LEGAL REGULATION FOR INNOVATION: A REVIEW OF NAFDAC BAN ON IMPORTATION, MANUFACTRE, DISTRIBUTION AND USE OF ALCOHOLIC BEVERAGES IN CONTAINERS OF 200ML AND BELOW*[1]

Abstract

This research focused on Legal Regulation for Innovation: a review of NAFDAC Ban on the Importation, Manufacture, Distribution, Sale and Use of Alcoholic Beverages in Sachets, Pet and Glass Bottles of 200ml and below. It has long been accepted in International Economic Law that state acts are in principle not subject to compensation when they are an expression of the police powers of the state. Expropriation of property by a government of property belonging to foreigners raises pertinent issues, such as payment of adequate compensation to the owner of the property. However, where government in expropriating the property seeks refuge under its right to make regulation in the interest of the general public (police powers doctrine) in order to avoid responsibility or liability to the foreigner, this may raise some questions. The research using the doctrinal research methodology looks into the rationale of the innovation attracting criticism by majority of the citizens and some trade bodies as being irrational and not having a human face. This paper makes way for the progressive thought that rather than perceiving regulations as stifling constraints, innovators should view them as necessary guidelines that encourage responsible growth. Ultimately, the paper suggests approaches that leads to development of products and services that not only meet consumer demands but also adhere to essential security standards.

Key Words: Regulation, Innovation, Expropriation, Police Powers doctrine.

1. Introduction

The concept of regulation for innovation investigates empirically how regulatory conditions affecting various innovation processes within and outside the country. The recent case of the National Agency for Food and Drug Administration and Control[2] ban on the importation, manufacture, distribution, sale and use of alcoholic beverages in sachets, pet and glass bottles of 200ml and Below can be viewed as a case of regulation for innovation. The NAFDAC directives falls within the police powers of the Nigeria government. This is because the police powers of the state, once non-discriminatory, and done in the interest of public health, safety, morality, the environment, etc., bears protection over acts which ordinarily could have been seen as expropriatory, and attracting compensation to the foreign investor affected by same.

The economics of regulation spans a wide variety of research questions, ranging from macro-oriented issues, such as growth, environmental and systemic effects, to microeconomic matters related to, for instance, entry, allocative efficiency, and an economy's knowledge base. The regulatory landscape is continuously changing as new processes, markets, and opportunities emerge, originating in technological processes, as

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[2] Herein referred to as NAFDAC

illustrated by digitalization, or due to political processes (example. regional integration of geographical tensions).[3]

A regulation typically refers to some constraint, often codified in law, on the behaviour of agents, which is enforced by Courts or administrative agencies. These constraints may be complemented by informal regulations, which originate in traditions and norms. Formal regulations are frequently classified according to the area of economic mechanisms that are affected, such as the product or factor markets, or entry and competition. Alternatively, regulations can be separated based on their direct and indirect effects, for example, how the overall conditions in the business environment are affected.[4]

There is consensus that regulations are necessary for a well-functioning economy, influence behavior that generates externalities, and reduce transaction costs. Yet, overly regulated economies may impede creative destruction processes and industrial dynamics, leading to fewer innovations, lower efficiency, lagging productivity, and slower growth.[5]

The challenge for the lawmaker is thus to strike the balance between these two forces. Furthermore, economic research has demonstrated that regulations often fail, are misguided, have unintended consequences, and may be the outcome of political failures. Innovations, as a dynamic phenomenon, may be impacted by these regulatory deficiencies.[6]

Reducing the regulatory burden and finding a proper regulatory mix that induces welfare-increasing effects is thus, high on the agenda of policy makers, irrespective of country. Evidently, there is wide host of regulatory tools at the policy makers disposal, ranging from *command-and-control* measures to instruments that affect the incentives and ultimately, the behavior of economic agents. An important policy area, both from a scholarly and a policy perspective, concerns the relationship between regulation and innovation. The reason is the critical role attributed to innovation in driving economic growth and generating augmented economic welfare and gains.[7]

