



**File No. 0032-2010-PI/TC  
MAIN  
Request to be considered AMICUS CURIAE**

**MR. PRESIDENT OF THE CONSTITUTIONAL COURT**

The *O'Neill Institute for National and Global Health Law*, of Georgetown University Law Center (“O’Neill Institute”), the *Campaign for Tobacco Free Kids* (“CTFK”) and the *Framework Convention Alliance* (“FCA”), domiciled in the United States, duly represented by Oscar A. Cabrera (Deputy Director, O’Neill Institute), Patricia Sosa (Latin American Program Director, CTFK) and Laurent Huber (Director, FCA) appear in the unconstitutionality proceedings against Article 3 of Law 28705, General Law for the Prevention and Control of the Risks of Tobacco Consumption, modified by Article 2 of Law N. 29517, presented by Jaime Barco Roda on behalf of more than five thousand citizens.

**RESIDENCE**

For the purpose of this petition, we are domiciled at P.O. Box 6412 of the Lima Bar Association, located on Santa Cruz Avenue, Block 2, Miraflores, Peru.

**PETITION – REQUEST TO BE CONSIDERED AMICUS CURIAE**

It is our intention to appear for File N. 0032-2010-PI/TC, filed by Mr. Jaime Barco Roda on behalf of more than five thousand citizens, in the unconstitutionality proceedings against Article 3 of Law 28705, General Law for the Prevention and Control of the Risks of Tobacco Consumption, modified by Article 2 of Law 29517.

The writing that we attach supports the constitutionality of the regulatory reform, as we understand that, from an international law perspective, said reform responds to the provisions of the World Health Organization’s Framework Convention on Tobacco Control, as well as to international human rights treaties ratified by Peru.



The case has obvious public relevance, not only for Peru, but for the entire region, and for this reason the O'Neill Institute, CTFK, and the FCA have decided to submit the following *Amicus Curiae*.

## ABOUT THE INSTITUTIONS

The **O'Neill Institute** is located in Washington DC, at Georgetown University Law Center. The Institute's mission centers on contributing to a more powerful and deeper understanding of the multiple ways in which law can be used to improve health. The O'Neill Institute hopes to encourage the employment of the law as a positive tool to enable individuals and populations in the United States and throughout the world to lead healthier lives.

**CTFK** is a leading force in the fight to reduce tobacco consumption and its devastating health and economic consequences in the United States and around the world. The Campaign, a non-governmental organization headquartered in Washington DC, works in conjunction with various national and international partners with the goal of: a) Informing governments, the general public, and the media about the devastating health consequences of cigarettes, other forms of tobacco consumption, and exposure to secondhand smoke; b) Promoting public policies scientifically proven to reduce tobacco use and exposure to secondhand smoke; and c) Sharing information and best practices concerning tobacco control efforts in order to guarantee that efforts to reduce the consumption of tobacco are as effective as possible.

The **FCA** is a civil society alliance, made up of close to 400 organizations from more than 100 countries, that works on the development, ratification and implementation of the world's first global public health treaty, the Framework Convention on Tobacco Control.



**THEREFORE:**

We respectfully request this honorable Court to accept the *AMICUS CURIAE* petition, which we hope may contribute to the debate being considered in the present proceedings.

Attached is the content of the technical report submitted to the court as *AMICUS CURIAE*.

Washington, July 1, 2011

A handwritten signature in blue ink that appears to read "Oscar A. Cabrera".  
Oscar A. Cabrera  
Deputy Director  
O'Neill Institute for National and Global Health  
Law

A handwritten signature in black ink that appears to read "Patricia Sosa".  
Patricia Sosa  
Director of Latin American Programs  
Campaign for Tobacco-Free Kids

A handwritten signature in black ink that appears to read "Laurent Huber".  
Laurent Huber  
Director  
Framework Convention Alliance

**Presentation by the *O'Neill Institute for National and Global Health Law at Georgetown University Law Center* (“*O'Neill Institute*”)<sup>1</sup>, the *Campaign for Tobacco Free Kids* (“*CTFK*”)<sup>2</sup>, and the *Framework Convention Alliance* (“*FCA*”)<sup>3</sup> as *Amicus Curiae* before the Constitutional Tribunal of Peru regarding the unconstitutionality suit presented by Jaime Barco Roda, accepted on December 10, 2010.**

*Amicus Curiae* in defense of the constitutionality of Law 28705, reformed by Law 29517

## I. INTRODUCTION

Regarding the case disputing the constitutionality of Law 28705, reformed by Law 29517, we respectfully present our support in favor of the validity of the law. To that end, we respectfully submit for your consideration the present document, which, as “Friends of the Court” (*Amicus Curiae*) we leave at the disposition of this distinguished Tribunal in the hopes that it may contribute to the present debate.

