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Violations of the Right to Health Due to Inadequate Regulation of Tobacco in Argentina

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Fundación Interamericana del Corazón Argentina [Interamerican Heart Foundation- Argentina], whose mission is to promote public policies and

social changes that guarantee the protection of the right to health, through the reduction of chronic non-communicable diseases (NCDs). FIC – Argentina is an affiliate of the Interamerican Heart Foundation, an organization with a trajectory of over 20 years. Within the field of the prevention of NCDs, FIC Argentina takes different action lines to promote the design and implementation of tobacco control, alcohol abuse control, nutrition and prevention of obesity and physical activity policies with a human rights perspective. Furthermore, it also develops a variety of activities and projects to raise awareness of the importance of these measures with the final objective of protecting the right to health. <http://www.ficargentina.org>



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I. Tobacco's Health Consequence

1. Tobacco is one of the most preventable causes of death worldwide. Tobacco consumption causes **6 million deaths worldwide each year**, and nearly 80% of the world's smokers live in low- and middle-income countries.¹ In the region of Latin America alone, more than 370,000 people die every year from diseases caused by tobacco consumption.²
2. Tobacco use increases the risk of death from **many preventable diseases**, such as cancer, ischemic heart disease, chronic obstructive pulmonary disease (COPD), and stroke.³ Exposure to tobacco smoke has also been shown to be harmful, indicating that tobacco consumption can be injurious to both the user's health and the health of those around them. According to the World Health Organization⁴, second hand smoke killed more than 600,000 non-smokers in 2010.
3. It is important to consider data related with other tobacco control issues, such as **advertisement exposure**. Studies have shown that tobacco marketing has substantial influence over smokers and non-smokers. For instance, one-third of

youth experimentation occurs as a result of exposure to tobacco advertising, promotion, and sponsorship, and 78% of youth aged 13–15 report regular exposure to tobacco marketing worldwide.⁵ This strongly contributes to turning youth aged individuals into smokers.

4. According to the National Risk Factor Survey of the Health Ministry, 25% of the Argentinean population smokes.⁶ The smoking prevalence in Argentina is about 22.1% of the adult population and 24.1% in young people. Additionally, 46.8% of the population said that they were exposed to tobacco smoke⁷. According to studies⁸, in Argentina, tobacco causes the loss of 998,881 years of life each year and accounts for 13.2% of all deaths occurring in the country. This represents 44.851 deaths per year that could be avoided⁹. However, if tobacco controls policies were strengthened, these deaths per year could be prevented.
5. In line with what is happening around the world, tobacco epidemic in Argentina is shifting from men to women and from rich to poor people¹⁰. In this context, according to the Risk Factors' National Survey¹¹, **although consumption diminished among women (22.4% in 2009 and 20.9% in 2013) and men (32.4% in 2009 and 29.9% in 2013), the gap between them was reduced**. Moreover, tobacco consumption causes the death of 11,348 women every year.¹² According to the estimated data, lung cancer has doubled among women in the last 38 years.¹³ Studies also assessed this problem with reference to specific women groups. For instance, 11% of Argentinian pregnant women continue smoking during pregnancy.¹⁴ Also, young women smoke more than young men (27% against 21%), according to the data.¹⁵
6. Tobacco consumption is also responsible for large **public budget** expenditures. The direct cost in regard of tobacco related diseases is more than \$33 billion Argentinean pesos.¹⁶ However, the fiscal income for tobacco taxes is only about 18 billion Argentinean pesos, which is almost half of the public spending on diseases related with tobacco.

II. The Framework Convention on Tobacco Control (FCTC)

7. The FCTC is the legal framework that places obligations upon States to adopt tobacco control policies. It facilitates the implementation of laws that are necessary to protect the global population from the toxic effects of tobacco consumption and exposure to secondhand smoke. By March 2017, 180 countries had ratified the FCTC¹⁷, and Argentina is the only country in South America that

is still not a member of this Convention; the first public global health treaty.

