market. In fact, it nullifies the ability to influence consumers' decisions on buying the product over the competition in advance of its purchase and thus limits the freedom to market the product and consumers' right to be informed in order to have sufficient elements at the time of selecting a product. The same thing happens with the total ban on cigarette sales in one hundred percent smoke-free places. The near ban on doing product advertising also expropriates the company's brand property, whose function is to distinguish that product from the competition's products and position it in the marketplace. It also limits its freedom of speech on contents that do not harm morality, good habits or public policy. Below we will show that the new text in Article 12 of the bill restricts advertising opportunities to such an extent that it practically eliminates any chance to advertise. According to the cited Article 12, advertising could not be located in places where cigarettes are sold, especially supermarkets and food stores, because they are freely accessed by minors. Advertising may also not be located in places typically accessed only by adults, such as bars and dance halls, because those places are declared one hundred percent tobacco smoke free, according to Article 5 (f) of the draft bill. According to Article 12 of the bill, if a tobacco company sponsors an event aimed at adults only, it cannot put up any advertising to which the sponsor is entitled, either, because such events are held in meeting halls and auditoriums declared one hundred percent smoke free, according to the draft bill in Article 5 (m). Advertising likewise cannot be done in the mass media, because according to the bill in Article 12 (b) advertising is permitted only through direct communication with tobacco product vendors and consumers. Given this scenario, no other options for commercial tobacco advertising are left. The ban is total. If the cultivation, industrialization, marketing and consumption of tobacco products are legal, under our Constitution it will not be possible to impose indirect restrictions by law with the effect of banning that legal activity. The Constitutional Division has reaffirmed on this matter that private actions that do not harm morals, public policy or third parties are beyond legal action. Article 46 of our Political Constitution confirms the principles of free enterprise and free trade. This is why the State may impose only reasonable and proportional restrictions on such rights for industry, trade and agriculture, not arbitrary or illegal ones, corresponding to the activity in question. The Constitutional Division has also explained that while free trade and its exercise are not unrestricted, the measures adopted must be in proportion to the proposed end (see Vote 4848-96). In view of the above, no legal norm may have the effect of indirectly banning an activity that has not been banned directly, because it imposes a limit on the exercise of the right to free enterprise and trade that protects any legal business activity. According to the current law, the production, sale and consumption of tobacco are regulated activities, not activities prohibited by law. But despite this being a legal business activity, the draft bill's

purpose is to create indirect obstacles that cause the same effect as banning tobacco consumption. Analyzing the Constitutional Division's votes, the stated measure lacks technical reasonableness (proportionality between the means and ends) since it is an excessive ban without scientific basis when considering the desired end. Moreover, it lacks legal reasonableness vis-à-vis the effect it has on personal rights, in that that it imposes irrational and excessive limitations on both consumers and property owners in view of its objective. As we see, adults are not even permitted to buy cigarettes in places for adults only, nor are they permitted to see tobacco product advertising. On the other hand, advertising is a fundamental part of the exercise of freedom of enterprise and free speech: to ban advertising is to deny both freedoms. The Constitutional Division in its Vote No. 5393-97 provided, among other things, that in commercial advertising the State may protect consumers' rights only subsequently--not through legal or parliamentary limitations or bans (ex post regulation)—through administrative or criminal sanctions. The bill's Article 12 specifically restricts and, more seriously still, prevents tobacco producers and sellers from the ability to advertise the product in any way. The ban is not explicit, but upon a close analysis of the places defined as one hundred percent tobacco smoke free, it becomes clear that the advertising ban is equal to the ban on smoking and even broader. As we have shown earlier, according to the draft bill, no advertising may be done in practically any way. So not only is it a clear restriction, it is a total implicit ban, which presumes bad faith in the article proposed. The bill involves an improper use of technical terms. Terms used in the bill are: "advertising, promotion and sponsorship". However, at least the term "promotion" is imprecise and improper, because its definition would seem to refer to the concept of "propaganda". This terminological imprecision appears confusing and ambiguous and will bring about problems for interpretation and application of the law, in which such broad interpretation is left to the Executive Branch, which in the end will be the one to give the law content and not the lawmaker. But the described case law criteria, fundamental rights and freedoms are not absolute. Instead, they may be limited as they come into conflict with other fundamental rights and freedoms. But their limitation must be made according to the criteria of reasonableness and proportionality. When analyzing the freedoms of trade and speech expressed in commercial advertising specifically on health matters, the Constitutional Division has provided that such freedoms are Constitutionally protected and may not be suppressed, even when they chafe the right to health or rights of third parties. At most, they can--and even must--be regulated, but under certain criteria and parameters. The bill's Article 12 does not propose a restriction, but instead a suppression of the freedoms of trade and speech enjoyed by tobacco manufacturers and venders. Regarding permitted advertising limitations, these may be done only via law, not via regulation. But the bill omits regulating direct

communication in Article 12 (b) with vendors and consumers; instead, it unconstitutionally delegates both its definition and its regulation to the Executive Branch: "according to the protocol provided in the regulation to this law". So the regulation might establish a definition so broad and so vast that it can easily restrict advertising even more, and all through regulation. The bill thus delegates the Executive Branch a matter of statutory reserve, which is unconstitutional according to case law. Since the consumer enjoys the right to be protected against risks that might affect his health, safety and the environment, he is entitled to know the contents of certain substances that are present in the product and relate to its consumption. The total ban on advertising would not meet this goal and would leave unprotected that right to proper, truthful, protective information against health risks. The producer is entirely within his obligation of informing the consumer clearly and truthfully about the nature, composition, contents, weight and other features of the goods and services, as well as providing consumers with the risks involved with its use or the one normally foreseeable for his health, safety and the environment. In the case of cigarettes, advertising fulfills this purpose. The restriction on advertising proposed by Article 12 is abusive and disproportionate. As mentioned earlier, any limitation on Constitutional rights and freedoms, in addition to being permitted only by law, may not be arbitrary, capricious or abusive, but instead must fit the criteria of rationality, reasonableness and proportionality (see Vote No. 5393-97). Article 12 of the bill limits and even *ex ante* bans advertising, in fact. In other words, it does not let any merchant carry out the advertising campaign. It is admissible for the State to qualify and eventually to sanction such an advertising campaign once it has begun, but not ban it before it is done. Amen to all the arguments stated. They add that numeral 12 of the bill is an abusive, irrational, unreasonable and disproportionate norm, because for one thing, it allows the sale of tobacco products –because it is a legal activity -- in a whole range of commercial businesses and only bans it in the businesses found in Article 15 of the bill, but on the other hand, it bans its commercial advertising. More forcibly, the Constitutional Division in its Vote No. 4804-99 explicitly said that an absolute ban on commercial advertising in the specific case of smoking would be unreasonable and disproportionate, because "the activities of commercialization and cigarette consumption are entirely legal in our environment". Then, besides a study of proportionality and reasonableness, the bill is lacking an examination of the criteria of need and suitability through a cost-benefit analysis, statistics and reliable, convincing and sufficient testing that the measures whose adoption is intended are efficient and the best options over other alternatives to achieve the objective of reducing tobacco consumption. This is why it would appear that the proposed measures do not meet the requirement of suitability or at least has not been properly proven, as the Constitutional Division requires. The advertising ban