To begin, we would like to include information about the magnitude of the tobacco epidemic on a global and regional level, and in particular in Peru:

- According to the World Health Organization (“WHO”), tobacco is responsible for 1 out of every 10 adult deaths around the world (of which there are 5 million annually). This international organization has signaled that “if current smoking trends continue, tobacco consumption will be responsible for some 10 million deaths per year by the year 2020”<sup>4</sup>.

<sup>1</sup> The *O'Neill Institute for National and Global Health Law* at Georgetown University is located at the Georgetown University Law Center in Washington, DC. The Institute’s mission consists of providing innovative solutions to the most pressing national and international health concerns. The O’Neill Institute is a joint project of the Law Center and School of Nursing & Health Studies, and draws upon the University’s considerable intellectual resources, including the School of Medicine, the Public Policy Institute, and the Kennedy Institute of Ethics. By contributing to a more powerful and deeper understanding of the multiple ways in which law can be used to improve health, the O’Neill Institute hopes to encourage key decision-makers in the public, private, and civil society sectors to employ the law as a positive tool to enable individuals and populations in the United States and throughout the world to lead healthier lives. [www.oneillinstitute.org](http://www.law.georgetown.edu/oneillinstitute/index.cfm) (<http://www.law.georgetown.edu/oneillinstitute/index.cfm>)

<sup>2</sup> The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign, a non governmental organization based in Washington DC, partners with several organizations nationally and internationally with the goal of: a) Informing governments, the general public, and the media about the devastating health consequences of cigarettes, other forms of tobacco consumption, and exposure to secondhand smoke; b) Promoting public policies scientifically proven to reduce tobacco use and exposure to secondhand smoke; and c) Sharing information and best practices concerning tobacco control efforts in order to guarantee that efforts to reduce the consumption of tobacco are as effective as possible. [www.tobaccofreekids.org](http://www.tobaccofreekids.org)

<sup>3</sup> The Framework Convention Alliance – FCA, is a civil society alliance, made up of close to 400 organizations from more than 100 countries, that works on the development, ratification and implementation of the world’s first global public health treaty, the Framework Convention on Tobacco Control (FCTC). [www.fctc.org](http://www.fctc.org)

<sup>4</sup> World Health Organization, Tobacco Free Initiative, available at [www.who.int/tobacco/health\\_priority/es/index.html](http://www.who.int/tobacco/health_priority/es/index.html)

- According to the Pan American Health Organization (“PAHO”), tobacco kills 1 million individuals per year in North and South America and costs the global economy 200 billion dollars per year.<sup>5</sup>
- Currently, there are more than 120 million smokers in Latin America and more than half of these individuals will die as a result of a tobacco-related illness.<sup>6</sup>
- According to recent scientific studies<sup>7</sup>, Latin American has been classified as being at Stage 2 of the tobacco epidemic due to an ever-increasing prevalence of tobacco consumption among men, a rising increase in the prevalence of smoking among women, and a tobacco-attributable mortality rate among men that has yet to reach its maximum peak.<sup>8</sup>
- 18.4% of the population of Peru between the ages of 12 and 64 years of age has smoked in the last 30 days, and 8 million individuals, out of a total population of 30 million, have tried tobacco at least once.<sup>9</sup>

Taking into account the gravity of these statistics, and given the significance that the rulings of the Constitutional Court of the Republic of Peru will have, the O’Neill Institute, CTFK, and the FCA, would like to make a contribution to the decision-making process of this case, which will undoubtedly have a great impact on public health in Peru.

The first portion of this submission will link the obligations derived from the fundamental human right to health with the legal standard for tobacco control. Afterwards, the effectiveness of smoke free environments as a public health policy will be analyzed in order to show that such methods respect both proportionality and reasonability principles. Finally, the regulatory measure in question will be linked with the notion of market liability for a lawful activity – one that is tolerated, but discouraged for public health reasons. This submission will thus conclude that Law 28705, reformed by Law 29517, is not only constitutionally valid, but also a necessary regulation from an International Human Rights Law perspective.