8. The FCTC establishes a set of measures that are proven to be effective to protect human right to health from the consequences of tobacco consumption and exposure to secondhand smoke. Among others, the treaty requests governments to implement 100% smoke-free environments, complete bans of tobacco advertising, promotion and sponsorship, warning labels on the package, measures to raise tobacco prices, mechanisms to control illicit trade and to promote transparency and accountability in the relationship between tobacco industry and decision makers.
9. Scientific evidence demonstrates that, worldwide, the tobacco industry has undermined country's efforts to implement effective tobacco control policies that endanger industry profitability¹⁸. In order to properly protect the right to health of its population from the tobacco industry strategies, it is not enough to approve tobacco control legislation. There is a clear need of ratifying the FCTC¹⁹.
10. Ratifying the FCTC would give Argentina greater legal tools to advance tobacco control policies according to the international standards and it will allow the government to participate in decision-making process together with FCTC member States.
11. **Therefore, Argentina's ratification of the FCTC would provide the optimal framework for the implementation of more effective means for reducing demand of tobacco and offers a true pathway for the maximal protection of public health.**

III. Argentina's Existing Legal Framework and Public Policies Regarding Tobacco

12. Argentina remains one of the top ten worldwide producers of tobacco and the country's legislative agenda has historically encouraged production and commercialization of tobacco products with minimal deference to public health.²⁰ Argentina has been slow to develop the legal framework for tobacco control at a national level, as exemplified by the failure to ratify the FCTC and the delay in adopting a comprehensive national tobacco control law, which did not happen until mid-2011.
13. In 2011, after decades of unsuccessful parliamentary initiatives to implement

tobacco control measures,²¹ the National Congress approved a tobacco control law: Law 26.687.²² Although this law established some minimal protections and standards and should be view as a significant first step in national tobacco regulation, it fell well short of encompassing all aspects of the Framework Convention on Tobacco Control.²³

14. In 2016, the Government implemented a decree that increased tobacco taxes slightly reducing the affordability of cigarettes. Then in 2017, the Executive extended the policy by passing Decree 15/2017 which contains the same measure²⁴. However, the increase did not include all tobacco products and it allowed the industry to raise the prices of some trademarks and not all of them.
15. The deficiencies in Argentina's National Tobacco Law continue to facilitate the tobacco industry's ability to interfere with the application of even the basic standards enumerated in the law. This failure to maximize health protection is the result of the inherent weaknesses in 26.687 and the tax decree recently passed. Legislation in Argentina does not meet international standards and, most egregiously, does not fully regulate taxes and pricing of tobacco products or comprehensively ban advertising, promotion and sponsorship by the tobacco companies.
16. **As a result, the last six years have not shown the expected impact on consumption of tobacco products in Argentina and, more importantly, the legislation has not provided the needed additional safeguards for the protection of venerable populations, including women and children.** Despite its multiple shortcomings, which will be elaborated below, the adopted tobacco control measures endure as a milestone in Argentina's progress toward fulfilling its obligation under its Constitution²⁵ to ensure the protection and achievement of the right to health.

A. Argentina's restrictions on tobacco marketing: Laudable but Insufficient

17. In 2011, National Government passed law 26.687, which met the standards of FCTC, such as the implementation of smoke-free environments, health warning labels, prohibition on the sale of tobacco products to minors, regulated the content of cigarettes and educational programs. However, the adopted restrictions on tobacco advertising, promotion and sponsorship are insufficient to protect the right to health and show the necessity to move forward to strong regulations.