is unrelated to the consumer's decision to keep on smoking. Disproportionate to the desired result, it believes that the limitation is greater than the benefit the measure would provide, in this case so great that the alleged benefit could result in harm to the community (current and potential consumers). They think that the lawmaker must of necessity carry out a serious cost-benefit analysis to ensure that the proposed measures will meet the intended end. Otherwise the bill would be unconstitutional, since it breaches the tobacco companies' rights to property, free enterprise and freedom of speech with no acceptable, reliable or sufficient justification for State intervention and the impairment of those fundamental rights and freedoms that the State is also called upon to guarantee. In conclusion, Article 12 of the bill becomes unconstitutional in light of the Constitutional Division's case law, because it limits and even bans *ex ante* commercial tobacco advertising through prior censure instead of regulating it *ex post.* Furthermore, it bans the advertising of a product whose sale is legal in an abusive, disproportionate, irrational, unreasonable and unnecessary or non- ideal way. The bill proposes a lengthy list of places where smoking is banned. The list is so extensive that it equals a total ban. People who consume tobacco can do so only in totally private places and not at public sites or where the public goes, even if they are all adults. In its Article 4 (f), this bill defines **"**Enclosed place" as the "Space covered by a roof and enclosed by two or more side walls, regardless of the kind of material used or whether the structure is permanent or temporary". Also, in paragraph g), it defines "Public place" as the "Place to which the general public has access or places of community use, regardless of who owns it or who possesses the right of entry". As we clearly see, the draft bill considers a place to be enclosed that has a roof and only two walls, because that is how a place where smoking is banned is considered to fit the definition in Article 5 of the bill. The imposed restrictions also do not fit the contents of the WHO Framework Convention on Tobacco Control. The rules are far more extreme than the Convention itself, which is a norm with a rank higher than law, as stated in Article 7 of the Political Constitution. The bill's Article 4 imposes an unconstitutional restriction on smoking in open spaces through the statement that enclosed spaces are any structure enclosed on two of its sides. This proposed solution does not conform to Article 28 (2) of the Political Constitution, because it is anti-technical and irrational. It is obvious that what is considered a public space in the judged text is in no way compatible with the provisions of the World Health Organization's Framework Convention on Tobacco Control (Article 8), which means to regulate tobacco consumption and protect health in the understanding that it is a legal activity permitted and protected by law. The Framework Convention makes no mention that a public place is synonymous with public access. They find that when it comes to restrictions on trade, the Constitutional Division has said that while commercial activity and tobacco

consumption may be subject to restrictions, restrictions cannot be aimed at banning it entirely. The above (see Articles 8 and 2 (1) of the WHO Framework Convention) blocks the measure intended for adoption, which is banning smoking anywhere with a roof and only two walls, according to the enclosed place definition set forth by the bill, because the proposed norm is clear when it says stricter requirements may be imposed provided they are compatible with its domestic provisions, meaning, the country's legislation. The definition of enclosed space included in the draft bill bans the activity entirely for all practical purposes, because places open to the outdoors on two sides will be outside the law, according to the bill. Considering that the activity is legal in our country, this definition illegally breaches the Constitutional rights of whoever has an open place. The draft bill is meant to be protected by the signed Framework Convention that in order to restrict and ban a legal activity; however, the purpose of the Convention is not to block tobacco consumption, but instead just to regulate it. That is the reason they believe that the subject of smoking spaces continues being an absolute ban and is thus unconstitutional, since it indirectly prohibits the performance of a legal activity. As a result, the bill's Article 4 definition of an enclosed space is openly unconstitutional by its text as much as by the effect of the absolute ban caused by Article 5. With respect to the ban on packs of fewer than 20 units, they refer to Article 17 a) of the bill. Here the change from 10 to 20 cigarettes limits cigarette access in the most convenient form or display mode or the consumer's choice of a legal product. In Costa Rica the adult who has made the decision to smoke consumes an average of approximately 10 cigarettes a day, so it makes no sense to require him to buy twice his daily consumption or to buy it on the illegal market. This causes consumers who belong to groups with less buying power to be completely excluded from any chance to acquire legal cigarettes. But in an event, the manufacturer, merchant or adult consumer is prohibited from freely deciding what the package size is of a legal product. According to the above, Article 17 a) of the bill promotes unequal or discriminatory treatment against those who want to obey the law and acquire cigarettes at the legal price, and less fortunate social groups (those with lower purchasing power), in contrast to the upper and middle-upper social classes. In other words, the only effect of this norm is to limit access to legal cigarettes for social groups with less buying power in an unequal and discriminatory treatment towards them. In addition, it condemns people with fewer resources to buying cigarettes illegally. The norm is aimed at keeping social groups with scarce resources from being able to consume legal products. Constitutional Law prohibits any discriminatory or unequal treatment among social groups, because it breaches the Constitutional principle of equality established in Article 33 of the Political Constitution. Both the middle-upper and upper-class consumer and the lower and lower-middle class consumer are considered as equal before the

law. Differences in acquisitive power are not circumstances "legitimately differentiated by law that merit special treatment due to their characteristics", which justify the discrimination caused by this norm to low and lower-middle class consumers. The only grounds that may be reasonably perceived as a basis for the decision to increase the minimum number of cigarettes that can be sold per pack from 10 to 20 is to raise the barrier to sale of the product, in this case by the increase in price – not insignificant – which affects only groups with less purchasing power. So an eventual legislative decision to approve this norm would be baseless and discriminatory and promote unlawfulness, smuggling and public insecurity. Consumer rights establish that consumers are entitled to "equal treatment", which is obviously not fulfilled in the text proposed by Article 17 (a) of the bill. The regulation aimed at banning cigarette packages of fewer than 20 units is also designed to set up an indirect total ban that exceeds the reasonableness and proportionality demanded by our Political Constitution. Its guiding principle is to block tobacco consumption instead of regulating it. This is a restriction imposed at the margin of what the Constitutional Division has qualified as reasonable commercial restrictions and regulations, because the State's intervention in the size of legal commercial product packages is itself excessive, and it is an abuse of legislative power by breaching Article 28 of the Political Constitution of Costa Rica in order to allow a restriction on private activities. The act of enforcing a measure like the one suggested in the draft bill would mean that Costa Rica would experience a similar situation, with the increase in smuggled cigarettes and the loss of tax income. We the undersigned representatives believe that with the approval of this draft bill, the Constitutional norms shown above could be breached along with the legislative process, and this is why they submit it to this Constitutional Division so that once and for all the Division will say whether the Political Constitution is breached or not.

2. – Through a motion received in this Division's Clerk's Office at 3:30 PM dated February 27, 2010, Representative Annie Saborío Mora and Representative Walter Céspedes Salazar asked that the signature of the former replace that of the latter on this enquiry. We give warning that Mrs. Saborío signed the filed motion, but given this request, only Mr. Céspedes was recorded on the header.

3. – Through a motion received at the Division Clerk's Office at 2:32 PM on February 28, 2012, Representative Adonay Enríquez Guevara reported to the Division that the President of the Legislative Assembly had submitted the draft bill in question, No. 17,271, to a vote on February 27, 2012, at 4:07 PM. He requested that this vote be declared null and void.

4. – In Decision Number 2012-002980, at 11:30 AM dated March 2, 2012, the Division stipulated the following: *"The discretional legislative enquiry is admitted for study. The President is hereby ordered not to sign or publish the draft bill 'Tobacco Control and Its Harmful Effects on Health',* Legislative File Number 17,371, until this Division makes a decision through a judgment or stipulates otherwise".

5. – Through an official letter received at the Division Clerk's Office at 1:29 PM on March 8, 2012, the certified copy of Legislative File Number 17,371 was filed by the Clerk's Office of the Legislative Assembly Board for the bill entitled "General Law on Tobacco Control and Its Harmful Effects on Health".

6. – The corresponding legal statutes of limitation have been followed, and this decision is issued within the one month period stipulated by Article 101 of the Law of Constitutional Jurisdiction, which expires on April 8, 2012.

Written by **Judge Rueda Leal;** and

Whereas:

I.- PRELIMINARY QUESTION. The reason why this enquiry has been accepted, despite the bill's being approved in Second Debate by the Legislative Assembly Plenary and with the effect of suspending the bill's signing and publication, is explained as follows:

In Judgment Number 2000-02928 at 9:00 AM dated April 7, 2000, this Division stated that from the time when a Discretional Parliamentary Inquiry is filed in accordance with the number of signatures required by the Law of Constitutional Jurisdiction No. 96 (b), and the Legislative Assembly Board is aware of it, the Legislative Body must abstain from taking a final vote on the draft bill until the Division issues a ruling on it. This Tribunal duly justified its stance, because determination of the requirements for admissibility of legislative enquiries is exclusively a matter of this Division. As a result of this reasoning, this Tribunal annulled the Second Debate on legislative file number 13,507, due to the fact that a Constitutional enquiry had already been filed.