## II. THE HUMAN RIGHT TO HEALTH AND THE ROLE OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

From an International Law perspective, the Republic of Peru has the obligation to respect, protect and guarantee the rights to life and to health because they are essential and part of the intangible core of human personality. This duty unequivocally arises with the ratification of instruments like the American Convention on Human Rights (ACHR)

<sup>5</sup> PAHO, Tobacco Control Program, available at <http://new.paho.org>

<sup>6</sup> 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).

<sup>7</sup> Although some countries in the region are classified as Stage 3, Latin America as a whole has been classified as Stage 2.

<sup>8</sup> Ana M. Menezes 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>; and Lopez A, Collishaw N, Piha T: *A descriptive model of the cigarette epidemic in developed countries*. Tob Control, 3(242–247) (1994) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1759359/pdf/v003p00242.pdf>

<sup>9</sup> CEDRO - HEALTH BRIDGE. Amicus: Tabaquismo en hogares Pobres del Perú. Final Report. Centro de Información y Educación para la Prevención de Abuso de Drogas. Lima, Perú 2010. p. 4

and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Within this regulatory framework, the State has an obligation to refrain from acts that violate these rights, as well as the obligation to conduct positive activities that ensure that individuals not be victims of violations of these rights.

In interpreting the concept of the obligation to protect, the Committee on Economic, Social and Cultural Rights (CESCR)<sup>10</sup> has affirmed 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 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...*”<sup>11</sup> Given the high prevalence of tobacco consumption, as was described in the first section of this document, the State must act in order to bring an end to the tobacco epidemic and protect public health.

As illustrated by the analysis of international Human Rights treaties, the Peruvian State is obligated to implement measures to promote a decrease in tobacco consumption in order to protect the health of its citizens. With the ratification of the Framework Convention on Tobacco Control (“FCTC”), sponsored by the WHO, the State of Peru has undertaken to implement certain measures to control the tobacco epidemic. Thus, independent of the discussion concerning the nature of Human Rights as pertaining to this treaty, what is certain is that this is an international commitment which calls for the interpretation of an international obligation to respect, protect and guarantee international Human Rights, such as the right to health. This thus constitutes the only legal standard for the interpretation of obligations regarding the right to health as related to tobacco control. From this perspective, and as will be examined in the following section, the changes introduced by Law 28705 are not only valid, but also obligatory in view of the international obligations assumed by Peru.

The use of the FCTC as a standard for the interpretation of Human Rights treaties in so far as they relate to health has already been supported, including by the very Human Rights bodies of the universal system. Thus, the CESCR has already addressed the link between tobacco control and the State’s obligation to protect the health of its citizenry. For example, in 2009, during the annual evaluation of Brazil, which like Peru, has ratified the FCTC, the Committee recommended that Brazil, as a Member State of the ICESCR, take measures to reduce tobacco’s impact on the population in the following terms:

“30. The Committee notes with concern that it is still permissible to promote the use of tobacco through advertising in the State party and that, while the use of tobacco-derived products is banned in publicly accessible areas, smoking is permitted in areas specially designed for the purpose. (...) **The Committee recommends that the State party take measures to ban the promotion of tobacco products and enact**

<sup>10</sup> The Committee on Economic, Social and Cultural Rights (CESCR) is the independent body of experts that supervises the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by its Member States. The Committee was established on May 28, 1985, by virtue of resolution 1985/17, by the United Nation’s Economic and Social Council (ECOSOC) to carry out the monitoring functions assigned to the Council in Part IV of the Covenant. The Committee publishes its interpretations of the Covenant’s legal requirements in the form of general observations. Its webpage is at: [www2.ohchr.org/spanish/bodies/cescr/index.htm](http://www2.ohchr.org/spanish/bodies/cescr/index.htm).

<sup>11</sup> General Comment No. 14 from the Committee of Economic, Social, and Cultural Rights (emphasis added)

*legislation to ensure that all enclosed public environments are completely free of tobacco.”<sup>12</sup>*

As noted in the observation and in the corresponding recommendation, the CESCR uses the FCTC as a standard to evaluate compliance with the obligations arising from the right to health as set forth by the ICESCR. This type of approach is also shared by institutions like the Pan American Health Organization (PAHO), which has affirmed that “*National governments have the authority to regulate smoking in public places and both public and private workplaces and should implement laws, policies, plans and practices, guided by their human rights obligations, that require all of these settings to be 100% smoke-free indoors*”<sup>13</sup>.