18. Law 26.687 places bans on tobacco advertising, including TV, radio, newspapers and internet, and restricts certain promotion and sponsorship activities. Article 5 specifically states that “advertising, promotion, and sponsorship of tobacco products through any medium of diffusion or communication, whether direct or indirect, is prohibited”²⁶. However, Article 6 of Law 26.687 enumerates exceptions to Article 5’s prohibition on advertising and promotion of tobacco products, and, as a result, permits “point of sell advertising,” allows tobacco promotion in “tobacco growing-related publications,” and “direct communications toward individuals of 18 years and older” with verification of age and consent. These exceptions essentially undermine the efficacy of Article 5 and leave open industry’s ability to directly advertise on potentially more effective modalities, including social media. For instance, according to a 2014 FIC Argentina study, 73.7% of the products at different points of sale did not follow the law in terms of product display^{27 28 29 30 31 32}.
19. Indeed, taking advantage of the loopholes in law 26.687, the tobacco industry has been using an unconventional marketing tool called "Bellow The Line" (BTL). FIC Argentina has been closely monitoring the industry’s activities regarding this type of aggressive marketing and has concluded that tobacco product marketing is present in all types of mass means of communication, from e-mail newsletters to advertisement for cultural events.³³
20. Furthermore, it is relevant to mention that the tobacco industry has developed aggressive campaigns to promote flavored cigarettes in Argentina. The national tobacco control law 26.687 does not regulate cigarettes content which gives the industry the opportunity to sell tobacco tasting like sweets or alcoholic drinks³⁴. It has been proved that flavored cigarettes are more appealing to young people and the tobacco industry has been promoting these products in order to catch new smokers³⁵.
21. Also, the tobacco industry has been implementing corporate social responsibility strategies by contributing to events, activities or individuals with the aim of promoting tobacco products and tobacco consumption. These sponsorship strategies are recognized as marketing and, ignoring the international standards, they are allowed by the national tobacco control law 26,687. Five years after the enactment of this Law, Argentina has demonstrated only moderate compliance with regard to indirect bans including sponsorship of public events.³⁶
22. Tobacco marketing, which includes advertising, promotion and sponsorship, has

been shown to increase youth initiation of smoking³⁷. The continuing tobacco epidemic is directly linked to the effectiveness of industry's advertising and promotional schemes, which are targeted at the recruitment of new smokers who are primarily children and adolescents. Advertisement as well as promotion and sponsorship have not only been shown to increase tobacco consumption, but also frequently achieves this end by presenting information designed to mislead or confuse younger audiences.³⁸

23. Consequently, the ban on all aspects of this activity must be complete and uniform. Production and distribution of tobacco advertising is purely commercial speech and, as such, does not fall within the scope of protection of freedom of expression.³⁹ **The World Health Organization (WHO) noted that in order to have effective controls in this area, the ban must be directed at “all individuals and entities” responsible for the “production, placement, and/or dissemination of tobacco advertising, promotion and sponsorship.”⁴⁰**

24. **Partial bans encourage manipulation and enable avoidance. Only through enactment of regulations that assure an absolute and comprehensive ban on all forms of direct and indirect tobacco advertising can Argentina further the goal of tobacco consumption reduction. Argentina's current legal framework lacks many of the most significant components of the FCTC and this has severely hampered governmental efforts to curb tobacco use.**

B. National Decree 15/2017: Tobacco prices and consumption

25. As it was mentioned before, National Decree 15/2017⁴¹ increased tobacco taxes slightly reducing the affordability of some tobacco products, allowing the industry to raise the prices of some of its trademarks. This situation created a breach between premium and cheaper products. In this context, several smokers are substituting from smoking premium trademarks to cheaper ones, and the tobacco industry is advertising strongly cheaper cigarettes⁴². This strategy is undermining governmental efforts to reduce tobacco consumption by raising tobacco prices.

26. It is important to mention that this decree will be applicable until December 2017. Consequently, the Government has to pass a law ratifying the decree before its due date, including all tobacco products and an updating mechanism, in order

to make the tax increase sustainable. A comprehensive, national-level tobacco control law must include a stringent taxing scheme on tobacco products, including all tobacco products. In addition, it must include a control mechanism that prevents the industry from implementing price strategies that weaken the public health measure.