In Judgment Number 2002-06291 at 3:33 pm dated June 25, 2002, this Tribunal determined that in the case of the Discretional Parliamentary Enquiry, specification be made that the submitting representatives make the Legislative Assembly aware that such an action had been filed in order to interrupt the final vote on the questioned draft bill. Specifically, prior to the second draft bill debate when this

matter was put to discussion in the Plenary, a representative had advised that a Constitutional enquiry had been filed with the Division. Given this situation, the President of the Legislative Assembly declared that the mere filing of the enquiry in question suspended the processing of the draft bill. However, an appeal against this decision was filed, which was approved under the argument that Legislative Assembly Regulation Number 143 (6) stipulates the following: "*The formally admitted and notified enquiry will interrupt the vote on the bill in Second Debate or, as applicable, the signing and publication of the respective decree. However, this interruption takes effect in cases of binding enquiry, beginning with its filing at the Constitutional Division."* The Division determined that such a regulatory provision threatened the proper sense of the Constitutional Jurisdiction Act, Article 100 with the understanding that the effect of the cited interruption requires no formal, notified admission. The Division argued the peremptory dynamics of the legislative process that would have reduced the approval procedure for laws from three debates to two. Furthermore, Article 10 (b) of the Political Constitution grants the Constitutional Division an attribution of competence related to hearings in that area of control, which in turn is the exercise of the Legislative Branch's rights and obligations. It is from this provision that the Law of Constitutional Jurisdiction establishes remaining circumstances under which the Division may be consulted so that it will exercise the competency the Constitution gives it in preventive control matters. So, protective control of Constitutionality is a competency strictly and exclusively belonging to the Constitutional Division, which cannot be limited by other governmental bodies except by the Constitution and the law. As a result, with greater reason, this competency, the conditions under which it is used and its effects may not be taken away from it, blocked or impeded by the Legislative Assembly Regulation. Specifically, the Legislative Assembly's internal system whereby the branch's internal parliamentary enquiries are regulated becomes of secondary importance and instrumental to the protective control system laid out in the Constitution and the Law of Constitutional Jurisdiction. With respect to binding enquiry, since the Legislative Assembly itself is inquiring through its Board, it is presumed that it has direct and accurate awareness of its filing, so interruption of the final vote on the bill occurs by the simple filing. In the case of the discretional enquiry, the submitting representatives are required to inform the Assembly in order to cause interruption of the final vote on the bill. Hence, in this case, the Division invalidated the bill's vote on Legislative File No. 14,234 in the Second Debate.

The same stated arguments apply to Article 145 (2) of the Legislative Assembly Regulation, which provides that in the case of Discretional Parliamentary Enquiry, representatives must send a copy of the filed brief to the Assembly President in

order to inform him that an enquiry has been filed on a particular project. This requirement is not the only valid way for the Legislative Assembly to learn about the filing of a Discretional Parliamentary Enquiry. For the interruptive effect typical of this type of enquiry to occur, the only thing required is to show that the Legislative Assembly has been made aware of its filing, because it is reported to the Legislative Assembly Board or the President through the filing of a copy of the filed brief with the corresponding stamp of receipt, and before the bill's Second Debate in the Plenary, the filing is to be reported. As said, protective control of Constitutionality is exclusively the competency of the Constitutional Division and may be limited only by the Constitution and the law, not by internal regulations from other government bodies.

Apart from this, it is proper to recall that study of the admissibility of Discretional Parliamentary Enquiries is not restricted to verifying the number of signatures required by the Law of Constitutional Jurisdiction's Number 96 (b). For example, in Judgments Nos. 1998-05006, 1998-5325, 1998-07143, 1999-07085, 2001-11643, 2001-12459, the Division rejected Discretional Parliamentary Enquiries because they did not meet the provisions of the Law of Constitutional Jurisdiction's Numeral 99, to wit, that it must be filed in a reasoned brief, stating the bill's questioned aspects and the motives for which questions or objections were raised about its Constitutionality. The enquiry must also be confirmed as having been filed after the draft bill's approval in First Debate and before its being approved in second.

So, when in regard to a bill that was already voted on in First Debate a Discretional Parliamentary Enquiry is filed but there is approval of the bill in Second Debate before its admissibility is ruled on because the Legislative Assembly was not told about the enquiry filing, what the Law of Constitutional Jurisdiction and the Legislative Assembly Regulation explicitly set forth must be applied. Article 100 of the Law of Constitutional Jurisdiction stipulates: ... *"the enquiry shall interrupt no procedure, save for the vote on the bill in Third Debate or, where applicable, the signing and publication of the respective decree, notwithstanding the provisions of Article 98, Paragraph 2".* (Italicized portion is not from the original). Such a provision is replicated in No. 143 (6), which reads thus: "*The formally admitted and notified enquiry will interrupt the vote on the bill in Second Debate or, as applicable, the signing and publication of the respective decree. However, this interruption takes effect in cases of binding enquiry, beginning with its filing at the Constitutional Division."* (Italicized portion is not from the original). The literal interpretation of the norm, in the majority's opinion, thus requires suspension of the signing and publication of the respective decree in question. This

situation was fully known by the lawmaker when the Special Permanent Committee on Constitutional Enquiries was created and the enquiry on Constitutionality in the Legislative Assembly Regulation regulated, as it appears in the legislative file according to Legislative Agreement Number 2737 dated May 6, 1991, approved in session dated April 25, 1991. At that time the Legislative Assembly had created a special mixed Committee for amendments to the Legislative Assembly Regulation. Regarding the current Numeral 143 (6), which like the Law of Constitutional Jurisdiction permits suspension of the signing and publication of the respective decree, one of the writers, Representative Hugo Alfonso Muñoz Quesada, at Session No. 138 on February 12, 1991, page 20, said the following: *"This last hypothesis foresees the possibility that it has already been voted upon and that the enquiry be created after... or that the enquiry was filed after the first and Second Debates, but the interim between when it reached the Division and returned to the Assembly gave the Assembly the chance to vote in Third Debate, because the Board was not notified earlier. For example, if the Division had not ruled on the enquiry made about the counsel for the defense in half an hour and that day the Minister suddenly appeared and monopolized the Assembly session, it might have been possible for the Assembly to vote in Third Debate and as a result, the enquiry opinion would have come back after the Assembly had approved the bill in Third Debate, in which case the solution is that signing and publication cannot be given to the Executive Branch if there are flaws of unconstitutionality concerning parliamentary procedure. But if it dealt with a basic matter, with the bill's content, it would have the power to sign and publish it. Therefore, we are looking at a case where the Assembly would already have ruled. But in any case, the Regulation could not have decided this aspect of the legal solution, so it would be a problem belonging to the Executive Branch".* (Italicized portion is not from the original). Ergo, from legislative precedents, the explicit text in the Constitutional Jurisdiction Act and the Legislative Assembly Regulation, we infer that in case an enquiry is admitted that is filed after the bill is approved in First Debate and not decided by the Division before the respective approval in Second Debate, the appropriate step is to suspend the signing and publication of the decree.

We should clarify that the provisions of Article 100 in the Law of Constitutional Jurisdiction do not apply to the budget bill, because a veto is inadmissible against it (Article 125 of the Political Constitution), and there is a Constitutional time period for its final approval (Article 178 of the Political Constitution).

In this case, according to the investigated item, the understanding is at that Plenary Session No. 147 on February 27, 2012, at 4:00 PM, it passed to the second part of

the session, the bill discussion. There, after the "Whereas" was added to the document with what was decided by the Division on the enquiry for Legislative File 17,219 in order to send them to the Committee on Constitutional Consultations, and to mention that Legislative Files 17,410 and 18,100 were at the Division for enquiry – regarding which Representative Góngora filed a motion of order for that Committee to meet to answer that submission—the discussion in Second Debate began on Legislative File 17,371, "General Law on Tobacco Control and Its Harmful Effects on Health". The matter went to a vote with no further discussion and was approved by 45 votes in favor and 2 opposed. After the vote Representative Villalta Flores asked the Legislative Assembly President if at that time any word on Constitutionality had been received, to which he answered no, the only thing was a motion for review of the voting filed by Representative Oviedo. That motion went to a vote with nothing being stated about the filing of the enquiry, and it was defeated by 45 votes in favor and 2 opposed. So, before the vote on Legislative File 17, 371 and the said motion for review, no representative reported the filing of any Discretional Parliamentary Enquiry. On the other hand, that same day at 1:52 PM, the enquiry in question was filed with the Constitutional Division. Then, at 4:18 PM, the filing of the enquiry in question was reported in writing to the Clerk's Office of the Legislative Assembly Board (see photocopy attached to the file).

