REGIME SHIFTING BY MULTINATIONAL CORPORATIONS WITHIN CONSTITUTIONAL COURTS IN DEVELOPING COUNTRIES: ANALYSING TOBACCO LITIGATION

Abstract: Increasing awareness of the harms associated with tobacco led governments around the world to introduce a range of measures, from smoke free laws to restrictions in the advertisement of tobacco products, especially in the wake of signing the Framework Convention on Tobacco Control (FCTC). The tobacco industry began challenging this growth of regulation in international courts and courts in developed countries. More recently, they have brought the fight to low- and middle-income countries. Using constitutional case analysis from tobacco litigation in South Africa, India, Uganda and Kenya, this article argues that there is increasing evidence that tobacco companies are engaged in vertical forum shifting through a reappropriation of constitutional rights from corporations. This we argue, has had an adverse impact on human rights in low- and middle-income countries. We end this article by boldly calling on courts to find (and limit) the kinds of rights that are to apply to corporations.

Keywords: corporations, FCTC, tobacco litigation, human rights, public health

Introduction

> An internal memo circulated through the RJ Reynolds Tobacco Company in 1993 stated: "The way we won these cases, to paraphrase Gen. Patton, is not by spending all Reynolds' money, but by making the other son of a bitch spend all his."[1]

Tobacco litigation has, for the better part of the industry's monopolistic history, played out in a multitude of forums. Previously, legal scholars focused on forcing tobacco companies to admit that tobacco was a public health threat. Their partial success led to large scale settlements by tobacco companies. The agreement of the Framework Convention on Tobacco Control (FCTC) was a landmark moment in the fight against tobacco use. Relying on its provisions, many activists launched litigation that coerced signatory states into complying with their obligations to it.[2] In response, tobacco Multi National Corporations (MNCs) pushed back against the FCTC through multilateral forums in at least 10 international jurisdictions,[3,4] primarily through appealing to international tribunals and and supporting countries to sue other countries in international legal forums such as the WTO in order to delay the implementation of domestic tobacco laws.[5,6,7,8] This litigation was relatively unsuccessful and despite their efforts, international forums such as the WTO sided with the FCTC. As a result, national trade and investment laws have banned flavoured cigarettes, restricted point-of-sale marketing and advertising, placed graphic warnings on cigarette packaging, and raised taxes on tobacco. These strategies have greatly reduced global tobacco rates.[9,10]

In response, MNCs continue to use a range of strategies to curtail states' attempts to use public health policy arguments in accordance with the FCTC. . One strategy is *Forum shifting* which, allows parties to move policy and adjudication both horizontally and vertically across the legal system in order to achieve the most favourable outcomes.[11] Such strategies only exist through scale: MNCs enjoy

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[1] *Haines v Liggett Group* (1993) 818 F Supp 414, 421 (DNJ).
[2] A Mitchell & T Voon, *The Global Tobacco Epidemic and the Law* (Edward Elgar 2014) 187-255.
[3] Each of these forums has had at least one case brought by a tobacco corporation: The European Court of Justice, ISDS arbitration under the International Centre for Settlement of Investment Disputes, (ICSID), the Permanent Court of Arbitration, PCA, The Court of Justice of the European Free Trade Association (EFTA), The Eritrea-Ethiopia and the Iran-Unite States Claims Tribunals, The Court of Justice of the Andean Community, as well as the WTO Tribunals under its predecessor the General Agreement on Tariffs and Trade (GATT) and the Southern Common Market or MECOSUR dispute settlement bodies.
[4] S Puig, 'Tobacco litigation in International Courts' (2016) 57 Harv. Int. L J 2 392.
[5] For instance, 11 Philip Morris Asia (PMA) unsuccessfully challenged Australia's plain packaging laws, contending that the legislation contravenes the 1993 Australia – Hong Kong Bilateral Investment Treaty. Cuba, the Dominican Republic, Honduras, and Indonesia - have challenged plain packaging in the WTO, arguing that the legislation is more trade-restrictive than necessary for the achievement of a public health objective and breaches certain WTO obligations relating to the protection of trademarks. On 28 June 2018, the WTO panel hearing the case decided in favour of Australia on all grounds, finding that plain packaging contributes to its public health objectives, that it is therefore no more trade-restrictive than necessary for public health, and that it does not violate any relevant intellectual property obligations. Honduras and the Dominican Republic have appealed the panel's report to the WTO's Appellate Body. Uruguay was also taken to an arbitration tribunal by Philip Morris in 2010 on the grounds that it was violating its obligations under a bilateral treaty between Uruguay and Switzerland on the grounds of just and equitable treatment to investors and breach of IP rights.
[6] Mitchell & Voon, *supra* note 3.
[7] K Tienhaara et al., *Regulatory chill and the threat of arbitration: A view from political science, in Evolution in Investment Treaty Law and Arbitration* (C Brown edn, Cambridge University Press 2011)
[8] EM Greenhalgh et al., ' Legal Cases Initatied by the Tobacco Industry,' in MM Scollo and MH Winstanley (eds),*Tobacco in Australia: Facts and Issues* (Melbourne: Cancer Council Victoria 2018).
[9] T Voon et al., *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar 2012).
[10] S Puig, 'The Merging of International Trade and investment Law' (2015) 33 Berekerly J Int'l Law 6-30.
[11] S Sell, 'Cat and Mouse: Forum Shifting in the Battle over Intellectual Property Enforcement' (American Political Science Association Meeting, Toronto, September 2009).

supranational freedom of legal movement. **In this paper we analyse how tobacco companies use multiple forums to decrease the impact of tobacco control.**

We explore ways in which tobacco companies put pressure on home countries to not ratify the FCTC and to include favourable terms in bilateral and multilateral trade agreements.Additionally, we illustrate how at the national level corporations taking economic and legal action against governments they accuse of breaking the law. Given the near-universal condemnation of the health risks of smoking, tobacco control is a good case to use to understand the power of MNCs. . The case is further bolstered by the fact that five large MNCs(China National Tobacco Corporation, British American Tobacco, Philip Morris International, Japan Tobacco, and Imperial Brands PIC) control the bulk of the tobacco industry, and have been extremely zealous in protecting their interests.

Tobacco companies continue to leverage the uneven power dynamics of nation-states in their socio-economic relationships with each other..[12,13] For example, an empirical analysis of the role of litigation in high-income countries that ratified the FCTC[14] illustrated that, there was a clear strategy of litigation showing that tobacco companies were increasingly taking governments to court to challenge the legality of domestic tobacco legislation.[15,16] In the majority of these claims, the focus was on constitutional and human rights law,[17] with MNCs using broad rights-based arguments in bad faith to undermine the enforceability of good-faith litigation along similar lines in other fields and industries. So far, scholarship has focused on the fact that tobacco companies frequently lose cases and so governments should be emboldened to defend these cases vigorously, but the long game playing out in courts today involves death by a thousand cuts, with implications far beyond the tobacco industry. All major tobacco companies have significantly diversified holdings across the economies of several countries, and it is likely that shifts on the basis of human rights in tobacco will lead to similar, dangerous paths for growth across their portfolios. Thus, an analysis of how tobacco companies are using courts to reframe the spirit of fundamental rights in order to deploy them as proactive tools against future regulatory threats is an important question not only for these diversified holdings but also in determining how states will deal with future public health and environmental challenges.

Methodology

We searched WHO FCTC global reports, which are publicly available on the WHO website, for countries which had signed up to the FCTC and any ongoing litigation from 2004 to 2020. We used outcome data from Tobacco Control Laws, which is a publicly available online resource (http://www.tobaccocontrollaws.org), to identify any litigation that we may have missed, appeals and case history. We also contacted organisations that had acted as *amicus curae* (friends of the court) for copies of their court applications to join tobacco litigation. We began our search in 2004 in order to catch pre-emptive court cases before the FCTC came into force. We focused our analysis on instances where tobacco corporations had brought claims in constitutional courts in order to conduct a comparative constitutional study of the major types of claims that were used.