However, regulations that influence innovation is a complex policy area embracing several fields in economics, including the market structure, entry and exit, the labour market, and more directly targeting innovation policies, such as Intellectual Property Rights[8] and public procurement, to mention a few. Regulations related openness, i.e., trade, foreign direct investments, are likely to influence innovation through their effect on knowledge flows across countries. Obviously, the regulatory set up for a multitude of policy areas that are often interconnected become decisive for economies' innovative

[3] P Braunerhjeim, ., *et al, Handbook of Innovation and Regulation: Introductory Chapter, op.cit*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] P Braunerhjeim,, *et al, op. cit*.
[8] IPRs.

and dynamic capacities. Comprehending these connections and their impact on innovation is a tedious and challenging task for policy makers.[9] Thus, NAFDAC regulatory measures is towards safeguarding the health of Nigerians, particularly the vulnerable youth, against the dangers of reckless consumption of alcohol.

2. Definition of Terms.

2.1, Regulation

Even though interest in regulatory economics has been growing, there is no consensus on how to define the concept of regulation. According to an early definition,[10] regulation refers to taxes and subsidies of all sorts as well as to explicit legislative and administrative controls over rates, entry and other facets of economic activity. More authors[11] provide a similar definition- the imposition of rules by government, backed by the use of penalties, that are intended specifically to modify the economic behaviour of individuals and firms in the private sector. More recently, Organisation for economic Co-Operation and Development[12] defines regulations as "imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector."

2.2, Innovation

Following standard approaches, *innovation* is defined as the introduction of new processes, products or services, management methods, and methods to bring products to customers in market and non-market environments.[13] As far as the definition of *innovation* is concerned, an obvious point of departure is the widely implemented version presented in the Oslo Manual, last revised in 2018 (OECD, 2018) thus: "An innovation is a new or improved product or process (or combination thereof) that differs significantly from the unit's previous products or processes and that has been made available to potential users (products) or brought into use by the unit (process)".[14] The definition uses the generic term *unit* to describe all actors responsible for innovations and not only firms.

2.3, Expropriation

Expropriation or "wealth deprivation" could take different forms: it could be direct where an investment is nationalised or otherwise directly expropriated through formal

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[9] *Ibid.*

[10] R A Posner., *Theories of Economic Regulation*, Bell Journal of Economics, 1974, <chicagounbound.uchicago.edu.com> Accessed on 4/6/2024.

[11] Braunerhjeim, P., *et al, Handbook of Innovation and Regulation: Introductory Chapter*, Elgaonline, 2023, <elgaronline.com> Accessed on 4/6/2024.

[12] Herein referred to as OECD (2021a)

[13] J M Bauer, and Shim, W., *Regulation and Digital Innovation: Theory and Evidence*, Michigan, 2012, 2.

[14] OECD, Oslo Manual, 2018, OECD, < https://www.oecd.org/science/oslo-manual-2018-9789264304604-en.htm> Accessed 20/6/2024

transfer of title or outright physical seizure. In addition to the term expropriation, terms such as "dispossession", "taking", "deprivation" or "privation" are also used. International law is clear that a seizure of legal title of property constitutes a compensable expropriation.[15]

Expropriation or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalisation and are generally termed "indirect", "creeping", or "de facto".[16] Expropriation, or measures "tantamount" to expropriation.

2.4, Police Power Doctrine

According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as:

(a) forfeiture or a fine to punish or suppress crime;

(b) seizure of property by way of taxation;

(c) legislation restricting the use of property, including planning, environment, safety, health and then concomitant restrictions to property rights; and

(d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[17]

For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations.

2. The NAFDAC Ban

The National Agency for Food and Drug Administration and Control (NAFDAC) was established by Act Cap N1 Laws of the Federation of Nigeria 2014 to regulate and control the manufacture, importation, exportation, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devises, bottled water, detergent and chemicals (referred to as regulated products).

NAFDAC in January, 2022 stopped the registration of alcoholic beverages in sachet and small volume PET and Glass bottles below 200ml.[18]This decision was based on the

15 *Ibid*

16 *Ibid*

17 *Ibid.*

recommendation of a high powered committee of the Federal Ministry of Health and NAFDAC on one hand, the Federal Competition and Consumer Protection Commission (FCCPC), and the Industry represented by the Association of Food, Beverages and Tobacco Employers (AFBTE), Distillers and Blenders Association of Nigeria (DIBAN), in December 2018.