From the above, the following may be inferred. First, from the existing evidentiary item we draw that the Legislative Assembly Board voted on Legislative File 17,371, "General Law on Tobacco Control and Its Harmful Effects on Health" without anything having been reported on the filing of the Discretional Parliamentary Enquiry. In fact, when he was questioned, the Legislative Assembly President assured that no enquiry of Constitutionality had been received and besides, there is nothing in the minutes that any representative, not even the signers of the enquiry, had informed the Plenary about filing this Discretional Parliamentary Enquiry. So, even though at 4:18 PM on the day in question the Clerk's Office to the Legislation Assembly Board was apprised of the filing of the enquiry in question, it is no less true that first, in the voting at Second Debate no reference of any kind was made to such a enquiry and, second, with no further discussion the voting took place right at the beginning of the second part of the session, which began at 4:00 PM, so that analysis of the evidentiary item tends to show that the Legislative Assembly was not made aware in a timely manner of the filing of such a measure.

So, according to the stated Division precedents, Votes Numbers 2000-02928 and 2002-06291, we infer that annulling the vote made in that Second Debate is

inadmissible, since the Legislative Assembly was not informed in advance of the filing of this Discretional Parliamentary Enquiry.

This being the case, Article 100 of the Constitutional Jurisdiction Act regulated that the enquiry will not interrupt any procedure, except that of voting on the bill in Third Debate (understood as Second Debate) or, where appropriate, the sanction and publication of the respective decree, notwithstanding the provision of Article 98 (2). Once the enquiry is answered, the bill discussion will continue. Legislative Assembly Regulation No. 143 (6) stipulates the same thing. Finally, while the Division has not ruled on the admission of a Discretional Parliamentary Enquiry, the process of legal formation does not stop. In other words, the Second Debate process, signing by the Executive Branch and publication in The Gazette goes on, according to the Political Constitution, Article 124. But when the Division admits such an enquiry, the process of legal formation must be halted immediately in the state in which it is found.

Since in the case in dispute communication about the filing of this enquiry occurred after Legislative File 17,371, the "General Law on Tobacco Control and Its Harmful Effects on Health", was approved in Second Debate, according to the above, the proper decision is immediate suspension of the signing and publication of the respective decree, as stipulated in Vote Number 2002-06291 at 3:33 PM on June 25, 2002. Be it furthermore advised that the enquiry was signed by ten representatives, filed after the bill was approved in First Debate and before its final approval, and it is reasonably formulated with a clear statement of the points that raise Constitutional objections.

II. – HANDLING OF ASSISTANCE. Through a motion received at this Division at 3:20 PM on March 20, 2012, Roberto Castro Córdoba appeared on behalf of the National Anti-Tobacco Network Association in defense of non-smokers' interests and public health in order to file a series of comments against this enquiry. In short, it said that the main reason for filing his measure is that said association believes the questioned draft bill must be analyzed from the viewpoint of the health and life of the entire public and not from the viewpoint of the tobacco industry's free enterprise. In view of the above, it is appropriate to simply add the motion to the file without rendering judgment on its content, since the assistance is inadmissible in the Constitutional legislative enquiry process.

III. – QUESTIONERS' OBJECTIONS REGARDING LEGISLATIVE PROCEDURE. According to repeated Constitutional case law, not every violation of the formal law preparation process is a substantial flaw. In this specific case, a

mechanism was used that was developed through parliamentary practice, the exchange of draft bills, used by faction heads, to whom Legislative Assembly Regulation Article 36 grants the power to choose one or more bills, depending on the number of representatives making up the respective party, in order to define the first fifteen draft bills that will be on the Plenary Agenda. On this point that norm provides: "(…) it is the responsibility of the faction heads to prepare the First Debates chapter agenda, which will be made up of at least fifteen bills for debate. Factions will be entitled to include bills of their interest on the agenda in proportion to the number of representatives they represent in the total Assembly. (...)". In the case in question, through a motion approved in Regular Session Number 13 on May 19, 2011, the agreed agenda was defined as stipulated in the above article. Then Representative Avendaño Calvo, in his capacity as Head of the National Restoration Party, chose File Number 15,681, "Amendment to Article 28 and Addition of a New Article", with Number 28 bis of Law Number 7302, June 8, 1992, "Creation of the General Pension System Charged to the National Budget". But based on the right granted in the amendment motion defined by the agreed agenda, Representative Avendaño Calvo asked through Official Letter FRN-302-09-2011 dated September 5, 2011 (see page 1877 of Legislative File No. 17,371) for the file selected initially to be replaced by File Number 17,371, "The Tobacco Control Act and Its Harmful Health Effects", so that it would take the place held by File Number 15,681. On September 26, 2011, the file under enquiry was put in spot number three of the Session Number 75 Agenda. In its Minutes, Representative Avendaño Calvo says literally: (…) "yes, thank you, Mr. President. It is specifically so that it will appear in the Minutes, because File 17,371 is being included, and in adhering to Regulation Article 36, I want it to be quoted there that on September 5 of this year, 2011, I filed a letter of exchange, Official Letter FRN-302, for File 17,371, "The General Law on Tobacco Control and Its Harmful Effects on Health" to occupy the place on the agreed agenda belonging to the National Restoration party. On Thursday, September 8, I also appeared at the meeting of faction heads so that party heads would agree to it and the bill would be included on the Plenary's agenda, as it is doing and you are so stating now, which appears in the Minutes of the party heads meeting. And I conclude with this, Mr. President, because this was a final agreement on that date and for this bill to be included in position number 3 of the daily agenda. The preceding is to prevent any procedural flaw and to clarify that this matter was processed in its proper order and approved at the meeting of party heads"(…). President Juan Carlos Mendoza, says after the participation of Representative Avendaño Calvo: "So it is and so it has been done in your case and in the case of other bills that were filed in, let us say, the same tenor of making exchanges of case". So, it is clear that there was a legislative procedural moment so that any representative who disagreed with what

was happening at the time or the methods used would say so or else file an appeal. However, no argument against what happened appears in the file, so by the Minutes from Session Number 75 being approved, the decision to include File Number 17,371 in spot number three was final. In any case, the day on which bill discussion began in the First Debate process, Regular Session Number 81 dated October 6, 2011, a motion for postponement was approved, which placed File Number 17,371 in spot number one, and it is because of this that the discussion on the bill in question began, which passed to the Social Affairs Committee for hearing of basic motions via Article 137 from the first day. The bill was heard again in Regular Session Number 112 on December 1, 2011 (see page 1399 of Legislative File Number 17,371), now in the extraordinary period, a time when the first motions report was read via Article 137. In Session Number 125 on January 17, 2012 (see page 1508 of Legislative File Number 17,371) the second motions report was read via Article 137. In Session Number 135 dated February 2, 2012, (see page 1591 of Legislative File Number 17,371) the third motions report was heard via Article 137, the motions for repetition were voted on and the bill was given First Debate. Finally, in Session Number 147 on February 27, 2012 (see page 1781 in Legislative File Number 17,371) it was voted on in Second Debate. In the case under examination it is clear that on the one hand the bill was fully studied and discussed by the lawmakers and on the other that at no time did the expressed flaw prevent the bill from following regular procedure. Furthermore, a substantial portion of the parliamentary process was undertaken in the extraordinary period when the Executive Branch defines the bill agenda the Legislative Assembly will hear during the months of December, January, February, March and April of each year. As a result, no evidence exists of any substantial flaw of Constitutional relevance in the legislative process followed.