[12] Greenhalgh, *supra* note 9.
[13] SY Zhou, JD Liberman and E Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2018) 28 Tob. Control 2.
[14] This study analysed 6 cases which were brought in the UK, Australia and Canada.
[15] S Steele et al., 'The role of public law based-litigation in tobacco companies' strategies in high income, FCTC ratifying countries, 2004-14'(2015) 38 J.Pub H. 3.
[16] ME Muggli et al., 'Tracking the Relevance of the WHO Framework Convention on Tobacco Control in Legislation and Litigation through the Online Resource, Tobacco Control Laws' (2014) Tob Control 23: 457–460.
[17] Steele, *supra* note 19 at 519.

There are difficulties with making valid comparisons across different jurisdictions which we tried to mitigate by focusing on two common MNCs- Phillip Morris International (PMI) and British American Tobacco (BAT), which are jointly responsible for making the majority of the claims in tobacco litigation at the domestic level. Analysing the claims, they made as opposed to the judgements from constitutional courts gave us greater points of commonality and clarified their strategies.

Comparative constitutionalism can be both descriptive and evaluative.[18] In conducting an analysis of the claims, we were more focused on the descriptive aspect. This can serve two major advantages: firstly, it can give us a better understanding of jurisdictions developed through 'thick description' of the context within which those constitutions operate. Second, it enables us to look to other places that could help broaden the scope of constitutional possibilities, especially where there are inadequacies across transnational contexts.[19] We also conduct an evaluative analysis through an analysis of the judgments. This article advances scholarship in comparative constitutionalism by illustrating how constitutional courts have become a site of struggle as part of a broader forum shift by MNCs, and examining how domestic tobacco litigation fits into a global narrative of how rights are being used by corporations.

This paper is divided into three parts. The first part analyses the historical use of litigation- primarily in the USA- and how this led to a global consensus and resulted in the establishment and enforceability of the FCTC. The second part then describes the nexus between human rights and the FCTC and how MNCs have responded to this treaty both at the international level and increasingly at the domestic level. We argue that in losing the ability to influence the FCTC, MNCs shifted forums by challenging the treaty in multi-national and bilateral trade in international courts regimes to create a more complex regulatory regime so as to lower their regulatory obligations. This paper will also use empirical evidence to argue that this is an ongoing process that has now moved to court processes within constitutional courts in developing countries. Finally, the third part of the paper will analyse whether there are any commonalities in the types of claims being made, and whether these claims pose any dangers to the very use of human rights arguments within constitutions at the state level.

A history of the global tobacco litigation movement

The World Health Organization estimates that tobacco kills at least 8 million people a year. Over 7 million of these deaths are due to direct tobacco use, while approximately 1.2 million die due to the dangers of second-hand tobacco smoke.[20] If current trends continue, deaths are predicted to rise to 8.3 million by 2030.[21] Currently, over 1 billion people currently use tobacco, with 80 percent living in low and middle-income countries, where the burden of tobacco-related illness and death is highest.[22] Tobacco companies are thought to be targeting these markets increasingly as smoking rates decline in the developed world.[23]

Tobacco litigation has been a broad part of the strategy in controlling tobacco use in developing countries,[24] with the first case being brought in 1954.[25] Early tobacco litigation could be divided into four major types: negligent manufacturing (tobacco companies failed to act with reasonable care in making and marketing cigarettes), product liability (tobacco companies made and marketed a product that was unfit to use), liability against passive smoking (innocent claimants who did not assume

[18] U Baxi, *The Future of Human Rights* (Oxford University Press 2008).
[19] Mendes, 2013 at 51-57.
[20] WHO, 'Tobacco Fact Sheet' (WHO, 27 May 2020).
[21] C Mathers, D Loncar, 'Projections of Global Mortality and Burden of Disease from 2002 to 2030' (2006) 3 PLOS Medicine 2011- 2021.
[22] WHO, *supra* note 25.
[23] American Cancer Society, 'Big tobacco is Targeting the World's Most Vulnerable to Increase Profits' (World Congress on Tobacco, Cape Town, 2018).
[24] R Daynard, 'Tobacco Litigation: A Midcourse Review' (2001) 12 Cancer Causes & Control 4.
[25] *Pritchard v Liggett* (1955) 134 F. Supp. 829 (W.D. PA).

responsibility for smoking were affected by cigarette smoke), and negligent advertising (the tobacco companies failed to warn consumers of the risks of smoking cigarettes).[26,27]

The USA was the pioneering leader in litigation against tobacco companies, but subsequently litigation followed in 10 European Community countries, along with Argentina, Australia, Bangladesh, Finland, India, Ireland, Israel, Finland, France, Guatemala, Japan, South Korea, Mali, Norway, Sri Lanka, Thailand, Turkey, Uganda, the United Kingdom, and Scotland.[28,29,30,31,32]

Initially, tobacco litigation was not very successful. Activists struggled to prove causation due to lack of adequate medical evidence showing that smoking caused cancer, but as this evidence became more widely available (the key moment being the 1964 Surgeon General's Report), this became considerably easier. In the USA and the European Community, decisions led to multi-billion dollar settlements,[33] banning the use of cartoon characters in advertising so as not to attract children, restricting brand-name sponsorship, banning outdoor advertisements, funding anti-smoking advertisements through the creation of the American Legacy Foundation, and prohibiting political lobbying by tobacco MNCs.[34] While this seems like considerable success, in practice the tobacco industry repeatedly backtracked, reorganized, and, for the most part, simply did not abide by the terms of various agreements.[35]

Despite this mixed record, many scholars believe that tobacco litigation was important in changing public perceptions of smoking. Mather argued that tobacco litigation helped to redefine the problem away from wide acceptance to one reserved for people who had assumed the risk of smoking and could therefore accept the consequences.[36] In cases where perceptions *could* be shifted, they were exploited by both sides to varying effects. Daynard, for one, pushed for tobacco litigation as a cancer control strategy. l.[37] In the end, litigation, was instrumental in leading to the discovery of documents that proved conclusively that tobacco companies knew that smoking was dangerous and addictive. The release of tobacco-related documents was pivotal in the public campaign against tobacco. It galvanised further litigation aimed at recouping medical costs by local and national governments and led to criminal investigations of wrongdoing against big tobacco companies.[38,39] The litigation strategy, public campaign, and overwhelming scientific evidence all led to a re-thinking of tobacco control, not only as a domestic issue, but as one that needed a coordinated global strategy. This gave momentum to efforts in the WHO.[40]

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[26] L Mather, 'Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation' (1998) 23 Law & Soc. Inq. 4.
[27] M McCann et al., 'Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States' (2013) 38 Law & Soc. Inq. 2.
[28] H Cooper, 'Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating the Hazards Associated with Tobacco Products' (1990) 16 BROOK. J. INT'L. L. 275.
[29] R Daynard et al., 'Tobacco Litigation Worldwide' (2000) 320 BMJ 7227.
[30] A Sirabionian, 'Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom' (2005) 25 Nw. J. Int'l L. & Bus. 485.
[31] L Gostin, 'The Tobacco Wars: Global Litigation Strategies' (2007) 298 JAMA 21.
[32] H Hiilamo, 'The impact of strategic funding by the tobacco industry of medical expert witnesses appearing for the defence in the Aho Finnish product liability case' (2007) 102 Addiction 6.
[33] These settlements were often appealed by tobacco companies and were reduced significantly.
[34] P Jacobson, S Soliman, 'Litigation as Public Health Policy: Theory or Reality' (2002) JLME 30;229.
[35] *Ibid.*
[36] Mather, *supra* note 26.
[37] Daynard, *supra* note 29.
[38] Mather, *supra* note 26.
[39] McCann, *supra* note 32.
[40] K DeLand et al., 'The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative' in A Mitchell & T Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar 2014)16.