As commitment to the decision reached at the end of this Committee meeting, producers of alcohol in sachets and small volume agreed to reduce the production by 5 percent with effect from 31st January 2022 while ensuring the product is completely phased out in the country by 31st January 2024.

On the part of the Agency, NAFDAC is committed to ensure that the validity of renewal of already registered alcoholic products in the affected category does not exceed the year 2024.[19]

The people who are mostly at risk of the negative effect of consumption of the banned pack sizes of alcoholic beverages are the under-aged and commercial vehicle drivers and riders. The World Health Organization has established that children who drink alcohol are more likely to: use drugs, get bad grades, suffer injury or death, engage in risky sexual activity, make bad decisions and have health problems. The World Health Organization also stated that harmful consumption of alcohol is linked to more than 200 health conditions including infectious diseases (tuberculosis and HIV/AIDS) and non-communicable conditions (liver cirrhosis and different types of cancer). it also associated with social problems such as alcohol addiction and gender-based violence.[20]

To curb the menace of abuse of alcohol the World Health Organization recommended some actions and strategies to Policy -Makers that have shown to be effective and cost effective, which includes: regulating the marketing of alcoholic beverages **(**in particular to younger people), and regulating and restricting the availability of alcohol. Alcoholic drinks in sachets, PET and Glass bottles are pocket-friendly and can easily be carried around, by the under-aged (including primary and secondary school children) without notice. It is easily affordable and comes handy for commercial bus drivers, keke riders, okada riders, amongst others who after taking them constitutes nuisance to the society.

The negative impact of the harmful consumption of alcohol which is occasioned by its being economical, easily accessible and miniature in nature, prompted NAFDAC to take the bold step of banning it, in order to save our children and to protect the health of the larger society. The decision was therefore, part of Government policy of banning the

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18 National Agency for Food and Drug Administration and Control (NAFDAC), 'Enforcement Activities to Enforce Ban On Production Of Alcoholic Beverages in Small Pack Volumes Of 200ml and Sachets'<,https://www.nafdac.gov.ng/enforcement-activities-to-enforce-ban-on-production-of-alcoholic-beverages-in-small-pack-volumes-of-200ml-and-sachets/> accessed on 13/02/2024.

19 *Ibid.*

20 *Ibid.*

importation, manufacture, distribution, sale and use of alcoholic beverages in sachets, PET and Glass bottles of 200ml and below. NAFDAC has started enforcement actions to enforce the implementation of this policy. The window period given to manufacturers by NAFDAC to sell off all alcoholic drinks in this category elapsed on the 31st January 2024.[21]

To this end on the first day, after the elapse of the window period, the Agency commenced nationwide enforcement actions on the 1st February 2024 to enforce the implementation of the new policy. The manufacturers and printers of labels and packaging materials were the initial targets.

4.Reasons For the Regulations

It has been argued as follows:

> **A**lthough the legal drinking age in the country is 18, alcohol abuse is commonplace among many underage boys and girls in the country, who easily purchase sachet alcohol for as low as N100 in Nigeria currency. This is beyond business; it is a social menace with frightening implications. The police should support NAFDAC to clamp down on garages, kiosks, shops, and makeshift spaces, where sachet alcohol and other harmful substances are being sold. Only compliant bars should be allowed to sell alcohol to adults.[22]

A 2019 report by scientific journal BMC Public Health, while referring to the 2014 Global Status Report on alcohol and health by WHO revealed that Nigeria ranked 27th globally in respect of adult alcohol drinking (age 15+) in litres per year. This made it one of the leading African countries in alcohol consumption. It stated that episodic heavy drinking of alcohol caused liver cirrhosis, cancer, high vehicular fatalities, and trauma to family members due to medical bills, among others. The WHO links reckless alcoholism to more than 200 health conditions, including tuberculosis and HIV/AIDS.[23]

Also, pet bottles and sachet alcohol are produced with single-use plastics and nylon, which contribute to the scourge of unrecyclable waste in the country. This constitutes environmental nuisance by clogging drainage. It breaks down into micro-plastics in the

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21 Punch Newspaper,' NAFDAC begins enforcement of ban on alcoholic drinks in sachets' <https://punchng.com/nafdac-begins-enforcement-of-ban-on-alcoholic-drinks-in-sachets/ > Accessed 11/2/2024.

