

Regulations for Innovations in International Economic Law: Challenges and Prospects

Onyema Ogadinma Otitodiri*

Abstract

The research examined the challenges and prospects of regulations for innovations in International Economic Law. In particularity, it underscored the relevance of the police power doctrine in modern international economic relations. The police powers doctrine is a regulatory measure in customary international law principle which acknowledges that states have the power to enact public interest regulations without incurring an obligation to compensate the investors the measure may affect. This lack of compensation is made not minding the deprivation of the proprietary rights and the effect the measure will cause on the investor. It also considered various regulations that govern global financial activities, including the international institutions' responsibility to ensure stability in the world economy and emerging innovations in the global economic landscape. The research found that little is known about police powers doctrine and that confusion exists as to its roots, scope and possible applications in contemporary times. The research also observed that certain governmental regulatory policies/ measures are lawful regulations and not an expropriation, as they cannot be considered indirect expropriation regardless of any adverse effects on the proprietary rights of the investors. However, for the purposes of promotion of foreign investment, there should be a balanced relationship between regulatory measures *vis-a-vis* the proprietary interest of the investor. The research adopted the doctrinal method of academic research which comprised both primary and secondary sources and finally concluded that government regulation, with particularity to police powers doctrine, is needful and consequently advocated for a uniform treaty that will regulate the doctrine.

Key words: Regulation, Innovation, Police Powers Doctrine.

INTRODUCTION

Regulatory expropriation is a subcategory of indirect expropriation, not defined as such in investment treaties. It occurs when host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investment but without actually changing or cancelling investor's legal title to their assets or diminishing their control over them.¹ Expropriation of property which is the taking over of private property or assets by the government for compensation is always done against the owners wishes.² When a just and adequate compensation is lacking, expropriation impacts negatively on the property owner(s) and most times attracts criticisms from the public for whose interest the expropriation was carried out in the first place.

In early 2000s, investment treaties introduced definitions of indirect expropriation, as well as carve-outs and explanatory notes, exempting certain regulatory measures from its scope.³ The definition covers measures having an effect equivalent to direct expropriation, which substantially deprive the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. In order to ensure greater certainty of the legal content of the expropriation provisions, the carve-outs and explanatory notes address various elements that arbitral tribunals should consider to ascertain regulatory measures that are potentially expropriatory. Some treaties cover rather specific sectors, for example the Australia-Hong Kong Investment Agreement 2019 provides specific guidance regarding regulatory measures aimed to protect public health.⁴

* **ASOOC. PROF. ONYEMA OGADINMA OTITODIRI**, Research Fellow, Queen Elizabeth Scholars, Open Africa Innovation Research Network (Open AIR), University of Ottawa, Ontario, Canada; Senior Lecturer, Faculty of Law, Imo State University, Owerri, Imo State, Nigeria. Email: oonyema@uottawa.ca, otitodirionyema@imsuonline.edu.ng, otitodirionyema@gmail.com

¹ Jus Mundi, 'Regulatory Expropriation', <<https://jusmundi.com/en/document/publication/en-regulatory-expropriation>> accessed 16/3/2025,

² Anjaneyulu 'Expropriation', <www.cleartax.com> Accessed on 13th June, 2024.

³ Jus Mundi, 'Regulatory Expropriation', *op.cit.*

⁴ *Ibid.*

Governments across the world, exist to protect the general well-being of their people,⁵ Even despotic governments have always hinged their authority within the planks of acting on behalf of the people. It is this power that gives them the authority to regulate economic activities within their jurisdictions. In the area of the economy, the role of government to challenge every man's activity within his domain was initially challenged by Adam Smith in his 'Invisible Hand Theory' as a cornerstone concept in economics, specifically within the framework of Classical Economics. Adam Smith, in his book "The Wealth of Nations", published in 1776 challenged government involvement in business. The theory revolves around the idea that an individual's pursuit of self-interest ultimately leads to the betterment of society as a whole.⁶ This is without any control or intervention by the government. In 1929 the world economy went into a 'great depression' as a result of the lack of government control, however, another economist of British origin, John Maynard Keynes espoused the theory that broadly states that government intervention is needed to help economies emerge out of recession,⁷ thus Keynesian Economic Theory opened the floodgate of assortments of government regulations and control.