Development of the FCTC and corresponding legislation

The Framework Convention on Tobacco Control (FCTC) is an international treaty brokered by the WHO that aims to 'reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke'.[41] The Convention recommends: i) increased taxation and other measures to drive up prices and thus deter consumers from buying cigarettes; ii) regulation of the contents of tobacco products; iii) requirements for the packaging and labelling of tobacco products; iv) increased educational and public awareness efforts by governments; and v) regulation of tobacco marketing. Additionally, the FCTC addresses supply, such as illicit trade in in tobacco products, sales to minors, and creating alternative economic activities for tobacco growers.[42] As of 2021, 182 countries have signed up to the FCTC (with 170 ratifications), which makes it one of the most accepted international treaties.[43] The FCTC is unusual as a WHO treaty because it includes compliance mechanisms for all its member States. However, *actual* compliance depends on individual government capacity, especially in developing countries, where tobacco companies can have more power, resources, and legal experience in tobacco than the state.[44] Thus in the case of developing countries, where states may lack sufficient resources to protect health in the first place, it becomes all the more crucial that governments abide by their human rights obligations to protect the right to health. In its preamble, the FCTC recognises that tobacco control is strongly linked to the right to health. Additionally, it also urges states to consider four international human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) as the basis to promote tobacco control. A human rights approach , offers a robust instrument to fight the growing burden of tobacco worldwide through opening doors to judicial recourse and enforcement mechanisms that are at the core of international human rights.[45] More specifically, because states duties under the right to health at times go beyond the FCTC, it further compels states not party to the FCTC, to implement the most effective tobacco control measures based on their ratification of conventions recognizing the right to health.

States are obligated to not only interfere with or violate the right to health (respect), but they have to protect groups or individuals from the violation of the right by third parties – for example tobacco companies – (protect), and they need to take appropriate measures, that enable and assist individuals to enjoy their right to health (fulfil). With respect to tobacco, states have an obligation to take all necessary measures to regulate the tobacco industry in the most effective way, including through direct intervention.[46] Specifically, the CESCR Committee recommends that states restrict advertising and marketing of tobacco products, to facilitate compliance with the FCTC.[47] Specific measures, such as advertising bans, plain packaging, smoke-free laws, and bans on the industry's interference with policy-making can further be implemented with few resources. In the words of the Committee, "the failure to discourage production, marketing and consumption of tobacco" is a violation of the obligation to protect.[48] This makes it difficult for countries to argue that they are unable to fulfil their core duties to curtail the spread of tobacco.

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[41] WHO Conference of the Parties, *Framework Convention on Tobacco Control* (WHO 2003).
[42] *Ibid.*
[43] United Nations Treaty Collection, 'Status of Treaties' (United Nations 2021).
[44] E Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control' (2004) 29 Yale J. Int'l L. 209, 219.
[45] L Graen, 'Advancing Tobacco Control with Human Rights,' (2020) 6 Public Health Panaroma 2, 252.
[46] OA Cabrera, LO Gostin, 'Human rights and the Framework Convention on Tobacco Control: mutually reinforcing systems' (2011) 7 Int J Law Context 3, 285–303.
[47] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, at para. 19.
[48] General comment No. 14: The right to the highest attainable standard of health (Art. 12). E/C.12/2000/4. Geneva: UN Committee on Economic, Social and Cultural Rights; (2000).

Pursuant to their obligations under international law, many countries are trying to curb tobacco use by introducing laws to make it harder for people to access tobacco.[49,50] However, countries that have introduced the most stringent laws have frequently been challenged in court by tobacco companies. Indeed, as will be discussed below, tobacco companies have shifted the locus of their battle from the international arena to the national, targeting developing countries.

From Forum Shifting to Forum Shopping

The term 'forum shifting' was coined in an attempt to study how advocates seeking to increase IP rights had shifted forums both horizontally and vertically in order to achieve their goals.[51]

Sell's work on the proliferation of forums within intellectual property is particularly important for understanding how forum shifting works, with the multilateral trading regime being her way into analysis. In the 1980s, the United States became disillusioned with the WIPO, which it felt was increasingly focused on low IP rights due to the influence of developing countries. As an alternative, the USA began placing increasing emphasis on bilateral negotiations to enhance IP rights. MNCs in the USA were impressed with the benefits of enhanced IP protection and increasingly lobbied the government to incorporate IP rights within a broader multilateral agenda.[52] Eventually, the USA left the weak WIPO regime in order to set up the General Agreement on Tariffs and Trade in the 1986 Uruguay round, leading to multilateral standards in The Trade Related Aspects of Intellectual Property Agreement (TRIPS).[53] The TRIPS Agreement was brokered by a number of pharmaceutical companies, computer and tobacco industries, all of whom were interested in retaining high IP rights.

With the TRIPS Agreement in place, MNCs such as tobacco companies could increase their imports to the developing world due to the removal of import taxes and other restrictions born from the multilateral trading system. They also had the resources to police any attempts to lower IP rights. A report in the US Congress noted that the US was hypocritically boosting the use of tobacco abroad while many US States were at the time pushing back on tobacco use.[54]

Tobacco MNCs have been relentless in protecting their markets through challenging the authority of the WHO to convene a treaty, and when that failed they lobbied developing countries ferociously, trying to convince (and often succeeding in convincing) them that this treaty would undermine their sovereignty.[55] Tobacco companies also proposed corporate social responsibility mechanisms as an alternative forum to the treaty, which would involve self-regulation as opposed to the WHO. However, this attempt to shift forums was unsuccessful because developed countries and health advocates were united in their agreement about the FCTC.

When the FCTC was finally ratified and countries had used its strength to initiate and implement domestic legislation, MNCs such as BAT wrote to the governments of Uganda, Namibia, Togo, Gabon, Democratic Republic of Congo, Ethiopia, and Burkina Faso, accusing them of breaching their own laws and international trade agreements, warning of the economic damage that would follow such hostile

[49] Mitchell, *supra* note 7.
[50] Voon, *supra* note 10.
[51] Sell, *supra* note 15.
[52] *Ibid.*
[53] *Ibid.*
[54] US Gov't Accountability Office, 'Trade and Health Issues: Dichotomy between US Export Policy and Anti-Smoking Initiatives' (Govt. of the United States 1990).
[55] Weishaartel, 2008.

domestic legislation.[56] This was not so much an attempt to overturn the tide against tobacco, but a longer game aimed at prioritising an alternative forum that met Big Tobacco's needs.

Philip Morris further engaged in forum shopping within trade tribunals and domestic contexts in order to articulate their claims. Individual countries who had agreed to enforce the FCTC were threatened with lawsuits under bilateral trade investment treaties, which centred on intellectual property infringement and uncompetitive behaviour, discrimination, and claims over authority to regulate. For instance, Australia, which was the first country to create domestic legislation in compliance of the FCTC, was sued by Japan Tobacco and Philip Morris, alleging that the legislation violated their constitutional rights. Philip Morris also lost a case in the permanent court of arbitration in 2015, which aimed to challenge Australia's plain packaging legislation under a clause in the 1993 Hong Kong-Australia Bilateral Investment Treaty.[57]

Likewise, the European Court of Justice (ECJ) was asked to give guidance on an EU directive on the manufacture, presentation, and sale of tobacco products and whether this infringed on MNCs' property rights under EU law. In 2002, it ruled against BAT.[58]

In a major trade dispute over tobacco plain packaging law in 2013, the WTO rejected a complaint brought by Cuba, Indonesia, Honduras and the Dominican Republic.[59] Following the decision, there were claims that Philip Morris covered some of the legal costs for the Dominican Republic and Cuba, and BAT did similarly for Ukraine and Honduras.[60] This engagement with other developing countries shows that big tobacco companies are trying to create alliances that can be used in different forums in order to counter the FCTC.

