicus Curiae Supporting Respondents.

54 See *Central Hudson Gas & Electric Corporation v. Public Services Commission*, 447 US 557, 561 (1980); see also *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); *United States v. Edge Broad. Co.*, 509 US 418 (1993) (finding a substantial federal interest in facilitating state restrictions on lotteries); *Rico Associates v. Tourism Co. of Puerto Rico*, 478 US 328 (1986) (Puerto Rico's 'substantial' interest in discouraging casino gambling by

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Argentinean courts have contrasted protected speech to commercial speech and defined commercial speech as the 'expression of ideas relating to only the issuer's economic interest and audience', linked to a 'commercial contract proposal'. Commercial speech is merely a component of the underlying economic activity promoted and the state can regulate the promotion of that activity to the same extent that it can regulate the activity itself.[55] As seen before, this was also the Colombian Constitutional Court's approach to determine whether a comprehensive ban violates the constitution. Under such a definition of freedom of expression, tobacco control regulations fall well within the mandate of government power.[56]

Tobacco control arguments – the fragility of industry claims to commerce and speech, and the greater power of the state to prevent illness, suffering and early death – can be used as a sword as well as a shield. That is, tobacco control arguments can be used to compel governments to enact rigorous regulations. The right to information, especially as related to the right to health (informational accessibility),[57] requires states to take all appropriate measures to ensure that industry advertising, promotion and sponsorship of tobacco products does not obfuscate the profound health hazards of tobacco smoking.

The High Court of Bangladesh made this connection in 1999, when it found that British American Tobacco's 'Voyage of Discovery' promotional campaign 'was unconstitutional because the yacht [used in the promotional campaign] constituted an advertisement for the tobacco company, [and] any cigarette advertisement without appropriate health warning offended the constitutional right to life' (Gostin, 2007b, p. 2539).[58]

## The future of human rights and tobacco control

As we have argued throughout this article, human rights and tobacco control are mutually reinforcing frameworks, supported both by human rights law and by the FCTC – two complementary regimes in international law. Using human rights can be effective not only in defending tobacco control laws, but also in affirmatively advancing tobacco control at the national level. The FCTC shapes the content of the right to health, and health-related rights, such as the right to life and a clean environment, as well as the right to information. Finally, regional and international human rights systems can also provide an avenue for monitoring the implementation of the FCTC. While the FCTC Conference of the Parties develops a mechanism to

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); *Zauderer v. Office of Disciplinary Counsel*, 471 US 626, 651 & n.14 (1985) (upholding requirement that attorneys' contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs); *Ohralik v. Ohio State Bar Association*, 436 US 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'); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977); see generally 'The World Cigarette Pandemic – Part 11', *New York State Journal of Medicine* 85:(7): (1985, pp. 391–425); Taylor (1984, pp. 277–79).

55 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, Corte Suprema de Justicia de la Nación [Supreme Court] (Arg.).

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

57 In General Comment 14, the CESCR defines the normative content of the right to health and its elements, availability, accessibility, acceptability and quality. The second of these elements is further divided and one of its sub-elements is informational accessibility. UN Economic and Social Council [ECOSOC], 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 (11 August 2000) ('The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees.').

58 Gostin (2007b, p. 2539), referencing *Slam v. Bangladesh*, Writ Petition No 1825 of 1999 and Writ Petition No4521 of 1999 (Bangladesh High Court, 1999).

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monitor implementation of the FCTC, international and regional human rights systems can monitor the implementation of FCTC duties.

Constitutional court decisions ranging from Colombia and Guatemala to India that have upheld tobacco control laws and driven tobacco control reform show great promise. There seems to be a shift both in how the public perceives tobacco control and also in how courts interpret tobacco control norms in line with human rights. In response, the industry is moving vigorously towards defending their corporate interests, challenging state powers to protect the public. Tobacco industry claims are not simply based on the rights of commerce and speech, but now include trade, investment and intellectual property treaty rights.

In a particularly disturbing case, Phillip Morris International (PMI) recently filed an arbitration request against Uruguay in front of the International Centre for Settlement of Investment Disputes (ICSID), challenging Uruguay's health warnings regulations. Not only is it alarming that the tobacco industry would challenge a sovereign state's public health regulations (which are in fact mandated under international human rights law as well as the FCTC), but also that PMI would challenge a developing country such as Uruguay.

Courts all over the world are moving towards recognising the link between human rights and tobacco control, and are deciding cases in favour of tobacco control laws over industry interests. Importantly, there is also growing international support that would push states to make this connection. For example, in October 2010, the Directing Council of PAHO issued a resolution on health and human rights urging 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' (Pan American Health Organization, 2010). The tobacco control movement needs to capitalise on this momentum and work actively to strengthen the connection between human rights and tobacco control, both in litigation and in policy development.

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