Therefore, this research will approach the issues of regulations and innovations from two different perspectives to wit: expropriation by a government of property belonging to foreigners using the police power doctrine and regulations made by international global institutions to promote fair trade, economic growth, and financial stability in line with the new international economic order.

REGULATION AND INNOVATION

Regulation simply means a rule or directive made and maintained by an authority. It also means the act of controlling something.⁸ **Regulation** is a rule or order issued by an authority or regulatory agency of a government and having the force of law.⁹ Regulations are rules made by a government or other authority in order to control the way something is done or the way people behave. A regulation is a constraint often codified in law on the behaviour of agents, which the court or administrative agencies enforce.

On the other hand, innovation means a new idea or method.¹⁰ Innovation is a process of applying methods that allow new ideals to grow, is a way of taking forward action and developing growth opportunities, it is way of challenging the status quo. 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.

⁵ See sections 4 and 14 (2)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), hereinafter referred to as 'The Constitution'.

⁶ Leo Evans, *Understanding the Invisible Hand Theory in Economics*, <<https://www.principlesofeconomics.net/classical-economics-invisible-hand-theory/>>, accessed 05/2/2025.

⁷ Tim Vipond, *Keynesian Economic Theory*, <<https://corporatefinanceinstitute.com/resources/economics/keynesian-economic-theory/>>, accessed 05/2/2025.

⁸ Cambridge Dictionary, 'Regulation', <https://dictionary.cambridge.org/dictionary/english/regulation#google_vignette> accessed 16/3/2025.

⁹ Merriam Webster, 'meaning of Regulation', <<https://www.merriam-webster.com/dictionary/regulation>>, accessed on 3/01/2025.

¹⁰ Cambridge Dictionary, 'Innovation', <<https://dictionary.cambridge.org/dictionary/english/innovation>> accessed on 16/3/2025.

Regulation and innovation go hand in hand together.¹¹ What regulation does is establish a basis for trust and predictability; that is valuable not only for the innovator but it's also absolutely critical for the user and for society.¹²

According to Onyema Otitodiri,¹³ under International Economic Law, state decisions are in principle not subject to compensation when they act in expression of police powers. This is because, in expropriating properties of nationals of other states, governments usually take refuge under their right to make regulations in the interest of the general public. In *Myers v Canada*¹⁴, the Tribunal held that the general body of precedent usually does not treat regulatory action as amounting to expropriation.

Regulation conditions firms' incentives to invest in and undertake innovation. Conceptually, there have been two opposite hypotheses about how regulation correlates positively with innovation. The less prevalent and more recently advanced view, which became known as the "Porter Hypothesis", stipulates that regulation can promote innovation. Twenty years ago, Harvard Business School economist and strategy professor, Michael Porter stood conventional wisdom about the impact of environmental regulation on business on its head by declaring that well-designed regulation could actually enhance competitiveness.¹⁵ According to the Porter hypothesis, strict [environmental regulations](#) can induce efficiency and encourage innovations that help improve commercial competitiveness. The hypothesis suggests that strict environmental regulation triggers the discovery and introduction of cleaner technologies and environmental improvements, the [innovation](#) effect, making production processes and products more efficient.¹⁶

The idea of the Porter Hypothesis is that – not all – but well-designed, stricter regulation may spur innovation through the following channels: Regulation may trigger creativity, help overcome organisational inertia or present bias, and permit differentiation between brown and dirty products.

However, the prevalent view among economists has been that regulation stifles innovation. Regulation has been coined as "red tape", "burden on business", "prone to capture" – essentially a barrier to innovation. From this perspective, regulation operates like a tax on business profits – compliance with the regulation generates costs, which reduce return to investment on innovation.

EXPROPRIATION OF PROPERTY

One major fear of every foreign investor is the stability of government and the security of investments in the investment destination. Many times, investors have suffered losses due to national policies that seek to take away their investment.¹⁷

¹¹ Imperial Tech Foresight, 'Innovation vs Regulation: Friend or Foe', < <https://imperialtechforesight.com/innovation-vs-regulation-friend-or-foe/>> accessed 16/3/2025.

¹² *Ibid*

¹³ Onyema Otitodiri Ogadinma, 'Legal Regulation For Innovation: A Review Of NAFDAC Ban On Importation, Manufacture, Distribution and use of Alcoholic Beverages in Containers of 200ml and Below', Nnamdi Azikiwe University, Journal of Private and Property law, Volume 1(1) (July 2024).