### III. EFFECTIVE PROTECTION AGAINST SECOND HAND SMOKE

As established by the guidelines for Article 8 of the Framework Convention, “*effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment*”<sup>14</sup>. Moreover, the WHO has declared that the establishment of 100% smoke free environments is the only effective strategy to “*reduce exposure to tobacco smoke in indoor environments to safe levels (...) Ventilation and health experts agree that ventilation is not a solution to this significant health issue*”.<sup>15</sup> A study of more than 1,200 public places in 24 countries found that the level of indoor air pollution was 89 percent lower in smoke free places, as compared to those where smoking was permitted.<sup>16</sup> These changes have a direct positive impact on health. Since the implementation of its smoking ban, Scotland has seen a 17 percent reduction in heart attack admissions in 9 major hospitals.<sup>17</sup> Similarly, studies conducted in the United States and Italy have shown that the number of hospital admissions for heart attacks dropped significantly following implementation of strict smoke free legislation in public places and workspaces.<sup>18 19</sup>

One of the arguments made in the suit is that it should be permissible to establish places exclusively for smokers where only smokers would work. This option presents two insurmountable weaknesses. On the one hand, international experience demonstrates that these types of permits result in the expansion of establishments where, in

<sup>12</sup> CESCR (2009), Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Brasil, E/C.12/BRA/CO/2.

<sup>13</sup> Pan American Health Organization (2006), Exposure to Secondhand Tobacco Smoke in the Americas, Washington DC, p. 26 and 27, (emphasis added).

<sup>14</sup> Guidelines for implementation of Article 8 of the WHO Framework Convention on Tobacco Control, p. 6.

<sup>15</sup> WHO (2007), Policy recommendations on protection from exposure to second-hand tobacco smoke, p. 20

<sup>16</sup> Roswell Park Cancer Institute, Department of Health Behavior; International Agency for Research on Cancer; Division of Public Health Practice, Harvard School of Public Health (September 2006). A 24-Country Comparison of Levels of Indoor Air Pollution in Different Workplaces. Available at: [http://www.tobaccofreeair.org/downloads/GAMS%20report.v7\\_Sept\\_06.pdf](http://www.tobaccofreeair.org/downloads/GAMS%20report.v7_Sept_06.pdf)

<sup>17</sup> Sally Haw. Scotland's Smokefree Legislation: Results from a comprehensive evaluation. Presentation given at the Towards a Smokefree Society Conference. Edinburgh Scotland, 10 – 11 September 2007. Available at: <http://www.smokefreeconference07.com/programme.php>. Accessed 10.30.07

<sup>18</sup> Sargent RP, Shepard RM, Glantz SA (2004) Reduced incidence of admissions for myocardial infarction associated with public smoking ban: before and after study. British Medical Journal. 328(7446):977-80. Available at: <http://www.bmjjournals.org/cgi/content/short/bmj.38055.715683.55v1>

<sup>19</sup> Bartecchi C, Alsever RN, Nevin-Woods C et al (2006) Reduction in the incidence of acute myocardial infarction associated with a citywide smoking ordinance,” Circulation. 114(14):1490-6. Available at: <http://circ.ahajournals.org/cgi/content/short/CIRCULATIONAHA.106.615245v1>



addition to allowing smoking, the sale of food and drinks is also permitted, making them no different from restaurants or bars, ultimately undermining the law's very purpose. On the other hand, the Peruvian government itself recognized internationally that "*the spread of the tobacco epidemic is a global problem with serious consequences for public health*" and committed itself to devising "*effective measures to promote cessation of tobacco use and adequate treatment for tobacco dependence*"<sup>20</sup>. It would be a contradiction to permit the establishment of areas where workers must be smokers, a condition which the State itself has pledged to combat. As if this were not enough, the regulation suggested by Jaime Barco Roda and the lawsuit's other signatories would imply a direct discrimination against non-smokers' access to jobs.

Moreover, from a labor law perspective, one of the main provisions of the International Labor Organization (ILO) requires that the work environment be free of environmental pollution<sup>21</sup>. This includes second hand smoke, which is considered a class I carcinogen<sup>22</sup> by institutions such as the World Health Organization (WHO), the Pan American Health Organization (PAHO) and the International Agency for Research on Cancer (IARC)<sup>23</sup>, institutions that are also in agreement that no level of exposure to tobacco smoke is innocuous. This conclusion is also shared by numerous jurisdictional bodies, like the Constitutional Court of Colombia, which has affirmed that "*there exists a global consensus regarding the intrinsically noxious character of tobacco products and their derivates, taking into account the certain damage to health, objective and verifiable, that occurs in both smokers and secondhand smokers*"<sup>24</sup>. The fact that there is no innocuous level of tobacco smoke conclusively responds to the suggestion put forth by the lawsuit in point VII.2.11, which argues that areas for smokers should be permitted in public spaces as long as they are inside "the maximum permitted values for toxic substances". Taking into account that ventilation systems do not eliminate tobacco smoke, the only possible regulation is an absolute smoking ban in these areas. These labor law regulations are in the public sphere, so they must be complied with even in the event of contradictory agreements between an employer and employees. The objective of these norms is to protect the health of workers, and for this reason, the norms are unrenounceable.

