# THE STATUS OF FCTC IN THE INTERPRETATION OF COMPENSABLE INDIRECT EXPROPRIATION AND THE RIGHT TO ADOPT "STRICTER" TOBACCO CONTROL MEASURES UNDER BITS

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**ABSTRACT**

*After putting into effect the WHO's Framework Convention on Tobacco Control (hereinafter "FCTC"), there is an apparent trend of countries adopting strict tobacco control measures. Tobacco companies have concern with such strict tobacco control measures and have started legal challenges against the measures. The disputes between Philip Morris and Uruguay, as well as between Philip Morris and Australia, have reminded us about the long-term unsettled issue of indirect expropriation and its relationship to a State's right to regulate under a bilateral investment treaty (hereinafter "BIT"). Drawing from investment arbitral jurisprudence, this paper seeks to explore how tobacco control measures, which are stricter than what are mandatorily required by the FCTC, could be addressed in the context of proportionality and bona fide approaches. The author argues that there are problems of applying these approaches because there could be the result that measures suggested or recommended by the FCTC and its guidelines are divided into compensable and*

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*non-compensable measures. Such results could make the FCTC stumble. The author suggests that investment arbitral tribunals should make reference to the FCTC and its related legal instruments based on the Vienna Convention on the Law of Treaties (hereinafter "VCLT"), Article 31.3(c) so as to inform the concept of a State's right to regulate tobacco products. Such an approach might help maintain the legitimacy of stricter tobacco control measures required or recommended by the FCTC under BITs, and also contribute to global health benefits.*

**KEYWORDS**: *FCTC, BIT, indirect expropriation, right to regulate, Philip Morris, stricter tobacco control measures*