27. Studies have consistently demonstrated that a significant increase in cigarette prices markedly reduces tobacco consumption, especially diminishing the use by young people and by those in lower socio-economic sectors.⁴³ This price sensitivity represents a powerful deterrent to tobacco demand and evidence indicates that for every 10% increase in the price of cigarettes consumption is reduced by 4% and 8%, in adults and young people respectively.⁴⁴

28. Article 6 of the FCTC mandates that parties “recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons,”⁴⁵ and suggest implementation of tax policies and pricing devised “to contribute to the health objectives.”⁴⁶ The Framework respects the sovereign right of Parties to determine national tax policy, while recognizing the critical nature of this specific intervention in achieving the goal of reducing the use of toxic tobacco products. **Taxation is a pivotal policy component and is synergistic with the other control measures including bans on price-reducing market strategies (coupons and multipack deals), educational campaigns, and cessation support.**⁴⁷

C. Provincial and Sub-National Laws and Regulations Addressing Tobacco Control

29. Many sub-national governments established regulations aimed at reducing the negative impacts of the tobacco epidemic in their respective jurisdictions. In this context, provinces like Santa Fe, Neuquén, La Pampa, San Luis and Santa Cruz, enacted regulations establishing smoke-free environments and total bans of advertising, promotion and sponsorship. However, at a practical level, the implementation of provincial tobacco control laws is not good since governments are not enforcing the law. In a context of multiple legal frameworks with a weak implementation, the tobacco industry continues to market its products regardless of the restrictions established by law⁴⁸ 49.

30. There are still some provinces (in particular tobacco grower provinces) that have not passed any tobacco control regulation, and others that are not enforcing the

minimum standards contained in law 26,687. In this context, clear policies from the Federal Government are needed to guarantee the effective implementation of the current legislation across the country. In addition, these policies could promote the adoption of tobacco control measures in those provinces that are not enforcing at least the minimum standards adopted by the national tobacco control law 26,687 or even more protective measurements

IV. Argentina's Human Rights Obligations

31. Article 75 of the Argentine Constitution, subsection 22, expressly grants hierarchical control to international human rights treaties within Argentina's legal framework. International instruments to which Argentina is a party thereby have the force of law within the nation and compel the State to fulfill its obligations, including the progressive realization of the right to health and progressively stronger tobacco controls to that effect. Such international agreements include the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man (Art. XI); the International Covenant on Economic, Social, and Political Rights (Art. 12); the Convention on the Elimination of All Forms of Discrimination Against Women (Arts. 3, 10, 11, 12); the Covenant on the Rights of the Child (Art. 19); and the American Convention on Human Rights (Art. 5).

32. The Universal Periodic Review, International Convention on Economic, Social, and Cultural Rights, and the Convention on the Elimination of Discrimination Against Women all require and have previously recommended the State to adopt stronger tobacco control measures than it has presently done.

33. The human rights bodies created by these covenants have lease to periodically review the State's compliance and efforts for full implementation. On such occasions, various human rights committees have determined that the State is not fulfilling its duties in regards to tobacco control and recommended that Argentina undertake stronger measures to reduce tobacco consumption and use and regulate tobacco marketing.

A. Universal Periodic Review (2012)

34. The Universal Periodic Review (UPR) Working Group in 2012 reviewed Argentina in the 2nd meeting of the 14th Session of the Human Rights Council.⁵⁰

FIC Argentina, O'Neill Institute, and other partners submitted a parallel report to the UPR regarding Argentina.⁵¹ The 2012 parallel report was skeptical of Law 26.687 and identified gaps in the national law, especially in tobacco product marketing and promotion. The parallel report also noted Argentina's non-ratification of the FCTC as well as Argentina being only South American nation to not ratify the FCTC, as mentioned above. **FIC-Argentina and O'Neill Institute recommended in 2012 that Argentina adopt the FCTC.**⁵²

35. In addition to recommendations and conclusions related to other human rights and the State's obligations to its people in light thereof, the UPR determined that the State was deficient in fulfilling its duties under international human rights law through inadequate tobacco control and regulation. **Principally, the UPR Working Group recommended that the Government of Argentina ratify and implement domestically the Framework Convention on Tobacco Control as adopted by the World Health Organization with Argentina's input and signature.**