Forum Shopping: From Developed Countries to developing countries.

In its 2016 annual report, BAT outlined the "risk" of legislation and litigation which was being brought in to control tobacco around the world. Its response was an "engagement and litigation strategy coordinated and aligned across the Group".[61]

Because of the nature of state restrictions and the global health movement against their operations, tobacco MNCs, as a group, operate with expansionist aims very similar to other industries. With this in mind, we focused our analysis on just two main MNCs: BAT and PMI (which have the biggest market share) in order to get a global picture. We analysed litigation data from 2004 – 2020 in order to see whether they were from countries which had been sued by either BAT and or PMI and their subsidiaries in order to see whether there were any trends in litigation.

We found that 15 countries had had litigation which had been brought by one of these two tobacco companies against them after bringing legislation under the FCTC. Of these, 73 percent (11 countries) were developing countries and 12 of the cases involved constitutional claims. (See table 1 for details.).

Start Year	*End Year*	*Country*	*Tobacco Company*	*Number of Cases*	*Constitutional?*

[56] Hutchens, *supra* note 22.
[57] N Hertz, *The Silent Takeover* (Heinemann 2001).
[58] *The Queen v Secretary of State for Health*, Application, Judgment of 10 December 2002.
[59] A Martin, 'Philip Morris Leads Plain Packs Battle in Global Trade Arena' (Bloomberg, 22 August 2013).
[60] *Ibid.*
[61] Hutchens, *supra* note 22.

2006	2015	Argentina	BAT	3	Y
2007	ongoing	Colombia	BAT	5	Y
2010	2016	Panama	BAT	5	Y
2010	ongoing	Uruguay	PM	3	Y
2011	2012	Australia	PM	1	Y
2011	2012	Norway	PM	1	
2011	2018	Philippines	PM	2	Y/N
2011	2012				
2011 /2020	2012/ ongoing	South Africa	BAT	3	Y
2012	2015	Peru	BAT	3	Y
2014	2016	United Kingdom	BAT	4	
2016	2016	France	BAT, PM	1	
2016	ongoing	India	BAT, PM	6	Y
2016	2019	Kenya	BAT	4	Y
2017	2023	Uganda	BAT	4	Y
2018	ongoing	Pakistan	BAT	1	Y

Table 1. Global Tobacco Litigation from 2004 to 2022

Footnotes about details. There is no distinction between appeals and fresh cases, and each is counted as an individual case.

The durations of cases vary, with Colombia having the longest running litigation, which has gone on for over 12 years. Again, developing countries have considerably longer cases than developed countries (see Table 2). The targeting of developing countries raises various concerns about 'regulatory chill' which may impact developing countries disproportionately. The latest FCTC Global Progress Report acknowledges that in many jurisdictions there is laxity in implementing anti-tobacco regulation, due to challenges by the tobacco industry.[62] Thus, we see that this 'regulatory chill' is being translated into hesitation by countries who are afraid of being sued.

[62] WHO, *supra* note 25.

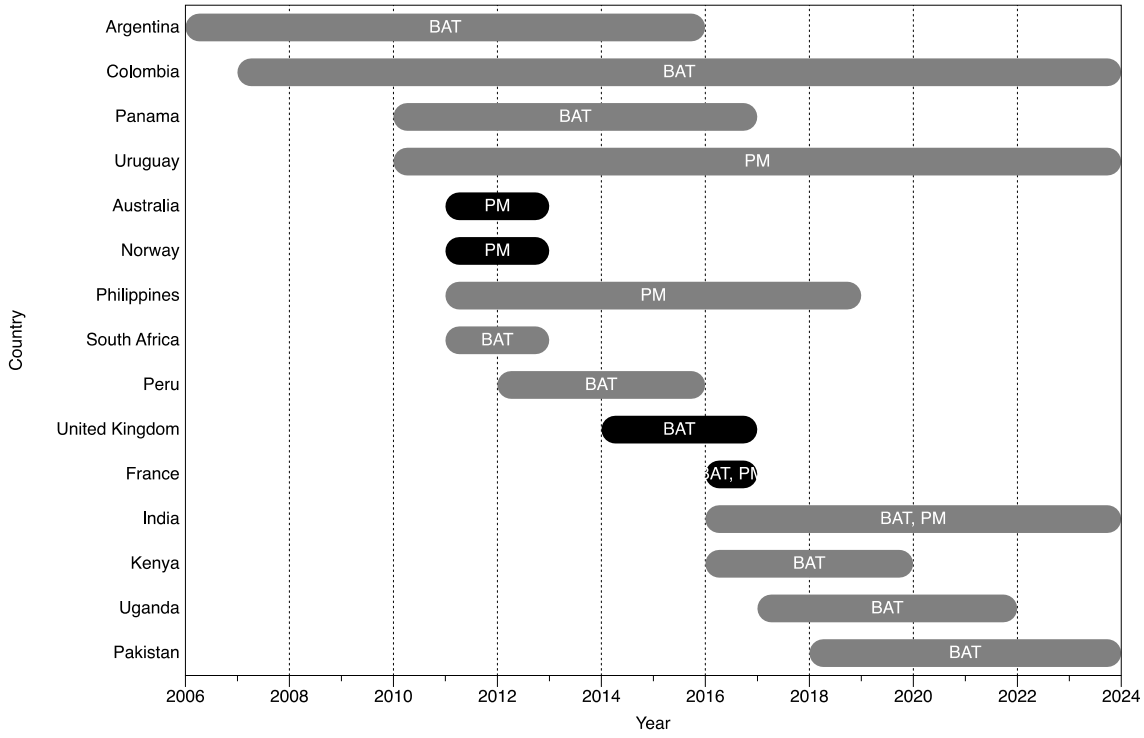

Table 2: Duration of tobacco litigation

PM = Phillip Morris; BAT = American Tobacco.

Countries in black are developed countries; those in grey are developing countries (on the basis of IMF classification).

Constitutional claims in tobacco litigation in developing countries.

Twelve countries in which either BAT or PMI or its subsidiaries brought court challenges based on constitutional claims are listed in Table 3. Among these cases, we further narrowed this to four English speaking countries, India, Kenya, Uganda and South Africa in order to ensure that the rights were comparable across jurisdictions.[63]

Table 3

Start Year	*Country*
2006	Argentina
2007	Colombia
2010	Panama
2010	Uruguay
2011	Australia
2011	Philippines
2011/2020	South Africa

[63] we excluded Argentina, Brazil, Colombia, Costa Rica, Panama, Uruguay because they were not English speaking.

2012	Peru
2016	India
2016	Kenya
2017	Uganda
2018	Pakistan

Table 3. Tobacco Cases involving constitutional claims within developing countries.

In this section, we analysed the way in which tobacco companies had made constitutional claims within these four jurisdictions. Corporations have always used courts as sites of struggle in order to diminish public health arguments. In Kenya, for instance, pharmaceutical corporations have utilised courts in order to challenge the provision of cheaper essential medicines. [64] The use of constitutional courts in developing countries is significant, as constitutions are intended to serve certain and predictable functions and ultimately aim to protect the people against unfettered state control. This, along with the varying contentious rights afforded to MNCs as individuals, can force countries into insurmountable legal after effects despite the success of individual cases.[65]

Understanding human rights and what they offer Big Tobacco

Stephen Gill introduced the idea of 'new constitutionalism' due to globalisation, which meant the restructuring of the state in order to prioritise the international political forms that emphasize market credibility. Doing so invariably limited the space for democratic control of states while conferring privileged corporate citizenship on MNCs.[66] In the literature, these rights are limited to property and investment rights; however, we argue that the shift of tobacco litigation to the domestic level shows that this practice has widened in scope, with corporations no longer restricting themselves to the traditional rights of property or industry but increasingly positioning themselves as individuals, with all the attendant rights.. This strategy becomes particularly dangerous not only in the various ways it will help Big Tobacco, but the precedent it will set for companies across the world.