IV. – QUESTIONERS' OBJECTION TO THE CREATION OF A TWENTY-COLON TAX ON EACH CIGARETTE. The questioners object to the creation of a new tax on tobacco products:

> *"ARTICLE 22.- Creation of the Tax*
> *Creation of a specific tax on cigarettes and similar. A specific tax of twenty Colons (₡20,00) is created for each domestically produced or imported cigarette, cigar or "puro" cigar made of tobacco and its derivatives, included in the tariff items listed below:* (text taken from the "Final copy" issued by the Permanent Special Writing Committee on page 1765 of File No. 17,371).

Basically, they allege that Article 21 of the bill creates a twenty-Colon tax per cigarette on tobacco products, which would encourage smuggling. Now, with

respect to that argument, two comments should be made. The first is that the stated motive, consisting of "When the new tax takes effect, the motivation to smuggle cigarettes will be even greater, especially due to how fragile the Customs police are and the lack of a budget to control this smuggling", does not constitute a question of Constitutionality. It is unknown in this regard and to date whether the questioned measure would or would not increase cigarette smuggling. But that is not a normative legal problem, but instead an anti-social situation the promoters predict will happen. Then, in addition to there being no certainty about that eventual situation, there is likewise no circumstance where a regulation counters any Constitutional precept. This being the case, to assess such a situation and determine the best solution is the lawmaker's responsibility in exercise of his right to free determination. The second comment is that the measure as such, meaning the imposition of a tax, has a legal basis, according to the "World Health Organization (WHO) Framework Convention on Tobacco Control", approved by Law No. 8655 dated July 17, 2008, which for all relevant purposes says:

> *"Article 6. Measures related to prices and taxes to reduce the demand for tobacco*
> *1. The Parties acknowledge that measures related to prices and taxes are an effective and important way for different sectors of the public, particularly the young, to reduce their tobacco consumption".*

Given the above, the motives expressed in this regard against the stated tax lack grounds and must be dismissed.

V. – OBJECTION TO THE REGULATION ON ADVERTISING, PROMOTION AND SPONSORSHIP BY TOBACCO PRODUCTS. The promoters oppose regulation of these aspects of the questioned draft bill. In this regard, the text they challenge states the following:

> *"ARTICLE 12. -"Advertising, Promotion and Sponsorship*
> *Any form of advertising, promotion and sponsorship of tobacco products and its derivatives is banned.*
> *Hereby exempted from the ban established in the above paragraph are advertising and promotion that are done:*
> *a) Inside places and events where access is limited to adults only and that have not been declared one hundred percent (100%) tobacco smoke free spaces by this law.*

b) Through direct communication with tobacco product sellers and consumers, according to the protocol to be established in the regulation to this law".

Concerning this norm, they allege that in the face of that scenario no options commercially advertise tobacco remain, because the ban is total. They add that the purpose of the draft bill is to create indirect obstacles that cause the same effect as banning tobacco consumption, and that upon carefully analyzing which places are defined as one hundred percent tobacco free, it becomes obvious that the ban on advertising is equal to the ban on smoking. They also assert that if cultivation, industrialization, commercialization and consumption of tobacco products are legal, under our Constitution, it is not possible to impose indirect restrictions by law that have the effect of banning such legal activity. From an analysis of those arguments, the first thing that should be said is that the questioned norm contains no "total" ban on advertising, as we see in its paragraphs a) and b). Also, tobacco consumption is not being banned, despite the restriction on advertising. It must likewise be specified that this norm is also based on the "World Health Organization (WHO) Framework Convention on Tobacco Control", which in regard to this particular matter stipulates:

"Article 13. Advertising, Promotion and Sponsorship of Tobacco
1. The Parties recognize that a total ban on advertising, marketing and sponsorship would reduce the consumption of tobacco products.
2. Pursuant to their Constitution and its Constitutional principles, each Party will move towards a total ban on tobacco advertising, marketing and sponsorship. According to the legal environment and technical means available to the Party in question, this ban will include a total ban on cross-border advertising, marketing and sponsorship originating in their territory. In this respect, and within a period of five years from when the Convention takes effect for the Party in question, each Party will take legislative, executive, administrative or other appropriate steps and will report as a result of agreement with Article 21."

See the forcefulness of this precept approved by the Legislative Assembly. However, be also advised that the restriction on advertising in the questioned bill is not total. Furthermore, remember what the Division has said about the value and rank of these types of norms, whose purpose is to protect fundamental rights, such as in this case, in which the goal of the international convention (see its Preamble) is to protect public health.

> *"IV. – Conversely, in Judgment No. 3435-92 and its clarification No. 5759-93, this Division recognized that "Human Rights instruments in effect in Costa Rica have not only a value similar to the Political Constitution, but to the degree to which they grant greater rights or guarantees to people, they take precedence over the Constitution" (see Vote 2313-95 of 4:18 PM dated May 9, 1995) ... "(see Judgment No. 2007-03043, at 2:54 PM dated March 7, 2007).*

In short, the questioned norm is not only legally allowed, it is also in accord with the Constitutional Law on Human Rights. Finally, the questioners allege in regard to this precept that the bill does not regulate the "direct communication with sellers and consumers" contained in Article 12 (b), but instead unconstitutionally delegates both its definition and its regulation to the Executive Branch, so that the regulation could establish a definition so broad and a regulation so vast that it may easily restrict advertising even more, and all this through regulation. To this argument we must respond that it is not admissible, either, because it is clear that the lawmaker may assign the Executive Branch creation of the concepts for a law and, in any event, he could review it in due time in the regular jurisdiction if he believes the regulation would exceed what is stipulated in the law in question by being ruled upon.

VI. – OBJECTION TO THE REGULATION OF PLACES WHERE SMOKING IS BANNED. The questioners allege that the bill establishes an exhaustive list of places where smoking is banned that is so extensive, it is equivalent to a total ban. They hold that people who consume tobacco can do so only in totally private places and not at public sites or where the public goes, even if they are all adults. They explain that this bill's Article 4 (f) defines "Enclosed place" as the "Space covered by a roof and enclosed by two or more side walls, regardless of the kind of material used or whether the structure is permanent or temporary" and that in paragraph g) it defines "Public place" as the "Place to which the general public has access or places of community use, regardless of who owns it or who possesses the right of entry". They say that the draft bill deems an enclosed place to be one that has a roof and just two walls, because it considers a place where smoking is banned to meet the definition of the bill's Article 5. They argue that the imposed restrictions also do not correspond to the contents of the WHO Framework Convention on Tobacco Control, because the rules are much more extreme than the Convention itself, which is a norm of a higher rank than law, as stated in Article 7 of the Political Constitution. Finally, they allege that what is considered a public space in the adjudged text is in no way compatible way with the provisions of the World Health Organization's Framework Convention on

Tobacco Control (Article 8), which intends to regulate tobacco consumption and protect health with the understanding that it is a legal activity permitted and protected by law. Concerning the above, the text of the questioned norms says in this regard:

> *"ARTICLE 4. – Definitions*
> *For the purposes of this law, the terms shown below must be understood as follows: […]*
> *f)Enclosed Place: Space covered by a roof or enclosed by two or more walls or sides, regardless of the kind of material used or whether the structure is permanent or temporary.*
> *g) Public Place: Place to which the general public has access or places of community use, regardless of who owns it or who owns the right of entry."*
> *"ARTICLE 5. - Places Where Smoking is Banned.*
> *The spaces shown in this article are declared one hundred percent (100%) tobacco-smoke free.*
> *It is forbidden to smoke in the following public and private spaces or places:*
> *a) Health and hospital centers or establishments.*
> *b) Work centers, according to the provisions of Article 4 of this law.*
> *c) Government and public law centers and offices.*
> *d) Public, private and training educational centers.*
> *e) Social service centers, except for open spaces in penitentiaries.*
> *f) Shopping centers, casinos, night clubs, dance clubs, bars and restaurants.*
> *g) Sports facilities and places where performances and recreational activities of any type are carried out.*
> *g) Lifts and elevators.*
> *i) Telephone booths and automatic teller machine areas and other reduced size public use spaces. A reduced size space of public use is understood as one that occupies a surface area of no more than five square meters.*
> *j) Service stations that supply or store fuel and similar.*
> *k) Vehicles and means of transportation for which people pay, ambulances and cable cars.*
> *l) Means of rail, sea and air transportation originating or ending in the country.*
> *m) Cultural centers, cinemas, theaters, lecture and exposition halls, libraries, conference halls, auditoriums and museums.*
> *n) Areas or establishments where food is produced, transformed, prepared, ingested or sold, such as restaurants, bars and cafeterias.*
> *ñ) Leisure or relaxation centers for minors.*
> *o) Ports and airports.*

p) Bus and taxi stops, as well as any other means of transportation for which people pay that are duly authorized by the Ministry of Public Works and Transportation's Public Transportation Council (MOPT).
Non-smokers shall be entitled to demand that the owner, legal representative, manager, administrator or person responsible for whatever reason of the respective locale or establishment warn the violator to cease his behavior.
The provisions here established must be regulated by the Executive Branch in order to grant operating permits."