36. In its 2014 Mid-term Report, the State addressed the stalled ratification of the FCTC in Argentina in passing, stating merely that ratification had been "postponed" with no clear indication as to when it may resume or prospects for passage.⁵³ Instead, the State pointed to the Law 26.687 (2011) and Decree No. 602/2013 (2013) which approved regulations for implementing Law 26.687. The State hold that these two acts cover approximately "80%" of what the FCTC requires. **International human rights law does not consider partial implementation of similar provisions as tantamount to adoption and full compliance with the convention.**⁵⁴

B. Committee on Economic, Social, and Cultural Rights (2011)

37. Argentina submitted its third report to the Committee on Economic, Social, and Cultural Rights (CESCR) during the 47th Session in 2011 as required by the International Covenant on Economic, Social, and Political Rights (ICESCR).⁵⁵

38. FIC Argentina, the O'Neill Institute and other partners submitted a parallel report⁵⁶ concluding that the State was not in compliance with its obligations under ICESCR Art. 12 by failing to substantially enact and enforce comprehensive tobacco control measures. The FIC-Argentina, O'Neill Institute and partners' parallel report praised Argentina's Law 26.687 in regards to establishing smoke-free environments and health warnings on cigarette packs, but found the national

law inadequate in meeting the obligations Article 12 requires. The parallel report recommended that Argentina implement stronger tobacco control measures to comply with the State's duties under ICESCR. These recommendations include **comprehensive ban on advertising and promotion for tobacco products, including prohibiting brand sponsorship, implementing a tax on cigarette packs and tobacco products that increases the prices of these products and the ratification of the FCTC .**

39. CESCR reviewed Argentina's report and made several recommendations based on concerns it generated and received from civil society sources, including concerns related to smoking and tobacco use among women and youth. CESCR stated that it was "concerned about the high level of tobacco consumption in the State party, especially among women and youth."⁵⁷ **CESCR recommended that Argentina "ratify and implement" the FCTC and "develop effective public awareness and tax and pricing policies to reduce tobacco consumption, in particular targeting women and youth."**
40. Argentina will be reviewed by CESCR in 2018, and for the pre-sessional work group submitted its State report.⁵⁸ Paragraph 23 of the document repeats much of what Argentina has stated in reports to human rights bodies since 2011. Argentina recognizes that the FCTC has not been ratified but provides no reasons or justification as to why or when the national legislature may consider it, and reiterates the provisions of Law 26.687.

C. Committee on the Elimination of Discrimination against Women (2010, 2016)

41. Argentina submitted its seventh report to the Committee on the Elimination of Discrimination Against Women (CEDAW) established under the Convention on the Elimination of Discrimination Against Women in 2016.⁵⁹ The Convention requires Argentina to adopt measures to protect women's health, particularly against the harms of non-communicable diseases brought about by tobacco use and exposure to second-hand smoke. Article 11.1(f) and Article 12 from the agreement obligates the State to protect the right to health for women.
42. FIC-Argentina, the O'Neill Institute, FUNDEPS and FEIM submitted a parallel report to CEDAW in 2016 focused on tobacco use in Argentina and echoed the calls made by the same organizations in previous reports to other bodies for Argentina to implement stronger tobacco control measures and adopt the FCTC.⁶⁰ **The high and increasing tobacco consumption among girls and**

women and the consequences to health are *prima facie* indicators that the State is derelict in its duties to protect women's health by adopting effective measures to control tobacco. Further, the State itself has recognized it is failing to comply with the recommendations issued by CEDAW and other committees by not ratifying the FCTC and implementing strong, comprehensive tobacco controls.

43. Among other recommendations, this Coalition recommended to Argentina the following in 2016: **ratification of the FCTC, prohibit advertising, promotion, sponsorship and marketing tobacco products, implement tax and price mechanisms to reduce tobacco consumption.**

44. The Committee stated its concern that, in 2016, girls consumed more tobacco than boys and women's rate of consumption for tobacco was comparably high. **In its recommendations, CEDAW joined other human rights bodies and recommended Argentina to "ratify the [WHO] Framework Convention on Tobacco Control, reduce the high tobacco consumption among adolescents, in particular girls, and address the health consequences."**⁶¹

45. Notably, CEDAW had made the same recommendation to Argentina in the State's sixth report to the committee in 2010.⁶² The Committee offered conclusions and recommendations to the State following review of the State's Report as well as those offered by civil society⁶³. CEDAW issued its concern over the high consumption of tobacco products among women in Argentina and the impact on women's health that resulted. **CEDAW recommended Argentina ratify the FCTC, implement smoke-free zones, and restrict tobacco advertising in its 2010 report.** Argentina has in the seven years since then accomplished just one of these recommendations.