Fundamental rights are rooted in the idea that entitlements flow from certain key interests that individuals have, which evolves from the 'perspective of recipience'.[67] In his rights thesis, Dworkins identifies that under the constitutional order certain human rights are legally enforceable, and thus prioritized over other fundamental rights.[68] Individuals are given these rights in order to temper state power. These rights are grounded in international treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights– all of which recognise that fundamental human rights emerge from the inherent dignity of a human being.

This understanding developed into the idea that rights accrue in people by the simple virtue of their birth. As the ultimate bastion of rights, national constitutions, most notably those emerging after the establishment of the United Nations, all recognize dignity at their core. The Constitution of South Africa

[64] J Harrington, 'Access to Essential Medicines in Kenya, Intellectual Property, Anticounterfeiting and the Right to Health' in M Freedman et al., (eds) *Law and Global Health* (Oxford University Press 2014) Vol. 16, 94-118.
[65] J Elster, 'The Impact of Constitutions on Economic Performance' (The World Bank 1995).
[66] Gill, 1995 at 413.
[67] D Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations David' (2008) 125 SALJ 754; 1054.
[68] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

accords "everyone the right to have their dignity respected and protected."[69] Similarly, the Constitution of Kenya obligates the state to respect and protect the "inherent dignity" of all.[70]

Despite its universal appeal as the key value underpinning human rights, dignity as a concept is not without difficulty. In large part, this is a philosophically intractable problem: the lack of clarity around the meaning of dignity at the universal scale runs the risk of an equally high vagueness, and thus the exact function of dignity in the understanding of justiciable human rights is left uncertain. As one scholar puts it, "the character of vagueness and indeterminacy are distinctive features of the notion of dignity," which renders it a "useless concept".[71] Taking the argument further, some scholars find that dignity plays no role in the foundation of rights. Beitz, for example, argues that "human rights are institutional protections against standard threats to urgent interests".[72]

Dignity, then, is not so much a shared universal value as much as the need of the hour. If the sole basis for rights is to stem from urgency and the importance of interests threatened, then the existence of corporations and other similar organized entities can be threatened on an individual basis by governments as well.[73] Once a baseline for the protection of interests is established, it is extraordinarily futile to separate the interests of the individuals from the groups they belong to because evolution naturally offers the individual greater risk/reward relations than they can offer themselves. Thus, through a simple problem that has defined the very arc of history and human impact, it has become relatively easy for 21st century corporations to claim redress from courts for a wide array of rights. Studies on case law from the European Court of Human Rights suggest that the number of human rights the Court has deemed applicable to corporations has steadily grown in recent years due to the high volume of cases they file. Apart from rights to privacy and property, the Court has found corporations to be holders of rights to due process guarantees, protection against discrimination, freedom of assembly and association, freedom of movement, freedom of religion, freedom of speech, and even the right to compensation for nonpecuniary damages.[74] Multinational corporations today are shapeshifters in an almost literal sense of the term: their resources, capabilities, clout, and economic impact are far greater than any single individual in history, and yet like most individuals today, they demand recognition as one entity, of a range of fundamental rights.

This increased understanding of corporations as bearers of rights has even allowed for a certain standardization where corporations have brought suit to claim redress for violations of an array of rights at the national level. As Baxi puts it, the human rights presented in the Universal Declaration of Human Rights have been supplanted by 'trade-related market-friendly human rights', due to the push for increased globalization.[75] Thus even where constitutions such as those of India, South Africa, Uganda and Kenya have limited the idea of rights to vest in individuals, its courts have increasingly found corporations to be bearers of a myriad of rights. In the *Reserve Bank of India v. Palai Central Bank*, the Kerala high court went so far as to claim that the intention of the framers of the Constitution was never to exclude corporate bodies from exercising *all* fundamental rights.[76]

It is within this backdrop that it becomes increasingly important to consider the ways tobacco companies have sought to pivot suits to the national level against the increasing controls placed on their products. Taking the examples of India, South Africa, Uganda and Kenya, the following section shows how tobacco companies have begun to claim violations of rights beyond those typically afforded to them,

[69] Constitution of South Africa, Section 7(1) (1996).
[70] Constitution of Kenya, Section 10 (2010).
[71] G. Resta, 'Human Dignity,' in A. Popovici and L. Smith, eds., *McGill Companion to Law* (2015).
[72] C Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 111.
[73] C La Font, 'Should We Take the "Human" Out of Human Rights? Human Dignity in a Corporate World,'(2016) 30 Ethics & Int. Aff. 2; 233-252.
[74] *Ibid.*
[75] Baxi, *supra* note 22
[76] *Reserve Bank v. Palai Central Bank Ltd*. (1961) Ker. 68 (Kerala High Court).

such as rights of commercial speech, non-discrimination, and equality. The cases show how MNCs have clarified their strategies not only through rights-based litigation, but have also deployed tactics to stall the implementation of case decisions. It suggests that where state measures to combat tobacco have gone beyond minimum standards under the FCTC, the tobacco industry's tactics have only become more severe. Then, turning to the way courts have responded, it shows the similarities in the ways courts have found corporations to be bearers of rights, but the extent to which such rights must be limited in light of the government's goals to protect public health.

Case Study Countries and their relationship with human rights

In this section, we will focus on constitutional claims in four jurisdictions: South Africa, Kenya, India and Uganda, arranged in the order in which their constitutional claims emerged.

South Africa- *Going beyond rights to property to include violation of freedom of expression*

South Africa became party to the WHO Framework Convention on Tobacco Control on July 18, 2005. Where once the right to health and other fundamental rights remained a distant reality for its citizens, the post-apartheid era saw a shift from a pro-tobacco government to one that had the political will to advance tobacco control in light of its obligations under the FCTC. Under the new political leadership of the African National Congress (ANC) in 1993 and the help of Health Ministers supportive to tobacco control, South Africa made important advances in regulating tobacco products.

Previously, the government had passed The Tobacco Products Control Act 83 of 1993, South Africa's primary tobacco control law, which prohibits nearly all forms of tobacco advertising and promotion unless accompanied by a health warning.[77] Given the growing burden of tobacco, however, the state took steps to further restrict tobacco usage and advertising by amending in 2008 section 3(1) of the Tobacco Products Control Act. Pursuant to the revised regulations, no person can advertise or promote "a tobacco product through any direct or indirect means."[78] While commercial communication between tobacco manufacturers and traders are excluded, any commercial communication brought with a member of the public is prohibited—a failure to comply is punishable by fines of up to R1million. In 2011, reacting to these measures, the British American Tobacco Company first lodged a complaint against the government in the high court of Gauteng –where it lost its claim— and then again in the Court of Appeals and Constitutional Court, where it reasoned the unconstitutionality of section 3(1) of the Act on the basis of its right to the freedom of expression, as established under section 16 of the constitution.[79] In essence, BAT's argument rested on the idea that any prohibition against promotion not only denied the company their right to freedom of expression, but also denied individuals the right to receive necessary information about tobacco products. Mass scale advertising for Big Tobacco was essential in order to target young people and retain the social acceptability of smoking within societies. By adopting this stance, Big Tobacco was making the case that just like individuals, corporations had a right to commercial free speech. The hope for big tobacco was an attempt to avoid a total ban and move towards a US style system of commercial free speech which had in the past led to striking down of restrictions on tobacco advertising.[80]