Continuing from a labor perspective, unlike other chemicals whose presence in a work environment is part of the production process or the provision of services, tobacco smoke is not a necessary element of any type of process. For this reason, the solution to tobacco smoke is not to create tools to treat this smoke (as could be the case with other contaminants), but rather to eliminate its presence altogether, as required by international labor law. This last point puts to rest the argument contained in section VII.2.13 of the suit, which attempts to compare work in an establishment that permits smoking to work in a hazardous work environment. Hazardous work environments are those in which the hazardous elements are essential to the activity, which is clearly not the case in bars or restaurants or other enclosed public spaces.

<sup>20</sup> FCTC, Preamble and Article 14

<sup>21</sup> ILO R164 Occupational Safety and Health Recommendation, 1981

<sup>22</sup> Other carcinogen substances such as asbestos, silicon or benzene have much higher standards of regulation than those imposed (or even discussed) for tobacco.

<sup>23</sup> Pan American Health Organization (PAHO), Health in the Americas, Vol. I, Edition 2002, Washington DC; U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health. The Health Consequences of Involuntary Smoking. A Report of the Surgeon General. Rockville, Maryland: U.S. Department of Health and Human Services, 1986. Available at: [http://www.cdc.gov/tobacco/sgr/sgr\\_1986/index.htm](http://www.cdc.gov/tobacco/sgr/sgr_1986/index.htm).

<sup>24</sup> Constitutional Court of Colombia, Sentence C-830/10, Reference: file D-8096, 20 October 2010, p. 28.

Neither does the argument that smoking should be allowed in educational institutions hold up, seeing as the Framework Convention itself establishes in Article 12 that “*each Party shall promote and strengthen public awareness of tobacco control issues, using all available communication tools, as appropriate*”<sup>25</sup>. Considering the importance of educational centers for public awareness and education strategies, a complete prohibition applicable to educational establishments would be in perfect harmony with Article 12 of the FCTC. As a reference point, absolute smoking bans in universities have been passed in countries such as Austria, Bolivia, Cuba, Egypt, Guatemala, India, New Zealand, the United Kingdom and Uruguay, among many others<sup>26</sup>. As a subsidiary argument, given the fact that there is no guarantee that minors are not in attendance even at higher education institutions, these absolute bans are a method to strengthen youth protection against smoking. Taking into account that it has been proven that the tobacco industry targets their advertising and publicity campaigns towards children and adolescents<sup>27</sup>, extra protective measures to counteract these strategies may be justified by international agreements such as the Convention on the Rights of the Child.

The lawsuit also asserts that prohibiting tobacco consumption in places that are exclusively meant for smokers indirectly promotes an increase in consumption in the homes of smokers (point VII.3.15), a point that is in direct contradiction to the experiences of other countries. A survey conducted by Action on Smoking and Health UK, Asthma UK and The British Thoracic Society asked individuals who were exposed to smoke both before and after the smoking legislation about their levels of exposure to secondhand smoke at home. The results found that exposure had significantly decreased as the law encouraged people to make homes smoke free<sup>28</sup>.

As can be concluded from the previous paragraphs, and in contradiction to the claims of the suit, we sustain that these types of measures are suitable, necessary and proportional in a *strict sense*, complying with proportionality and rationality principles. According to scientific studies, laws regarding smoke free areas led to a 3% reduction in the number of smokers, and a decrease of three cigarettes per day by those who continued smoking<sup>29</sup>, thus proving the measure’s suitability. In addition, this measure is also necessary because less restrictive measures do not comply with the end goal of protecting health. In this sense, the United States’ American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) stated that the only way of eliminating health risks associated with second hand smoke is through an absolute smoking ban<sup>30</sup>. This information offsets the claim made in section VII.2.11 of the suit, which states that “*there were only four months to evaluate the suitability of the measure proposed by original Article 3 of law 28705 (...) making it impossible to argue that said measure was not enough*”. Keeping in mind the scientific evidence, it is not necessary to put the Peruvian population in a situation that would affect their right to health. Finally, proportionality in a *strict sense* indicates that the degree of the fulfillment of the