D. Going Forward: Tobacco Control and Human Rights

46. Strong tobacco control measures are increasingly an expectation on States in fulfilling their human rights obligations. Human rights bodies mentioned here as well as those that were not have indicated the need for effective controls on tobacco consumption and use and promotion, and multiple human rights bodies have looked to FCTC ratification as a core duty on States to comply with international human rights law. To this end, the UN Sustainable Development Goal 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages, looks to

FCTC ratification as an indicator for achieving the goal.⁶⁴ **Argentina has time and again been asked to ratify the FCTC and implement measures that will reduce tobacco use among women, children and adolescents, and otherwise generally; the State has not done so, and is therefore solely culpable for its violation of its citizens' fundamental human right to health.** Argentina will remain in violation of human rights conventions unless and until the State has ratified the FCTC and implements comprehensive tobacco control measures.

V. Conclusions and Recommendations for Argentina

47. This report begins with a brief review of the tobacco epidemic in Argentina, and reiterates the long-term harms to health brought about by tobacco consumption. The State is cognizant of these facts and the disproportionate risk burden for tobacco-induced health impacts for women and youth. Since before 2010, the State has repeatedly violated, as it has been pointed out by several human rights bodies, including UPR, its obligations to ensure that Argentines - male and female, old and young - are able to enjoy the highest attainable health. This will be made possible only through government actions to create healthy conditions and protect people from harmful actions by third parties such as the tobacco industry.
48. Negligible progress has been observed regarding the reduction of tobacco consumption in Argentina. **The primary factor inhibiting further advancement toward diminishing tobacco use and protection of venerable populations is Argentina's failure to ratify the FCTC. Ratification of the FCTC would establish a mandate for additional regulations and foster development of a fully integrated and functional governmental policy capable of yielding maximal, synergistic results from legislative initiatives.**
49. Argentina's legal framework is a step in the right direction, but the State nevertheless is deficient in its obligations and thereby cannot be anything but in violation of its commitments. **The loopholes in Law 26.687 with reference to advertising, promotion, and sponsorship associated with the absence of a comprehensive, national-level tobacco control law that regulates tax and pricing policy, makes unlikely to enhance public health or fulfill Argentina's international human rights obligations.** Human rights are non-derogable; achieving a proportion (even 80%) of its obligation is

inadequate compliance and dereliction in duty.

50. FIC Argentina, O'Neill Institute, FUNDEPS and FEIM conclude that Argentina has not fulfilled its commitments or adhered to the UPR's recommendations for strong tobacco control measures.

51. Respectfully to the State and the UPR, we request the UPR Working Group consider the analysis and position presented in this report and once again recommend to the Government of Argentina the following:

- 1. The Government of Argentina must ratify the Framework Convention on Tobacco Control and implement the FCTC into its national and sub-national legal framework.** The UPR Working Group should take into account that Argentina has received this same recommendation for multiple years and from multiple human rights bodies and has NOT provided reasons or justification for not complying with it.
- 2. The Government of Argentina must comprehensively ban advertising, promotion, and sponsorship of tobacco products.** Marketing strategies employed to influence young people and drive tobacco consumption must be directly mitigated. Public health should not be a secondary concern to the interests of the State.
- 3. The Government of Argentina should implement a national tobacco tax law and pricing policies.** An effective and sustainable tax and pricing regime on cigarettes and tobacco products will have a measurable impact for reducing tobacco consumption particularly among vulnerable groups.
- 4. The Government of Argentina should promote the adoption of strong tobacco control policies at the sub-national level** in order for provinces to meet the minimum standards to protect the Right to Health. These sub-national policies can be stricter than those adopted at the national level.-

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