While the Constitutional Court recognized the importance of commercial speech, it still found that a corporation's right to expression, along with other fundamental rights, is limited. Any right in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in a democratic

[77] Republic of South Africa, 'Tobacco Products and Control Act 83 of 1993' (1993).
[78] *Id* at section 3(1).
[79] *British American Tobacco South Africa (PTY) Limited v. Minister of Health*, No. 463/2011, Supreme Court of Appeal of South Africa (2012); *British American Tobacco South Africa (PTY) Limited v. Minister of Health*, No. CCT 65/12, Constitutional Court of South Africa (2012).
[80] Magherita Melillo, 'The Influence of the Commercial Speech Doctrine on the development of tobacco control measures' Journal of Law, Medicine and Ethics, Volume 50, Issue 2.

society.[81]Thus, consistent with the approach of courts in the country to use the principle of proportionality when balancing rights, the question before the court was whether the limit on tobacco users' right to receive informationn was justified in light of the state's obligations to protect the right to health. Citing to the Country's obligation under the FCTC and the growing global burden of tobacco, the Court dismissed BATs contention. It reasoned that where policies are in issue, it may not always be possible to prove that a policy directed to a particular concern will be effective. Given the gravity of tobacco related concerns, it found that, it was not even necessary for the government to produce additional evidence, as South Africa is a signatory to the FCTC, which is heavily steeped in public health considerations.[82] "If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify an action."[83] Thus the Court found that the limit on commercial speech was justifiable under the country's obligation to protect public health, especially because the purpose of free speech in this case was aimed at induing people into addictive behaviour and therefore any attempt to rely on this commercial doctrine would fail.

The British American Tobacco Company's actions in South Africa show that while the judiciary has been bold in limiting corporations' rights by highlighting the fundamental importance of public health, the extra legal tactics used by MNCs suggest that both state and court actions may not be enough. As states' actions to curb the spread of tobacco become stronger, MNCs will only become more relentless. Covid-19 provides a case in point.

After losing its appeals in 2012, BAT largely stayed away from pursuing judicial action against the state and it made no further challenges against Tobacco Control Acts which were introduced between 2012 and 2020. In May 2020, however, the state took the extraordinary measure of banning the sale of all alcohol and tobacco products as part of its lockdown strategy to combat the spread of COVID-19. Although this case was not brought in the constitutional court, we analyse it because of its basis on constitutional rights.

Despite the government withdrawal of the ban in August 2020, BAT South Africa brought suit against the state in the high court of the Western Cape.[84] BAT alleged that the ban not only infringed citizens' rights to dignity and privacy pursuant to section 10 and 12 of the Constitution, but ran counter to the state's initiative to promote public health as it would exacerbate illicit trade in tobacco and imperil the state's lockdown.[85] BAT argued that illicit tobacco was already a problem in the country and led to a loss of 7million Rand annually due to the growth of the illicit tobacco market.[86] Relying on article 10 and 12 of the constitution, BAT based its claim on expert testimony of tobacco consumers. It argued that smoking helped its consumers cope with the mental stress brought on by Covid-19 and attempts to ban it would impact on individuals attempts to live freely...[87]

Even though the court found the industry's claim to be moot considering the withdrawal of the ban, it found it necessary to rule on the matter as the state could re-impose the ban in the future when evidence between smoking and Covid-19 became clearer.[88] The court's decision in favour of BAT South Africa largely turned on the government's lack of evidence quantifying the risk to smokers who were hospitalized with Covid-19.[89] The Court found that though there may be a risk that smokers may

[81] *Id* at para. 15.
[82] *Id* at paras. 22-24.
[83] *Id* at para. 21 .
[84] *British American Tobacco South Africa (PTY) Limited v Republic of South Africa*, no. 6118/2020, High Court of Western Cape (2020).
[85] *Id* at para. 6.
[86]*Id* at para. 57
[87] *Id* at para. 41
[88] *Id* at para. 27.
[89] *Id* at para. 95.

contract more severe forms of Covid-19, evidence is still inconclusive. As in the words of the court, "if stopping smoking does not hold benefits as regards Covid-19 disease progression (as opposed to general improvements to health), it means that the objective of the prohibition will not be achieved and that the Minister had failed to justify the limitation of constitutional rights."[90] Thus the state's failure to produce sufficient data to suggest that illicit tobacco was on the rise, made the ban unreasonable in light of the state's duty to protect health.

This ruling is an important one for Big Tobacco because the courts failed to use the precautionary principle in order to promote the right to health within the concept of public health emergencies. Similar to BAT's newer claims around dignity and privacy, courts from Uganda, Kenya, and India have been pushed to consider limits on a slew of additional rights, including non-discrimination, equality, and the role MNCs play in promoting fair administrative action.

Kenya- *alleging violations of myriad rights*

In Kenya, the tobacco industry has been particularly bold in responding to the state's initiatives to regulate it. In 2007, the Kenyan Government passed the Tobacco Control Act, which required the state to not only pass a range of regulations on tobacco, but also additional measures through bans on the sale, advertising, and use of tobacco products.[91] When the government passed regulations in 2014 prohibiting the manufacture, sale, promotion, sponsorship, and use of tobacco products (including exposure to tobacco smoke), BAT alleged that the Act violated its rights to privacy and property, non-discrimination and equality, public participation, and fair administrative action.[92] In 2015, BAT Kenya lodged a complaint against the government in the high court and then the court of appeals, where it lost its claims. The decision in the court of appeals turned particularly on the process through which the 2014 regulations were passed and the extent to which the regulations unduly restricted BAT's *constitutional* right to equality under section 10 of the Constitution.

BAT alleged that the process through which the 2014 regulations had been passed failed to comply with state's obligation to ensure transparency and adequate consultation pursuant to section 118 of the Constitution. BAT argued that as "persons likely to be effected by the regulations," the government had failed to involve the tobacco industry in the regulatory process, by consulting with them and giving them the opportunity to respond and share their views.[93] Public participation, they alleged is not merely a "formality" as per constitutional dictates but should be attained both qualitatively and quantitively.[94] In considering the constitutionality of process, the Court of Appeals turned to *reasonableness* and found the Government's actions reasonable, as consultations with a wide range of stakeholders, including the tobacco industry were held prior to the publication of the regulations.[95] It does not matter how public participation is affected, but that a reasonable level of participation be accorded. Thus, it held that since meetings were held prior to the publication of regulations, and because the tobacco industry had an opportunity to share its views, the process through which the regulations were enacted was constitutional.[96] The court relied on the fact that rights are not absolute and that many of them have limitations and that since there was a process to take the industry's views into account this would suffice. As in the words of the court, there are limits to rights and that although fundamental, participation does not mean that one's views must prevail, but that different views be taken into account.