The first thing that must be said is that it is untrue that the above-quoted provisions mean a total ban. Furthermore, we see that the lawmaker's intention is to ban tobacco consumption in places where the public gathers, and at some of those places, even though adult smokers might frequent them, it is also true that they are visited by non-smokers whose health deserves to be protected. Moreover, in view of the supplication made by the rules of the WHO Framework Convention on Tobacco Control, this what it stipulates:

"Article 8. Protection against exposure to tobacco smoke
1. The Parties recognize that science has unequivocally demonstrated that tobacco smoke exposure is the cause of death, disease and disability.
2. In the areas of existing national jurisdiction and according to determinations of national legislation, each Party shall adopt and apply legislative, executive, administrative and/or other effective measures of protection against the exposure to tobacco smoke in interior work places, means of public transportation, closed public areas and, where applicable, other public places and will actively promote the adoption and application of these measures at other jurisdictional levels."

In view of the above-quoted norm, there can be no doubt that the questioned measures fit the terms of that international treaty, given that they aim to adopt efficient or effective provisions for protection against tobacco smoke exposure in places frequented by the public, and what the lawmaker is doing, according to his powers, is determining those places in order to protect non-smokers' right to health.

VII. – OBJECTION TO REGULATING THE MINIMUM NUMBER OF CIGARETTE UNITS FOR COMMERCIALIZATION. The questioners say that with regard to the ban on packs of fewer than 20 units, the change from 10 to 20 cigarettes limits access to these articles in the most convenient form or package design or the consumer's choice with respect to a legal product. They maintain that

the only effect of this norm (Article 17 (a) of the bill is to limit access to legal cigarettes for all social groups with less purchasing power in an unequal and discriminatory treatment towards such social groups. Hence, it sentences people of fewer resources to purchasing cigarettes illegally. They state that the norm is aimed at keeping social groups of scarce resources from the ability to consume legal products. Finally, they allege that the only grounds that may be reasonably perceived as a basis for the decision to increase the minimum number of cigarettes that can be sold per pack from 10 to 20 is to raise the barrier to sale of the product, in this case by the increase in price – not insignificant – which affects only groups with less purchasing power. Concerning this extreme, the questioned draft bill stipulates for all relevant purposes:

> *"ARTICLE 18.- Ban on the Trade, Distribution and Sale of Tobacco Products*
> *It is prohibited to perform any of the following behaviors:*
> *a) Sell cigarettes loose or retail, such as in packs holding fewer than twenty cigarettes.*
> *b) Use vending or dispensing machines for tobacco products or their derivatives".*

From an analysis of the objections made against this norm, we must say that the lawmaker's decision expressed on the bill is not arbitrary; on the contrary, it has just legal grounds. See the provisions of the World Health Organization's Framework Convention on Tobacco Control in this regard:

> *"Article 16. Sales to minors and by minors*
> *1. Each Party shall adopt and take legislative, executive, administrative or other effective steps at the proper governmental level to prevent the sale of tobacco products to minors, which domestic legislation, national legislation or minors may determine. Such steps may consist of the following: […]*
> *d) Guarantee that tobacco vending machines under their jurisdiction are not accessible by minors and do not promote the sale of tobacco products to minors. […]*
> *3. Each Party shall ensure the ban on the sale of cigarettes that are loose or in small packages that make those products more accessible to minors.*
> *4. The Parties acknowledge that to be more effective, the steps undertaken to prevent the sale of tobacco products to minors must be applied, where appropriate, jointly with other provisions set forth in this Convention."*

We deduce from the above international norm that there are clearly identifiable and legitimate grounds in the provisions drafted by the lawmaker, which consists of

putting up barriers to the commercialization of tobacco products, such as the type the questioners show (setting a minimum number of units for retail sale), in order to prevent or block their acquisition by minors. Given the above, the objections formulated here are inadmissible, as well.

VIII. – ANALYSIS OF THE GROUNDS AND AIM OF THE REGULATION DISPUTED BY THE QUESTIONERS. Because the challenged norms in the draft bill have been examined and addressed, it remains only to say, since this is an enquiry the lawmakers themselves are making about aspects they believe unconstitutional, that the law meant to be enacted is, as the analysis has shown, a reflection of an international obligation undertaken by Costa Rica on human rights matters and more specifically, on the issue of the fundamental right to health. In such regard, we should remember that the Legislative Assembly duly asked this Division for an opinion on the World Health Organization's Framework Convention on Tobacco Control, and at that time this Tribunal ruled as follows:

> *"VII. – Notes concerning the legal merits of the bill. The objective of the World Health Organization (WHO) Framework Convention on Tobacco Control is to protect present and future generations against the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke. The instrument seeks to provide a legal framework to establish measures for tobacco control that the Parties will apply nationally, regionally and internationally in order to continuously and substantially reduce the prevalence of consumption and exposure to tobacco smoke. The Convention sets forth the basic principles and general obligations, steps regarding the reduction of the demand for tobacco, steps related to the reduction in tobacco supply, protection of the environment, issues related to responsibility, technical and scientific cooperation and information communication, institutional and financial resources arrangement, the solution to controversies, development of the Convention, and its final provisions. It is important to stress that the United National Economic and Social Council recognized in its Plenary Session Number 51 on July 23, 2004, among other things, the adverse impact that tobacco consumption has on public health and the social, economic and environmental consequences, including on the improvement efforts of developing peoples. The need was also recognized to establish a strong political commitment at all levels in order to set up an effective control of tobacco within the World Health Organization framework, of which our country is a Party through Law No. 275 dated November 25, 1948. With all of that, our country is part of the international efforts to establish a*

regulatory system that not only helps to better our development in order to control and stop the negative and even addictive consequences of tobacco consumption, because it causes death, disease and disability that affects the productivity of the national and world population.

Due to the above, the importance of the draft bill is unquestionable. Because the Political Constitution's Article 21 provides that human life is inviolable, the Division has derived the right to life and health for every citizen. The preeminence of human life and its preservation through health are required for the State, all of which derive from the Political Constitution itself (as an ethical obligation that emanates from its different numbers and principles, such as Articles 21, 28, 46 and 74), as well as in the international instruments our country keeps in force, like the Universal Declaration of Human Rights, the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man and the International Covenant on Economic, Social and Cultural Rights. The Division has said in its case law that "Doctrine and philosophy throughout the ages have defined life as the greatest good that can and must be protected by law, and it has been given the highest status level on the human rights scale. This is its raison d'être, since without it, all other rights would become useless, and it must be protected precisely in that measure by the legal system. In our particular case, the Political Constitution's Article 21 provides that human life is inviolable, and from there the right of all people to health has been derived, with the State ultimately responsible for ensuring public health by blocking any threat against it. " (Judgment 1994-5130). Even more, data from a study by the Actuarial Office of the Costa Rican Social Security Fund show nationally in 2007 that that institution allocated the sum of C. 38.92 billion Colons to treat patient with tobacco-related illnesses. The relevance of the above is broken down as follows: C. 19.673 billion Colons were allotted to outside consultations and C. 15.952 billion Colons to hospitalization. Regarding disabilities, C. 3.295 billion Colons were paid to absent workers due to some tobacco-related ailment (http://www.ccss.sa.cr/html/comunicacion/noticias/2008/05/n_568.html). Finally, we should highlight that the study shows the two primary causes of death in our country are cardiovascular disease and cancer, which are highly related to smoking, and smoke precipitates respiratory illness in minors, according to information at the National Children's Hospital.

