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Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws

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Tobacco companies are pushing back against a worldwide rise in antismoking laws, using a little-noticed legal strategy to delay or block regulation. The industry is warning countries that their tobacco laws violate an expanding web of trade and investment treaties, raising the prospect of costly, prolonged legal battles, health advocates and officials said.

The strategy has gained momentum in recent years as smoking rates in rich countries have fallen and tobacco companies have sought to maintain access to fast-growing markets in developing countries. Industry officials say that there are only a few cases of active litigation, and that giving a legal opinion to governments is routine for major players whose interests will be affected.

But tobacco opponents say the strategy is intimidating low- and middle-income countries from tackling one of the gravest health threats facing them: smoking. They also say the legal tactics are undermining the world's largest global public health treaty, the W.H.O. Framework Convention on Tobacco Control, which aims to reduce smoking by encouraging limits on advertising, packaging and sale of tobacco products. More than 170 countries have signed it since it took effect in 2005.

More than five million people die annually of smoking-related causes, more than from AIDS, malaria and tuberculosis combined, according to the World Health Organization.

Alarmed about rising smoking rates among young women, Namibia, in southern Africa, passed a tobacco control law in 2010 but quickly found itself bombarded with stern warnings from the tobacco industry that the new statute violated the country's obligations under trade treaties.

"We have bundles and bundles of letters from them," said Namibia's health minister, Dr. Richard Kamwi.

Three years later, the government, fearful of a punishingly expensive legal battle, has yet to carry out a single major provision of the law, like limiting advertising or placing large health warnings on cigarette packaging.

The issue is particularly urgent now as the United States completes talks on a major new trade treaty with 11 Pacific Rim countries that aims to be a model for the rules of international commerce. Administration officials say they want the new treaty to raise standards for public health. They single out tobacco as a health concern, wording that upset the U. S. Chamber of Commerce, which said that the inclusion would leave the door open for other products, like soda or sugar, to be heavily regulated in other countries.

“Our goal in this agreement is to protect the legitimate health regulations that treaty countries want to pursue from efforts by tobacco companies to undermine them,” said Michael Froman, the United States trade representative, in a telephone interview. The language is not yet final, he said.

But public health advocates say the current wording would not stop countries from being sued when they adopt strong tobacco control measures, though some trade experts said it might make the companies less likely to win. This fall, more than 50 members of the House and about a dozen members of the Senate sent letters to the administration expressing concern.

Tobacco consumption more than doubled in the developing world from 1970 to 2000, according to the United Nations. Much of the increase was in China, but there has also been substantial growth in Africa, where smoking rates have traditionally been low. More than three-quarters of the world's smokers now live in the developing world.

Dr. Margaret Chan, director general of the W.H.O., said in a speech last year that legal actions against Uruguay, Norway and Australia were “deliberately designed to instill fear” in countries trying to reduce smoking.

“The wolf is no longer in sheep's clothing, and its teeth are bared,” she said.

Tobacco companies are objecting to laws in both developed and developing nations. Industry officials say they respect countries' efforts to protect public health, but face difficulties promoting their brands as more countries ban cigarette ads. Often, the only space left is the packaging, and even that is shrinking, with some countries requiring that packages be plastered with shocking pictures of people with cancer; in Australia, brand names are reduced to uniform block letters on drab olive backgrounds.

“Removing our trademarks removes our assurance to customers of the origin and quality of our lawfully available products, meaning they and their characteristics become indistinguishable from those of our competitors," said Gareth Cooper, group head of regulation at British American Tobacco.

In the early 1990s, the American government used to pressure countries to open their markets to American tobacco companies. As smoking rates in some of these countries rose, outrage grew, and President Bill Clinton issued an executive order in 2001 that banned the United States government from lobbying on the industry's behalf.

But other types of trade agreements have emerged that give companies rights.

Such treaties are intended to promote prosperity by reducing trade barriers and protecting investors from expropriation by foreign governments. They allow companies to sue directly, instead of having to persuade a state to take up their case. They have proliferated since the 1990s, and number around 3,000, up from a few hundred in the late 1980s, according to Robert Stumberg, a law professor at the Harrison Institute for Public Law at Georgetown University, whose clients include antismoking groups.

In Africa, at least four countries — Namibia, Gabon, Togo and Uganda — have received warnings from the tobacco industry that their laws run afoul of international treaties, said Patricia Lambert, director of the international legal consortium at the Campaign for Tobacco Free Kids.

"They're trying to intimidate everybody," said Jonathan Liberman, director of the McCabe Center for Law and Cancer in Australia, which gives legal support to countries that have been challenged by tobacco companies. In Namibia, the tobacco industry has said that requiring large warning labels on cigarette packages violates its intellectual property rights and could fuel counterfeiting.

Mr. Cooper, of British American Tobacco, whose local affiliate sent the government a legal opinion, said in an email that countries should "consider the broader context of implementing regulations that can impact trade."

Thomas Bollyky, a trade lawyer and a fellow at the Council on Foreign Relations, said many developing countries are at a disadvantage in investment cases because they do not have the specialized legal expertise or resources to fight.

Uruguay has acknowledged that it would have had to drop its tobacco control law and settle with Philip Morris International if the foundation of the departing mayor of New York, Michael R. Bloomberg, had not paid to defend the law. (The company's net revenue last year was $77 billion, substantially more than Uruguay's gross domestic product.) Even developed countries like Canada and New Zealand have backed away from planned tobacco laws in the face of investment treaty claims, Mr. Bollyky said.

The most closely watched legal battle is playing out in Australia, where the tobacco industry lost a case in domestic courts last year. Philip Morris International has filed suit under an investment treaty between Australia and Hong Kong, where the firm has a branch. The proceedings, which are not public, will be held in Singapore and decided by outside arbitrators, not judges.

Philip Morris International has dozens of subsidiaries, allowing the company "to play the treaty game much more adroitly," Professor Stumberg said.

Companies are even paying for countries to make the industry's case against other nations in the World Trade Organization. Ukraine filed a complaint with the organization against Australia's packaging rule, even though the two countries barely trade. Mr. Cooper acknowledged that his company was helping Ukraine pay the legal bills, but said that was standard practice in W.T.O. disputes.

Bashupi Maloboka, a Health Ministry official who steered the tobacco control law to passage in Namibia, said the industry's approach had slowed what was already a plodding process.

"The fear is that they have the money and they have the resources, so they can pay for anything," said Mr. Maloboka, who retired last year.

But Dr. Kamwi, the health minister, said he hoped the regulations to put the 2010 law into practice would be finished next year. "We have decided to put our foot down," he said. "If they want to go to court, we will see them there."