22 Puch Newspaper, 'NAFDAC's Bold Ban on Sachet-Alcoholic Drinks' <https://punchng.com/nafdacs-bold-ban-on-sachet-alcoholic-drinks/> Accessed on 11/2/2023

23 *Ibid.*

water systems, thereby affecting flora, fauna, fish, and human lives. To save the day, Lagos and Abia states have banned the use of single-use plastics.[24]

Studies show that sachet alcoholic beverages are prevalent in low-income African and some Asian countries. But in Europe and America, strict regulations have restricted the availability of alcohol in cans and bottles.[25]

The clampdown is long overdue. Drunk drivers have caused avoidable deaths and injuries. Criminals have been buoyed by it to cause havoc. The Lagos State Government, which has banned the sale of alcohol at its motor parks, should revive the enforcement and other states should sanitise their parks.

Despite the reasons adduced, it has been argued by some critics that rather than embark on outright ban, that government should work together with stakeholders and embark on advocacy initiatives to advise the public on the dangers of over consumption and underage drinking.[26] On this note concerned Nigerians in their hundreds under the auspices of the Food Beverage and Tobacco Senior Staff Association and National Union of Food Beverages and Tobacco Employee NUFBTE held protests in Lagos calling on the Federal Government to save over 500,000 Nigerians who would face job loss as a result of the phase out of production, sale and consumption of alcohol in sachets and polyethylene terephthalate (PET) bottles.[27] The associations complained that this new policy would further pile more problems on the Nigerian economy as it may lead to the eventual shut down of the industries producing these products.[28] They further added that many companies will fold up, especially those local industries that serve as raw materials to the producers.

5.Police Powers Doctrine

According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as:

(a) forfeiture or a fine to punish or suppress crime;

(b) seizure of property by way of taxation;

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24 *Ibid.*

25 *Ibid.*

26 Premium Times Newspaper, 'NAFDAC Ban on Alcoholic Drinks in Sachet and Pet Bottles: 500,000 Workers set to lose Jobs', <https://www.premiumtimesng.com/promoted/665934-nafdac-ban-on-alcoholic-drinks-in-sachet-and-pet-bottles-500000-workers-set-to-lose-jobs.html>

27 *ibid*

28 *Ibid.*

(c) legislation restricting the use of property, including planning, environment, safety, health and then concomitant restrictions to property rights; and

(d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[29]

For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations.

In present times, the police powers must be understood as encompassing a State's full regulatory dimension. Modern States go well beyond the fundamental functions of custody, security and protection. They intervene in the economy through regulation in a variety of ways: preventing and prosecuting monopolistic and anticompetitive practices; protecting the rights of consumers; implementing control regimes through licences, concessions, registers, permits and authorizations; protecting the environment and public health; regulating the conduct of corporations; and others.[30] An exercise of police powers by a State may manifest itself in adopting new regulations or enforcing existing regulations in relation to a particular investor.

Extensive State practice as well as arbitral awards and academic literature all acknowledge the right of States to engage in regulatory activity, which should not be undermined or restricted by investment treaties. The regulatory conduct of States must carry a presumption of validity as it is an essential element of the permanent sovereignty of each State over its economy. It has been stated that:

> State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.[31]

It has always been recognized that ordinary measures of taxation, or the imposition of criminal penalties or export controls do not constitute taking that is compensable. Legislation creating regulatory regimes in areas such as antitrust, consumer protection, securities, environmental protection, planning and land use are more common in developed States. It is well recognized that interference on the basis of such legislation does not constitute compensable taking in situations in which public harm has already

29 *Ibid.*

30 *Ibid.*

31 I Brownlie., *Principles of Public International Law*, 7th edition, Oxford, Oxford University Press. 2008, 532.

resulted or is anticipated. These regulatory takings are regarded as essential to the efficient functioning of the State. Regulatory functions are a matter of sovereign right of the host State and there could be no right in international law to compensation or diplomatic protection in respect of such interference.[32]International authorities have regularly concluded that no right to compensate arises for reasonable necessary regulations passed for the protection of public health, safety, morals or welfare.[33]