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[90] *Id* at 169.
[91] Republic of Kenya, 'Tobacco Control Act 2007' (2007).
[92] *British American Tobacco Kenya v. Ministry of Health*, Petition No. 143 of 2015 High Court of Kenya (2016); *British American Tobacco Kenya, PLC v. Ministry of Health*, Petition No. 5 of 2017 Supreme Court of Kenya (2019) para. 65.
[93] *British American Tobacco Kenya v. Ministry of Health*, Petition No. 143 of 2015 (High Court of Kenya 2015) at paras. 86,87.
[94] *Id* at para. 80.
[95] *Id*. at paras. 49,50.
[96] *Id.*

BATs argument, however, did not just rest upon its right to participation. Apart from challenging the regulatory process, BAT also alleged that regulation 22 of the Tobacco Act, which limited interactions between the tobacco industry and public authorities, violated their right to equal treatment pursuant to section 10 of the Constitution. It alleged, the Regulations were unconstitutional as the same limitations around public engagement did not apply to other industries. Thus, BAT argued it had been singled out as an industry and this limited its ability to engage in commercial engagements. It relied on the doctrine of non-discrimination arguing that this was not just to ensure greater recognition of historically marginalised groups but was necessary, "to achieve a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[97]

In considering this claim, the Court turned to jurisprudence from South Africa, where courts have relied on the *reasonableness* standard and held that equal treatment does not mean identical treatment[98], but that the question of unfairness depends on a question of whether the differentiation is unreasonable in light of the objectives of the state.[99] Thus, the court balanced the limitation placed on BAT's rights versus the state's objective to protect public health via article 43 of the Constitution. It found that the restrictions were necessary to prevent integration of tobacco industry policies with those of the government and to prevent interference with government policies from commercial and other vested interests. It reasoned, the restrictions necessary as there is a "fundamental and irreconcilable conflict between the interests of the tobacco industry and the goals of public health" which the state is obligated to promote, protect and implement.[100] While the Court recognized the right of commercial entities to equal treatment, it found a difference between manufacturers of other products and manufacturers of tobacco due to the impact of their products. In the words of the Court, "the need for regulation and control is apparent from the Tobacco Act. Players in the tobacco industry cannot expect equal treatment with other industries as due to the harmful effect of tobacco products. The State is under obligation to protect the health of its citizens, both consumers and non-consumers of tobacco products…."[101] "the inequality of treatment in limiting interaction between the public and members of the tobacco industry does not amount to discrimination as it is dictated by the circumstances obtaining."[102]

We argue that although this case was successful against Big Tobacco, the court erred in entertaining the idea that MNCs could enjoy the same rights to participation and non-discrimination to those conferred to other citizens due to the huge power asymmetries between individuals and corporations, especially when they are MNCs.

Uganda- *bringing the tobacco control debate into constitutional rights =debates*

Uganda became party to the FCTC on September 18, 2007. Following its new obligations, the government passed a Tobacco Control Act which came into force in 2015. The Act included a range of measures to regulate tobacco, including the prohibition on smoking in public spaces (Art. 1), a comprehensive ban on tobacco advertising, promotion, and sponsorship, and requirements for health warnings on tobacco labelling (art. 5).[103] Many of the regulations, went beyond the minimum requirements set by the FCTC. For example, where section 11 of the FCTC requires health warnings to cover at least 50%, but no less than 30% of the principle display area on packaging, Uganda sought to impose warnings to cover no less than 65% of the front and back of tobacco products. When the state

[97] *Id* at para 135
[98] *President of the Republic of South Africa v John Philip Hugo*, (1997) 4 SA para. 41.
[99] *Federation of Women Lawyers Fida Kenya & 5 Ors. v Attorney General*, (2011) e KLR.
[100] BAT v. Ministry of Health, *supra* note 106 at para. 137.
[101] BAT v. Ministry of Health, *supra* note 106 at para. 64
[102] BAT v. Ministry of Health, *supra* note 106 at para. 66.
[103] Government of Uganda, 'The Tobacco Act' (2015).

moved forward on this by amending section 5 of the Tobacco Act in 2019 to increase graphic health warnings from 30% to 65%, the industry responded with a complaint before the high court and then the Constitutional Court of Uganda.[104]

BAT challenged the constitutionality of section 5 of the Tobacco Act on grounds that it violated the corporation's right to communicate with consumers. BAT argued that the new requirements unjustifiably exceeded minimum standards under the FCTC and thus prohibited its right to effectively use logos and trademarks associated with its brands. Where in Kenya and South Africa BAT restricted its argument to limitations imposed on its fundamental rights, in Uganda they extended the argument to the harmful impact of health regulations on the state's ability to stimulate economic growth.[105] In acknowledging this shift, the Constitutional Court remarked, "there appears to be deliberate attempt by the petitioner to move away from the issues of constitutional interpretation and to draw this Court into the tobacco control debate."[106] The court therefore refused to engage with attempts to draw it into the global tobacco debate and restricted itself to issues of constitutional interpretation.

The Constitutional Court o found that not all rights are absolute, and when two rights may conflict, it is necessary to consider the extent to which restrictions on one prejudice the rights and freedoms of others, along with the public interest.[107]Thus, similar to the approach of courts in South Africa and Kenya, the Court upheld the constitutionality of the regulations on grounds that the promotion of public health was an obligation and legitimate objective the state had to fulfil. The court argued that BATs rights to trade lawfully, own property and commercial free speech could be restricted under Article 43 of the Constitution because they are not absolute and if they impacted on the rights of vulnerable groups such children, non-smokers, pregnant women and those who may have quit smoking. The court also cited the right to health in limiting the BATs right to a business under Article 40 (2) as this was subject to individuals citizens rights to a clean and health environment.

The court relied on other jurisdictions such as Nepal and Vanatu which had gone beyond the minimum standards set out by the FCTC and imposed even larger warnings covering 90% of all packaging. The Court reasoned that since use of graphic health warnings now constitute international practice and are consistent with scientific evidence, the state was not only justified in increasing its warnings, but that strengthening the requirement was a sound way of ensuring compliance with the country's obligations under the FCTC.

The approach of the Constitutional Court in Uganda was quite progressive because it aimed to contain the rights of tobacco companies as rights of businesses vis a vis rights of individuals through a public interest argument. The court's primary responsibility was the protection of guaranteed rights and thus the public interest could override the interests and rights of companies. This was through its clarification that all businesses are subject to license and regulation. The court also rejected the idea that states obligation to promote economic growth should come at the expense of individual citizen's rights, especially when they are vulnerable. However, this judgement could have gone further in trying to distinguish those fundamental rights which are in the public interest by virtue of their protection of human beings over other rights which may be afforded to body corporates. While BAT had appealed this judgement it recently withdrew its judgment in April 2023.[108] This threat of protracted litigation in developing countries is a strategy Big Tobacco has already used successfully as the case of India illustrates.

[104] *BAT Uganda Ltd v Attorney General*, No. 46 of 2016, (Constitutional Court of Uganda 2019); *BAT Uganda Ltd v. Attorney General*, No. 440 of 2019, (High Court of Uganda 2021).
[105] BAT Uganda Ltd v. Attorney General, No. 46 of 2016, (Constitutional Court of Uganda 2019)para. 10.
[106] *Id* at para. 10.
[107] *Charles Onyango Obbo v. Attorney General*, Constitutional Appeal No. 2 of 2002 (2002).
[108] The Supreme Court of Uganda, Notice of Withdrawal in Proposed Appeal in Relation to Constitutional Petition No 46 of 2016, BAT Vs Govt of Uganda and Centre for Health Human Rights and Development 18 April 2023.