<sup>25</sup> FCTC, Article 12

<sup>26</sup> Alianza para el Convenio Marco (2008), Entornos libres de humo. Informe sobre la situación internacional al 31 de Diciembre de 2008, disponible en: [http://tobaccofreecenter.org/files/pdfs/es/SF\\_environments\\_report\\_es.pdf](http://tobaccofreecenter.org/files/pdfs/es/SF_environments_report_es.pdf)

<sup>27</sup> N. Hafez, P.M. Ling, .How Philip Morris Built Marlboro into a Global Brand for Young Adults: Implications for International Tobacco Control., *Tobacco Control*, Vol. 14 No. 4 (2005) and G. Hastings, L. MacFadyen, *Keep Smiling: No-One's Going to Die*, British Medical Association Tobacco Control Resource Centre, London, (2000).

<sup>28</sup> ASH UK. As the smoke clears: The Myths and Realities of Smokefree England. October 2007 Available online at: <http://smokefree.ash.positive-dedicated.net/pdfs/mythsandrealitiesofsmokefreeengland.pdf>

<sup>29</sup> Fichtenberg CM and Glantz SA (2002). Effect of smoke-free workplaces on smoking behaviour: systematic review. *British Medical Journal* 325:18

<sup>30</sup> Samet J et al (2005). ASHRAE’s position regarding environmental tobacco smoke. Available at: [www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239\\_347.pdf](http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf)

intervention's objective must be at least equivalent or proportional to the degree that the fundamental right is being affected. As scientific evidence shows, the objective of protecting the population's health is accomplished with these measures. Also, the degree to which the rights in play are affected does not, as the suit claims, imply a negation of these rights, as essential elements of the right to commerce (manufacturing, selling and buying of these products) remain unaffected. Finally, as will be illustrated in the next point, neither do these measures imply a denial of the right to self-determination.

#### **IV. THE CONCEPT OF A PASSIVE MARKET WITH RESPECT TO A LAWFUL ACTIVITY**

On numerous occasions in the lawsuit, it is affirmed that the new legislation implies a violation of the right to self-determination (point VI.1.5) or a show of intolerance towards freedom of choice (point VII.2.19). According to the lawsuit, the regulation of Law 28705 would imply a prohibition on smoking, in violation of Article 8 of the Peruvian Constitution. As will be demonstrated, however, this argument is unfounded.

Without entering into an analysis of the text of the Peruvian Constitution, it is pertinent to cite a recent decision of the Constitutional Court of Colombia which, after making a reference to the fact that tobacco consumption is a grave public health concern, declared that "*it is not only acceptable, but also necessary that there be restrictions directed towards discouraging tobacco consumption, (...) all of which are framed by the State's will to impose upon production, imports and marketing the condition of a passive market, meaning that although it is legally tolerated, it is not subject to State promotion*"<sup>31</sup>. Thus, the passive market is applicable to an activity, which, although legally permissible, is disincentivized by the State in order to protect a constitutional value, and is linked to a human right such as the protection of the right to health. This regulation respects the right to self-determination, but due to the obligation to promote the right to health, it discourages certain behavior patterns without imposing a moral standard. As asserted by Rodrigo Uprimny, those activities that imply risks must be especially regulated by the State,<sup>32</sup> and this is certainly the case with tobacco. We understand that this conceptualization refutes the lawsuit's argument and demonstrates that the current law 28705 does not, at any point, absolutely prohibit tobacco consumption, but rather promotes healthier living standards and ensures that individual decisions do not negatively affect the right to health of other individuals.

#### **V. CONCLUSION**

For these reasons, the O'Neill Institute, CTFK, and the FCA respectfully request that this honorable tribunal find that the present lawsuit is without merit, and that it uphold the constitutionality of Law 28705, reformed by Law 29517, as 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 the citizens of the Republic of Peru.

<sup>31</sup> Constitutional Court of Colombia, Sentence C-830/10, Reference: file D-8096, October 20, 2010, p. 21

<sup>32</sup> Uprimny, Rodrigo and Camilo Castillo, Constitución, democracia y tabaco en Colombia, Centro de Estudios de Derecho, Justicia y Sociedad (DeJuSticia), Bogotá, 2009, p. 10