As regards State practice, in the context of the negotiations on the draft Multilateral Agreement on Investment (MAI), the OECD Ministers issued the following Statement:

> Ministers confirm that the MAI must be consistent with the sovereign responsibility of governments to conduct domestic policies. The MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.[34]

The Article on Expropriation and Compensation is intended to incorporate into the MAI existing international legal norms. The reference to 'measures tantamount to expropriation or nationalization does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.[35]

Police powers doctrine is the right of States to regulate its political, economic and social affairs and adopt laws to protect matters of public interest.[36] The right is well accepted in international law, as a variety of decisions of investment tribunals reveal.[37] The word 'police' in this context refers to 'policy' or 'polity'.[38] The references to 'police' used in

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32 M Sornarajah, *The International Law on Foreign Investment, (*2nd edition, Cambridge, Cambridge University Press, (2004), 357.

33 A Newcombe, 'The boundaries of regulatory expropriation in international law', *ICSID Review: Foreign Investment Law Journal*, 2005, 20(1):1–57.

34 Ministerial Statement on the Multilateral Agreement on Investment, 28 April 1998, para. 5.

35 Interpretative note to *Article 5* of the draft MAI "Expropriation and Compensation.

36 Fortier and Drymer (n 21) 298; Viñuales, 'Sovereignty in Foreign Investment Law' (n 7) 326–329.

37 Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14, [233]; *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59]; *Joseph Charles Lemire v Ukraine*, ICSID Case No.ARB/06/18, 14 January 2010, 505; Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14, [233].

38 Santiago Legarre, 'The Historical Background of the Police Power' (2006) 9 University of Pennsylvania Journal of Constitutional Law 745, 761.

this context originated from Greek ('politeia') and were used in France in the late fifteenth century,[39] where 'police' was a reference to public administration or

'institutional means and procedures necessary to secure peaceful and orderly existence for the population of the land'.[40] The expression 'police power' came to be widely used in the eighteenth century to describe the regulatory power vested in the ruler. For instance, lecturing between 1762 and 1764, Adam Smith observed that the power of police signified, among other things, government regulation to ensure 'the opulence of the state'.[41] In 1781, Jeremy Bentham similarly noted that the concept of police was incapable of a single definition but was interlinked with the idea of justice, as both had the same object of 'maintaining the internal peace of the state'.[42]

In his Commentaries on the Laws of England, Sir William Blackstone uses the expression 'police' alongside economy'[43] to connote the sovereign's prerogative to regulate domestic policy,[44] in a similar manner to the way in which a master manages his household. Blackstone also uses the expression in a criminal law context when referring to 'crimes against the public police and economy', by which he meant crimes against public order and 'the due regulation and domestic order of the kingdom'.[45]

The Swiss jurist Emmerich de Vattel also spoke of 'police',[46] describing the word as a reference to:

> …the attention of the prince and magistrates to preserve everything in order. Wise regulations ought to prescribe whatever will best contribute to the public safety, utility and convenience, and those who have the authority in their hands, cannot be too attentive to their being observed. By a wise polity, the sovereign accustoms the people to order and

39 Martin Loughlin, Foundations of Public Law (Oxford University Press 2010) 423; Markus Dirk Dubber, Police Power: Patriarchy and the Foundations of American Government (Columbia University Press 2005).1

40 Marc Raeff, The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600-1800 (Yale University Press 1983) 5.

41 Adam Smith, *Lectures on Jurisprudence* (RL Meek ed, Clarendon Press 1978) 6.

42 Jeremy Bentham, Theory of Legislation (Etienne Dumont and Richard Hildreth trs, 2nd ed., Trübner & Co 1871) 242;

43 A term also used by Jean Jacques Rousseau to describe 'the only wise and lawful government of a household for the common good of the whole family' which 'extended to cover the government of the greater family, which is the state': Jean-Jacques Rousseau, Discourse on Political Economy and the Social Contract (Oxford University Press 1994) 34.