India- ***stalling and protracting litigation***

Even prior to the creation of the FCTC in 2003, India had been regulating tobacco through the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act (COTPA). With the increasing trend toward regulating smoking in public, increasing health warnings, and restrictions on the advertisement and promotion of tobacco-related products, the country over the years has been strengthening its policies beyond the minimum requirements of the FCTC. In 2009, the Ministry of Health passed regulations to ban the advertisement of tobacco products on cable networks. In 2014, the Ministry sought to pass more stringent regulations around plain packaging by enhancing the display area for health warnings from 40% to 85%.[109] In 2021, the government released draft changes to COTPA to tighten provisions around advertising at kiosks and to prohibit the sale of loose cigarette sticks, which form the majority of sales of tobacco products in the country.[110]

Initially, such actions were met with a few suits in front of high courts. Over the years, however, the pace and volume of suits brought by the tobacco industry have increased dramatically, with over 107 claims being lodged between 2007 and 2019.[111] Challenging claims around the application of COTPA to e-cigarettes, to a prohibition on smoking in bars and restaurants, big Tobbaco's zeal to fight for its products has only intensified.[112] Additionally, nearly 40 million cases are currently pending before both the supreme and high courts.[113]With such a backlog, there is little surprise that any regulations the government has sought to impose on the industry have essentially been thwarted. Till date, for example, the amended regulations to increase the size of health warnings have yet to be implemented due to a slew of claims still pending before the courts. In 2018, Godfrey Phillips (who has exclusive license with Philip Morris for the sale of Marlboro cigarettes in India) and ITC Ltd (of which BAT owns 29 percent) brought suit against the government in the High Court of Karnataka, alleging that the amended plain packaging rules were arbitrary and, if not stayed, would impose severe economic hardship on the industry.[114] It contended, that because there is still no ban on tobacco products and because the courts have not ruled upon the constitutionality of pictorial warnings, the court should stay the regulations. Referring to the backlog of claims pending before the courts, the High Court of Karnataka refused to issue a full ruling, but still largely rejected Godfrey Phillips' claims, finding in part that no undue hardship would be caused if the petitioners had to include pictorial warnings on their products until the ultimate fate of the regulations had been determined.[115] As per the words of the Court, the addition of pictorial warnings poses no additional hardship on the industry that warrants a stay on the government's regulations.[116] Shortly thereafter, Godfrey Phillips appealed the high court's judgment , where the Supreme Court is yet to hand down full judgment.

Looking at specific cases that highlight the different avenues MNCs use to protract litigation, we have shown how courts and their associated mechanisms figure into Big Tobacco's strategy in LMICs. Where suits once primarily turned on corporations' right to engage in "lawful trade" , the tobacco industry has pushed the boundaries of legal personhood by trying to claim violations of a range of fundamental rights including free speech, privacy, non-discrimination, and equality. As a result, courts in countries around the world have been pressed to consider limits to the constitutional rights they uphold, and how their decisions speak to the relationship between different kinds of rights. In upholding

[109] Government of India, 'GSR 727 E' (2014).
[110] A Kalra, 'India's Proposed Changes to Anti-Smoking Law Face Objections from Tobacco Industry' (Reuters 6 January 2021).
[111] Tobacco Free Kids, 'Tobacco Control Litigation: India' (2021).
[112] *Ibid.*
[113] Bloomberg Quint, 'India's Pending Court Cases on the Rise: In Charts' (Bloomberg Quint 29 September 2020).
[114] Godfrey Phillips India Limited v Union of India, W.P.Nos.25903/2018 and W.P.No.26091/2018, High Court of Karnataka (2018).
[115] *Ibid.*
[116] *Id* at para. 10.

the value of the right to health, courts from South Africa and Uganda have found limits to the exercise of more 'fundamental' civil and political rights, marking a broadened understanding of the equality between human rights. Court action itself, however, has not been sufficient. Where state policies have gone beyond the minimum standards found in the FCTC, corporations have extended their legal argument to include effects on the national economy and abused their legal resources by stalling and extending litigation to put a hold on any kind of implementation. Most importantly, however, these cases provide foundational efforts in a new legal war that pushes the boundaries of how courts define humanity: how corporations have positioned themselves in relation to it, and necessitated questions around the extent to which constitutional rights apply to "natural persons" and "juristic persons."

The Danger of Free Speech Rights for Tobacco Companies

While tobacco MNCs have fought on as many fronts as possible, all case studies share the common factor of Big Tobacco claiming the right of free speech to argue that plain packaging deters them from their constitutional rights. The South African and Kenyan courts have tried to differentiate between free speech and commercial free speech and the Ugandan judgement in which courts recogniesd that commercial speech cannot be protected at all costs especially where it is addictive and causes harm to vulnerable citizens is particularly important. However, courts should be bolder and make a distinction between individual rights and commercial free speech rights on the basis that any attempts to give corporations free speech rights will come at the expense of ordinary citizens.

When we recall the purpose of human rights as the primary means through which individuals can maintain their inviolable dignity, the prevailing idea of "your right ends where mine begins" warps disproportionately with the inclusion of corporations as legal persons. For a corporation's right to exist does not rest on simply existing, as an individual's does. A corporation, being an agglomeration, exists solely for the purposes of growth, expansion, and profit. While an individual may choose to follow such aims, a corporation is *enslaved* to these purposes, and to its shareholders by proxy. To give a corporation human rights, then, is not only to *rewrite* human rights toward a narrow horizon of self-perpetuating profit-making, but to sanction modernized, complex structures of otherwise outlawed oppression in the name of the day's global engine: economics of scale.

The legal and extra-legal processes outlined in this paper have been playing out for many years, even before tobacco MNCs pivoted their efforts to LMICs. An analysis of court decisions in the USA shows that corporations have displaced people as direct beneficiaries of free speech in more than half of the cases brought to the Supreme Court on this issue (Coates, 2015 223).[117] Coates argues that this reliance on the use of legal tools to challenge legislation and move for more business-sympathetic regulation at the expense of public health and the State is tantamount to corruption. The push by corporations to use courts has culminated in the much-critiqued case of *Citizens United*, in which corporations were held to have a first amendment right to free speech, which meant a total unlimiting of caps on political donations.[118] The focus on extensive free speech rights for MNCs was also highlighted by the troubling judgement in *Kasky v. Nike*, through which commercial speakers are entitled to constitutional protection even if their statements amount to factual misrepresentations.[119]

This pattern of high-volume, relentless litigation in developed countries is now repeating itself in LMICs, with complex variations in each country that makes it difficult to clarify the paths Big Tobacco is carving out for itself.

Conclusion

[117] J Coates, 'Corporate Speech & the First Amendment: History, Data, and Implications' (2015) 30 Const. Comment 2.
[118] *Citizens United v FEC*,(2010) 558 U.S. 310.
[119] *Virginia State Board v Va Consumer Council*, (1976) 425 U.S. 748 at 762

This paper illustrates how MNCs are regrouping and shifting forums from litigation in developed countries and international forums to constitutional courts in the developing world, where the broad majority of their customer base has grown. Tobacco companies have taken note of strategies that were successful against them and led to the decline of tobacco use in many developed countries, and are now fighting back through seasoned strategies that involve protracted litigation and fundamental reworkings of the basic assumptions on which developing countries provide for their citizens.

This paper allowed us to look more closely at transnational rules which have always been capable of immense impacts on domestic constitutions giving them the power to embrace or resist them.[120] In this analysis, we see marked resistance as constitutional courts in three of the four jurisdictions which have rendered judgements so far (South Africa, Uganda, and Kenya). In all jurisdictions, the courts have refused to stay tobacco regulation and have so far rendered thoughtful judgements that defend states' rights to make legislation under the FCTC. As the tobacco industry is getting stronger, it is crucial that courts challenge the litigation creep that is occurring in developing country contexts by addressing what kind of rights MNCs ought to have when bringing constitutional claims.

MNCs are only artificial persons in law and giving them fundamental rights would be uniquely unfair to individuals whose rights are derived from a tradition of limiting agglomerative (government) power against the individual. MNCs operate very much like governments in terms of scale, but their specificity of purpose and the capitalist system of monetary imbalance undergirding them allows them to retain enormous, well-targeted resources that nations, particularly developing ones, cannot match. Moreover, allowing corporations as artificial persons to gain rights would mean that the few people within them, such as employees, directors, and shareholders, would have *double* rights both as individuals and through the embodiment of the corporation of which they are a part. This creates a particularly difficult human environment, because there is always a tension between the core values of corporations and those of citizens, whose citizenship follows a far less hierarchical mode of organization. A particularly thorny element of MNCs as opposed to nations is how they operate across different geographic locations and always act in a collective self-interest that is geared towards protecting the corporation at the expense of any national or civic duties.

[120] E Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society' (1998) 20 MJIL 1.