The Convention that this Division now knows, specifically shows among its basic principles that to achieve the Treaty's objectives, everyone must be informed of the "...health consequences, addictive nature and deadly threat of tobacco consumption and exposure to tobacco smoke, and appropriate

legislative, executive, administrative or other measures should be considered at the government level to protect all persons from tobacco smoke." This is all done in a joint effort by countries and the World Health Organization that have identified tobacco smoke as an addictive and damaging product to human health and that affects millions of individual throughout the world, mainly those in developing countries. Thus, it is possible to establish certain measures for people's protection, and since it is a factor that hinders and prevents the preservation of public health, the State must undertake its role and on behalf of third parties as the Convention itself provides.
Through Judgment No. 1993-3173 the Division established:
"II. - The fundamental rights of each person must coexist with each and every basic right of others. For the sake of coexistence, therefore, it often becomes necessary to cut back the exercise of such rights and freedoms, even though it may be only to the specific and necessary extent so that others will enjoy them under equal conditions. But the principle of the coexistence of public freedoms – the right of third parties – is not the only fair source for imposing limitations on them. The concept of "moral", conceived as the group of prevailing societal principles and fundamental beliefs whose violation seriously offends the majority of its members, and of "public policy" also act as justifying factors in the limiting of fundamental rights. It has to do with undetermined legal concepts whose definitions are difficult in the extreme.
III. – It does not escape this Division how difficult it is to unanimously specify the concept of public policy, nor that this concept may be used to both confirm the right of the individual versus public policy and to justify limitations on the rights on behalf of group interests. It does not have to do just with maintaining substantial order in the streets, but also maintaining a certain legal and moral order so that it is comprised of a minimum of conditions for a social life that is appropriate and suitable. Their basis is personal safety and that of property, healthfulness and tranquility. "
The Framework Convention seeks that the countries that are Party have a legal framework for tobacco control whose justification lies in the risk that it signifies for the health of millions of people around the world. It is a Treaty that by requiring that legislative and other types of steps be taken in our country, the Division neither believes nor sees any breach whatsoever of Constitutional Law" (see this Division's Decision No. 2008-10859 at four thirty-three p.m. on July first, two thousand eight, issued on the Discretional Parliamentary Enquiry by the Legislative Assembly Board on the "World Health Organization (WHO) Framework Convention on Tobacco Control, Legislative File Number 14,687. Italics is not in the original.)

Based on the above, there is no question that the norms being questioned are the result of the commitment assumed by Costa Rica and approved by the Executive Branch on the protection of public health against the effects of tobacco consumption. In the same vein, we must not forget the reasons for which that international agreement was signed, which is timely to recall now concerning this draft bill:

> *"WHO Framework Convention on Tobacco Control*
> *Preamble*
> *The Parties to this Convention,*
> *Determined to give priority to their right to protect public health,*
> *Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response,*
> *Reflecting the concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke,*
> *"Seriously concerned about the increase in the worldwide consumption and production of cigarettes and other tobacco products, particularly in developing countries, as well as about the burden this places on families, on the poor and on national health systems,*
> *Recognizing that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases,*
> *Recognizing also that cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classification of diseases,*
> *Acknowledging that there is clear scientific evidence that prenatal exposure to tobacco smoke causes adverse health and developmental conditions for children,*
> *Deeply concerned about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages,*

Alarmed by the increase in smoking and other forms of tobacco consumption by women and young girls worldwide and keeping in mind the need for full participation of women at all levels of policy-making and implementation and the need for gender-specific tobacco control strategies,

Deeply concerned about the high levels of smoking and other forms of tobacco consumption by indigenous peoples,

Seriously concerned about the impact of all forms of advertising, promotion and sponsorship aimed at encouraging the use of tobacco products,

Recognizing that cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling, illicit manufacturing and counterfeiting,

Acknowledging that tobacco control at all levels and particularly in developing countries and in countries with economies in transition requires sufficient financial and technical resources commensurate with the current and projected need for tobacco control activities,

Recognizing the need to develop appropriate mechanisms to address the long-term social and economic implications of successful tobacco demand reduction strategies,

Recognizing the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts,

Recalling Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

Recalling also the preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition,

Determined to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations,

Recalling that the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979, provides that States Parties to that Convention shall take appropriate measures to eliminate discrimination against women in the field of health care,

Recalling further that the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, provides that

> *States Parties to that Convention recognize the right of the child to the enjoyment of the highest attainable standard of health".*

To the above quote should be added what was agreed as the Convention's objective:

> *"Article 3. Objective*
> *The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke*" (see the referenced Law of Approval for this Convention, No. 8655 dated July 17, 2008; italics not in the original).

Thus, there is no doubt that the measures questioned in the enquiry are in keeping with the objective assumed by our country to place effective restrictions on tobacco, all with the goal of protecting public health, which was already confirmed by this Constitutional Tribunal.

IX.- CONCLUSION. From an analysis of the enquiry, we infer that the concerns of the lawmakers who have raised the question are baseless and that there are no flaws of unconstitutionality as alleged. Judge Calzada and Judge Jinesta dissent from the majority and believe it is inadmissible to rule to dismiss the enquiry.

X. – DISSENTING VOTE FROM JUDGE JINESTA LOBO. – Judge Jinesta Lobo dissents and believes it is clearly inadmissible and unsustained to answer the enquiry for the following reasons:

I. – OPPORTUNITY TO FILE THE LEGISLATIVE ENQUIRY AND PRECLUSION. Pursuant to the provisions of Article 98 (1) of the Law of Constitutional Jurisdiction, No. 7135 dated October 11, 1989, with utmost clarity a specific opportunity is established in the legislative *iter* for the filing of an enquiry with the Constitutional Division. The first portion of number 98 (1) of the Constitutional procedure regulates the time for filing enquiries when they deal with

Constitutional amendments. The second portion refers to other legislative bills of an ordinary nature. So the quoted norm decrees the following: ***"When dealing with other legislative (…) bills (…) it must be filed after approval in First Debate and before being so in third".*** This norm from the Law of Constitutional Jurisdiction of 1989 was tacitly modified with the partial amendment of Constitutional Article 124 through Law No. 7347 dated July 1, 1993, which, in addition to adding several paragraphs to the original 1949 version, stipulated in Paragraph 1 that to become law any bill must be the subject of **two debates on different, non-consecutive days.** In other words, from that time on, the number of legislative debates was reduced from three to two. Subsequently, through partial amendment to the same Numeral 124 of the Constitution through Law No. 8281 dated May 28, 2002, the issue of the two debates needed for a draft bill to become law of the Republic was ratified. As is obvious from the original text of Article 98 (1) of the Law of Constitutional Jurisdiction and its tacit modification by virtue of the two quoted Constitutional amendments, the lawmaker's goal was to precisely and clearly establish a moment or opportunity to file the enquiry. In the very first version and the one later tacitly amended, the spirit of the norm in question is that the enquiry be filed after the First Debate and before final approval by the legislative body – which after the partial reforms of the Constitution's Article 124 takes place in Second Debate. As the paragraph at the end of Article 98 underscores, the enquiry must be filed *"before final approval"*, this being understood as before its approval in Second Debate when dealing with an ordinary legislative bill. In light of this, and after its tacit modification through the partial amendments to the Constitution, the Law of Constitutional Jurisdiction establishes a preclusionary term for filing the enquiry. In short, to be legally timely, the legislative enquiry must be filed before its approval in Second Debate. The purpose of setting a preclusionary period without question is certainty and legal security as related Constitutional