44 William Blackstone, *Commentaries on the Laws of England*, vol 1 (First Edition, Clarendon Press 1765 - 1769) 264.

45 William Blackstone, *Commentaries on the Laws of England*, vol 4 (First Edition, Clarendon Press 1765 - 1769) 162.

46 Some English translations of Vattel refer to 'polity' instead of 'police': see J Brown Scott (ed), The Classics of International Law (Oxford University Press 1916); Legarre (n 28) 754.

obedience, and preserves peace, tranquillity and concord among the citizens…[47]

This articulation of 'police power' as meaning that States have 'the inherent legal authority to regulate' is common to all legal systems. For instance, Blackstone and Vattel's articulation of police powers was influential on the development of United States ('US') law.[48]

The police power is also found in the constitutional law of several European States, such as Norway, where the Norwegian Constitution allows the King to 'issue and repeal ordinances relating to commerce, customs, all livelihoods and the police'.[49] Further, there are numerous examples in domestic law that acknowledge the regulatory power of the State, using different language to 'police powers' but articulating the same idea. For instance, Constitutions of many Commonwealth countries formerly within the British Empire contain provisions giving the government the power to legislate or regulate to ensure 'peace, order and good government'.[50] The phrase expresses the conferral of legislative authority or competence on colonies.[51] The Judicial Committee of the Privy Council described the words 'peace, order and good government' as 'connoting, in British constitutional language, the widest law-making powers appropriate to a Sovereign'.[52] This description of the broad law-making sovereign power articulated by the Privy Council reminds how Chief Justice Taney of the US Supreme Court described the police power as 'the power to govern men and things within the limits of its dominion'.[53]

In Nigeria, the idea of police powers can, from the above, be seen to be captured in the Constitution of the Federal Republic of Nigeria 1999 (as amended), when it provides that the government through its legislature 'shall have power to make laws for the peace,

[47] Emmerich de Vattel, 'Police' <https://www.britannica.com/biography/Emmerich-de-Vattel > Accesed on 24/9/2023.

[48] Thomas McIntyre Cooley and Victor Hugo Lane, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (Little, Brown 1903) 829; Ernst Freund, The Police Power: Public Policy and Constitutional Rights (Callghan & Company 1904) 2; Christopher Gustavus Tiedeman, A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint (FHThomas Law Book Co 1886) 2.

[49] Constitution of the Kingdom of Norway, art 17. 'Police' in this context connotes 'policy': see Mads Tønnesson Andenæs and Ingeborg Wilberg, The Constitution of Norway: A Commentary (Universitetsforlaget 1987).

[50] See, for example, Commonwealth of Australia Constitution Act 1900 (Cth), ss 51 and 52 (Australia); Constitution Act1867, s 91 (Canada); Constitution of the Federal Republic of Nigeria 1999, s 4(2) (Nigeria). See also Hakeem O Yusuf, Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government (Routledge 2014); Maria Valverde, ''Peace, Order and Good Government, Policelike Powers in Postcolonial Perspective' in Markus D Dubber and Mariana Valverde (eds), The New Police Science: The Police Power in Domestic and International Governance (Stanford University Press 2006) 73.

[51] Yusuf, *op.cit.*

[52] *Ibralebbe v The Queen* (1964) AC 900 at 923; *R (Bancoult) v Foreign Secretary* (2009) 1 AC 453, 504.

[53] License Cases, 46 US (5 Howard) 504, 583 (1847).

order and good government of the Federation or any part thereof with respect to any matter…'[54]

One essential fact to note about police power is that it is not absolute.[55] Reference is often made to the 'legitimate'[56], 'valid'[57] or 'normal'[58] exercise of police power. In other words, the exercise of the power must be seen to be legitimate before it can be excused or justified, notwithstanding its impact on the investment of foreign investors. The question that then arises is, how is the legitimacy of the exercise of police powers of the State determined? Are there laid down rules for establishing that a particular government's exercise of police powers is legitimate or valid for the purpose of exonerating the government from liability to a foreign investor affected by the exercise of the police powers.

6.Expropriation Of Foreign Property

International law allows governments to expropriate properties owned by foreign entities within its domestic territory as long as the following conditions are satisfied:

- The property must be seized for the public benefit.
- The seizure must be non- discriminatory
- The accounts of the State must be in keeping with international norms for dealing with foreign individuals and properties.
- The State must offer fair compensation.

Expropriation of foreign property is of two types:

a) Direct Expropriation

This occurs when there is a legal transfer of title of the property. Along with the property, the foreign owners also give up any returns that might have been expected from their investment in the property. The domestic government assumes both ownership of the property, as well as the right to employ it commercially. The foreign investor must be paid a compensation equivalent to the true market value of the investment.

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[54] Constitution of the Federal Republic of Nigeria 1999 (as amended).s. 4.

[55] Saluka Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006, [258]; ADC Affiliate Ltd. and
ADC & ADMC Management Ltd. v Republic of Hungary, ICSID Case No.ARB/03/16, Award, 2 October 2006, [423]; Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012, [529].

[56] Les Laboratoires Servier v Republic of Poland, UNCITRAL, Award, 14 February 2012, [584]; James Crawford,
Brownlie's Principles of Public International Law (Oxford University Press 2012) 624.

[57] Chemtura Corporation v Canada, UNCITRAL, Award, 2 August 2010, [266].

[58] Saluka Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006, [256]; Convention Establishing
the Multilateral Guarantee Agency (MIGA) (opened for signature 11 October 1985) 1508 UNTS 90, Article 11(a)(ii); Jan Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2006) 3 Transnational Dispute Management 12.

b) Indirect Expropriation

Here, the foreign investor retains the title to the property but forgoes the right to earn any returns from the investment. The domestic government does not seize the property absolutely but acquires the right to keep any earnings arising out of commercialization of the property.

Unlike its direct counterpart, indirect expropriation is not considered unlawful if the State does not offer any compensation to the foreign investor. It is because sometimes indirect expropriation is not even considered as expropriation. Since there is no legal transfer of title, the State can refuse to acknowledge such restrictions on the foreign investor as expropriatory in nature.[59]

7. Legal Basis for the Regulation

The Legal basis of NAFDAC regulation on the importation, manufacture, distribution, sale and use of alcoholic beverages in sachets, pet and glass bottles of 200ml and below has generated controversy and consequent debate,

In *Chemtura v Canada*[60], a manufacturer of a lindane-based pesticide challenged the ban on lindane introduced by Canada. The tribunal found in addition to the fact that the measures did not amount to a substantial deprivation of the claimant's investment, that: "The relevant State agency took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.''[61]

Investor-State arbitration tribunals appear to be alive to these concerns. On 8 July 2016, a tribunal constituted by Professor Piero Bernardini, Mr Gary Born and Judge James Crawford convened pursuant to the Switzerland-Uruguay Bilateral Investment Treaty ('BIT') delivered an award[62] in the case of *Philip Morris v Uruguay*[63] which, by majority, upheld the legality of two tobacco-control measures enacted by the Uruguayan government for the purpose of protecting public health. The award contains an extensive analysis of the interaction between States' regulatory powers to enact laws in the public interest and States' obligations to protect and promote foreign investment within their territory.

In the above case, the company who were the claimants challenged two legislative measures by the Uruguayan government, to wit, one prohibiting different packaging or

[59] The investor can file a lawsuit for the same in a court of law, which will need to identify the situation as an expropriation. Even if the investor wins the case, the amount of compensation is not defined by the market value of the property.

[60] Ita Law, 'Chemtura Corporation (Formerly Crompto Corporation) v Government of Canada, PCA Case No. 2008-01' < https://www.italaw.com/cases/249> accessed on 20/6/2024.

[61] *Chemtura v Canada*, Award, 2 August 2010, para. 266.

[62] *Ibid.*

[63] ICSID Case No. ARB/10/7.

variants of cigarettes, and mandating that cigarettes be presented in a single packaging, and another one mandating the increase in size of the health warning on cigarette packs. The arbitral tribunal unanimously rejected the claim on the basis that the government's measures could not be said to be expropriatory since it was within their rights to enact *bona fide*, non-discriminatory measures for the protection of public welfare (including public health). The tribunal considered that the measures were *bona fide*, for the purpose of protecting the public health, were non-discriminatory and were proportionate to the objective pursued. The tribunal also noted that the measure did not deprive the claimants of their investment.[64]

One of the first cases to distinguish the non-compensable police power measure from indirect expropriation was the *Too v. USA* award, in which the tribunal stated:

> A State is not responsible for loss of Property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price (…)

One more recent award to have applied the distinction is the *Methanex v USA* case under NAFTA. The issue was a measure prohibiting the use of a petrol additive considered carcinogenic. In this case, the tribunal rejected the definition of indirect expropriation on the grounds that it was a bona fide general regulation designed to serve a public interest, on a non-discriminatory basis: "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable ..."[65] It thus, concluded that "from the standpoint of international law, the California ban was a lawful regulation and not an expropriation."[66] Such measures cannot therefore be considered indirect expropriations, regardless of any adverse effects on the investment.