values. The opportunity to file the legislative enquiry could not remain open *sine die*. Otherwise, the lawmaker's objective and spirit in setting a peremptory and preclusionary term to file the enquiry cannot be overlooked. Any interpretation to the contrary disregards the preclusionary term inferred from the Law of Constitutional Jurisdiction's Article 98 and the Constitution's 124, based on a systematic interpretation. To avoid such Constitutional and legal provisions would thus imply that the legislative enquiry becomes admissible, even if the bill has been approved in second and final debate, which does not fit the purposes or goals of the enquiry. Under the interpretation made by the majority of this Tribunal, the legislative enquiry could also be filed up to before the draft bill was signed and published by the Executive Branch (Article 140 (3) of the Constitution), which was obviously never the 1989 lawmaker's intent. Otherwise, Article 100 of the Constitutional procedural law stipulates: ***"Having received the enquiry, the Division will report this to the Legislative Assembly and request that the respective file and its background be sent (…) The enquiry shall not interrupt any procedure except for the vote on the bill in Third Debate or, where applicable, the signing and publication of the respective decree (…)".*** The last sentence of Article 100 of the Law of Constitutional Jurisdiction, when saying "(…) ***or, where applicable, the signing and publication of the respective decree",*** may lead to incorrect interpretations with the belief, contrary to the lawmaker's goals and spirit, that a legislative enquiry may be answered, even with the simple hermeneutical filing that could be used as a strategy against the imminent nature of a Second Debate in order to enervate the law's signing and enactment, thereby also getting around the opportunity prescribed by the Constitution and the law to file it and the implicitly established preclusionary term. That last sentence in Article 100 must be understood as referring to extreme or exceptional cases, whether it is when the President of the Constitutional Division has already granted formal admission

and through interlocutory ruling properly reported it to the Legislative Assembly and that Constitutional body persists in giving it Second Debate, or for its part, the Executive Branch insists on signing and publishing it, all of this despite the enquiry's formal admission by the Constitutional Division. One must consider for a correct exegesis that the *a priori* control of Constitutionality by presuming a "legalization" of the policy is limited in the law and thus must not be the subject of extensive or broad interpretations in order to avoid unnecessary brushes or conflicts between Constitutional bodies and eventual damage to the principle of separation of powers.

II. – INADMISSIBILITY OF THE ENQUIRY. In the case in question, the enquiry was filed at 1:52 PM on February 27, 2012. However, on the same date at 4:07 PM, in Regular Legislative Session Number 147, the draft bill *"Tobacco Control and Its Harmful Effects on Health",* Legislative File Number 17371, was approved in Second Debate. Consequently, when the questioned draft bill was approved in Second Debate, this Constitutional Division had not even ruled on the enquiry's admissibility, much less handled the request for discretional opinion, as mandated by Article 100 of the Law of Constitutional Jurisdiction. In accordance with Numeral 100 of the Law of Constitutional Jurisdiction, what deprives the discussion in Second Debate of force is the interlocutory ruling by the President of the Constitutional Division that formally and properly communicates to the Legislative Assembly the enquiry's receipt and requires sending of the respective legislative file. It must be pointed out that such an order by the President of the Constitutional Division requires no greater delay or difficulty, and so it must be limited to confirming or checking that the requirements stated by the legal system are met in order to admit the enquiry (e.g., that it is filed in a reasoned brief with a statement of the questioned bill's aspects and that it is signed by no fewer than ten representatives in the case of discretional ones, Articles 96 (b) and 99 of the Law

of Constitutional Jurisdiction). Solely based on the effective reporting of this interlocutory decision does the Legislative Assembly have full, true and formal knowledge that an enquiry was filed. Before then it would be illusory to demand that the request be filed so that this Constitutional Tribunal will issue an advisory opinion. In any case, it should be said that according to Article 101 of the Constitutional Jurisdiction Act the enquiry's result does not preclude the subsequent possibility of disputing the legal norm through the unConstitutionality proceeding or *a posteriori* control of Constitutionality.

III.- CONCLUSION. As a corollary to the above, I believe it is unsustained to answer an enquiry due to its being clearly inadmissible.

XI. – DISSENTING VOTE FROM JUDGE CALZADA MIRANDA. – Judge Calzada dissents and states that it is unsustained to answer an enquiry for the following reasons:

I. – The Legislative Enquiry was contemplated by our lawmakers as a procedure that permits the exercise of *a priori* control, solely for Constitutional reasons, of laws during their formative process. In some situations such an enquiry becomes binding, and in others, optional, but with a determined minimum of managing representatives. In both cases the lawmaker stipulated that the enquiry may or must be filed after its approval in First Debate and before its final approval, with the only exception for doing so before that when Constitutionally there is a particular time period for the legal process to be approved, such as the case with the Regular Republic Budget. This circumstance is a requirement for admissibility that is set forth in Article 98 of the Law of Constitutional Jurisdiction and as such is a procedural limit so the Division can issue a ruling on the draft bill submitted for hearing. This is because once the law is approved, the procedural path to verify Constitutionality of the norms would be the unconstitutionality proceeding. While Article 100 of the cited law says that once the enquiry is received, the Division will

notify the Legislative Assembly, ask for the legislative file and interrupt final vote on the bill in question, the truth is that that notification is done, at least in the case of discretional enquiries, once all the requirements for admissibility established by law in Articles 96, 98 and 99 are verified. Now, the above does not stop the questioning representatives in the Division's prior interim study and **before** submitting the bill submitted to this Tribunal for hearing to Second Debate, from advising the President of the Plenary about its existence, which I believe will have the effect of the causing the Second Debate to be suspended in order not to nullify the questioners' right. Otherwise, the Board would have no way at all of knowing about filing of the enquiry and in the end, it would not be obliged to suspend final vote on the bill.

II. – In this specific case, the enquiry in question entered the Division at 1:52 PM on February 27, 2012, but on the same day of its receipt, just a few hours later and without notice of the enquiry's admissibility having been made by this Tribunal to the Assembly, nor the Board even being advised of its existence by the questioning representatives, it was approved in Second Debate at Legislative Session Number 147. From studying the legislative file we see that when the bill was submitted to a vote in Second Debate, there was no warning of any kind of the enquiry's filing, since it is not until after the vote and approval that Representative Florez-Estrada in the same session "asks", "does not inform" the President if an enquiry is not pending hearing, with regard to which he answers no, and then a motion for review is submitted for vote. This being the situation, when said bill was approved under such circumstances, it lost one of its essential conditions for admissibility, because this Division was already facing a final approval, whose only control after being "Law of the Republic" was Constitutionally reserved for the Executive Branch by its having the power to veto or sign it. Under the circumstances, I believe that any questioning about the Constitutionality of this

would be contingent upon only a later procedural route -- the unconstitutionality procedure—and not prior control, because it lacked interest at that time by having precluded the legislative route. Otherwise, the control foreseen by the lawmaker for these types of process would be denied. Due to the above, I believe it inadmissible for the enquiry to be admitted by the Division, much less, ordering the Executive Branch not to sign or publish the draft bill in question, because this Tribunal has lost its competency to entertain hearing of the approved draft bill through Constitutional enquiry, according to the requirements of Article 98 of the Law of Constitutional Jurisdiction and so the provisions of Article 100 do not apply under the stated terms.

III. – Given the considerations shown, I fail to participate in issuing a ruling on the grounds of the matter, because in my opinion, answering the enquiry is inadmissible.

Therefore:

The question is answered in the sense that there are no flaws of Constitutional procedure or grounds on the questioned aspects of the draft bill called “General Law on Tobacco Control and Its Harmful Effects on Health”, processed in Legislative File Number 17,371. Judge Calzada and Judge Jinesta dissent from the majority and believe it is unsustained to answer the enquiry due to inadmissibility and give separate reasons.

Ana Virginia Calzada M.
President

Gilbert Armijo S. Ernesto Jinesta L.

Fernando Cruz C. Fernando Castillo V.

Paul Rueda L. Rodolfo Piza R.

Prl/fr/az.-

FILE NO. 12-002657-0007-CO

Phones: 2295-3696/2295-3697/2295-3698/2295-3700. Fax: 2295-3712. Email: www.poder-judicial.go.cr/salaconstitucional. Edificio Corte Suprema de Justicia, San José, Distrito Catedral, Barrio González Laman, calles 19 y 21, avenidas 8 y 6