At this point, it is worthy of note to mention that some investment tribunals in deciding Investor-State disputes, have applied the other doctrines earlier mentioned above, and from conclusions arrived at on the basis of the applications of those doctrines, have upheld government's obligation to pay compensation, not minding the validity or legitimacy of the exercise of the government's police powers. According to the Hull formula, 'under every rule of law and equity, no government is entitled to expropriate

[64] *Ibid.*

[65] *Methanex v USA*, award of August 9, 2005, Part IV, Ch. D, para. 7 <http://italaw.com> accessed 1 June 2023.

[66] *Methanex, Op. cit.* Part IV, Ch. D, para. 15.

private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor'.[67] The significance of the specification 'for whatever

purpose' lies in its affinity with the sole effect doctrine and its rejection of the police powers' doctrine which 'excuses' state conduct when taken to promote certain public policy objectives.[68]

A case that so well demonstrates the reasoning of the sole effect doctrine that some investment tribunals have applied is the *Metalclad v. Mexico* case where the tribunal decided that 'expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State'.[69]

As a matter of fact, the proportionality test was employed in the *Philip Morris v Uruguay* and *the Biloune v Ghana*[70] cases, and on the basis of that doctrine, the state's police powers doctrine was defeated in those cases. A plethora of decisions reveal that tribunals have a preference towards placing the police powers doctrine on a scale with the proportionality doctrine, and the circumstances of each case will determine which of the doctrines the tribunal would uphold above the other. Modern trend however, suggests that the proportionality doctrine is being increasingly upheld at the expense of police power claims by governments. Also, the sole effect doctrine and the Hull formula have been applied in several cases by tribunals in their rejection of claims of police powers by States.

In line with *Philip Morris v Uruguay* and similar cases decided on the police powers doctrine and on the state *bona fide* right to regulate, it is submitted that NAFDAC regulatory measures on the importation, manufacture, distribution, sale and use of alcoholic beverages in sachets, pet and glass bottles of 200ml and below did not amount to a substantial deprivation of the affected companies' investment. NAFDAC as government regulatory agency (Nigeria) took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by such alcoholic beverages for human health in issuing the regulatory measures. The measure, to say the least contains an extensive analysis of the interaction between states' regulatory powers to make regulations in the public interest and states' obligations to protect public security and public health.

[67] F Andreas . Lowenfeld; *International Economic Law* (2nd edition, OUP 2008) 478.

[68] Catharine Titi in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds) *General Principles of Law and International*
Investment Arbitration op.cit

[69] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103.

[70] Awards of 27 October, 1989 and 30th June, 1990.

8.Conclusion

From the standpoint of international law, NAFDAC ban on the importation, manufacture, distribution, sale and use of alcoholic beverages in sachets, pet and glass bottles of 200ml and below was a lawful regulation and not an expropriation. Such measures cannot, therefore be considered indirect expropriations, regardless of any adverse effects on the investment. NAFDAC is on a solid footing, given the gross societal and environmental damage being caused by the manufacturing and proliferation of pouch-sized alcoholic drinks. The ban is urgent because it abets under-age children, commercial vehicle drivers, and riders to abuse alcohol recklessly. This action cannot be viewed as expropriating the investors interest. It is only a step to safe guard the health of the citizens that merely restricted the aspect of the investors' production but not a total expropriation of their investment. It cannot be viewed as regulation of innovation but rather regulation for innovation. The critics should, therefore, look beyond the pecuniary gains they make from the business. Despite opposition from some sections of Nigeria, the regulator, (NAFDAC) must be resolute in its enforcement. Strict enforcement should be implemented to rid the streets, kiosks, marketplaces, parks, and garages of sachet and pet-bottle alcoholic drinks.