¹⁴ S.D Myers, Inc. V Canada, UNCITRAL, Partial Award, 13 November 2000, para.281

¹⁵ Stefan Ambec, Mark A. Cohen, Stewart Elgie, and Paul Lanoie, 'The Porter Hypothesis at 20: Can Environmental Regulation Enhance Innovation and Competitiveness?' <<https://media.rff.org/documents/RFF-DP-11-01.pdf>> accessed 16/3/2025.

¹⁶ *Ibid*.

¹⁷ AOC, "Expropriation of Foreign Investment in Nigeria: Legal Framework and Implications" < <https://aocsolicitors.com.ng/expropriation-of-foreign-investments-in-nigeria-legal-framework-and->

Expropriation refers to the act of a government taking privately owned property to be used for the benefit of the public.¹⁸ In the context of foreign investments, expropriation can be a significant concern for investors, as it involves the risk of losing their investments without adequate compensation.¹⁹

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. It occurs where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright physical seizure. The domestic government assumes both ownership of the property, as well as the right to employ it commercially. The foreign investor must be paid compensation equivalent to the true market value of the investment.

b) Indirect Expropriation

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.²⁰ 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 the 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 expropriation in nature.

As part of the efforts to provide an enabling environment that is conducive to the growth and development of industries; inflow of foreign direct investment (FDI); shield existing investments from unfair competition, and stimulate the expansion of domestic production capacity; Nigeria developed a package of incentives for various sectors of the economy. Consequently, the Nigerian Investment Promotion Commission Act²¹ was enacted.

This Act is the cornerstone of investment protection in Nigeria. It explicitly prohibits the nationalization or expropriation of foreign investments except for cases where it is in the national interest or for a public purpose. Nigerian Investment Promotion Commission, created pursuant to the Act, is an agency of the Federal Government of Nigeria established to encourage, promote and coordinate investments in Nigeria. *Section 25* of the NIPC Act guarantees against expropriation of foreign investments and it provides thus:

implications/#:~:text=Nigeria%20has%20established%20a%20robust,of%20investment%20protection%20in%20Nigeria.> Accessed 8/3/2025

¹⁸ *Ibid.*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Cap N117, LFN 2004. Herein referred to as NIPC

Subject to subsections (2) and (3) of this section-

(a) No enterprise shall be nationalized or expropriated by any Government of the Federation; and;

(b) No person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

(2) There shall be no acquisition of an enterprise to which this Act applies by the Federal Government, unless the acquisition is in the national interest or for a public purpose and under a law which makes provision for-

(a) Payment of fair and adequate compensation; and

(b) A right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled.

(3) Any compensation payable under this section shall be paid without undue delay, and authorisation for its repatriation in convertible currency shall where applicable, be issued

The understanding from the provisions of the NIPC Act is that it made provisions for direct expropriation and compensable indirect expropriation. However, the Act did not make provision on the non-compensable indirect expropriation which falls within the police powers doctrine.

POLICE POWER DOCTRINE

The police powers doctrine provides that a State possesses an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts bona fide, non-discriminatory and proportionate regulations in accordance with due process.²² The word police in the phrase should not be construed with the general notion of the meaning assigned to it today. Police in this context refers to policy, it is used in reference to regulation and control of a community. The concept of police powers doctrine is essentially the right of States to regulate their political, economic and social affairs and adopt laws to protect matters of public interest.

Adam Smith observed that the power of police signified, among other things, government regulation to ensure "the opulence of the state."²³ 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.²⁴ Police powers, therefore, simply mean that a sovereign state has the inherent legal authority to regulate.

INTERNATIONAL REGULATORY BODIES AND INSTITUTIONS

The field of International Economic Law cover various regulations that govern global economic activities, however, it is important to mention that their enforcement capacity in comparison with municipal regulatory bodies are weak as the debate as to whether international law is truly law is still ongoing. Therefore, below are some key regulatory bodies and their roles under IEL.

²² Jus Mundi, Police Powers Doctrine, < <https://jusmundi.com/en/document/publication/en-police-powers-doctrine#:~:text=The%20police%20powers%20doctrine%20provides>> accessed 16/3/2025.

²³ Adam Smith, *Lectures on Jurisprudence*, (RL Meek ed, Clarendon Press 1978), 6.

²⁴ Jeremy Bentham, *Theory of Legislation*, (Etienne Dumont and Richard Hildreth trs, 2nd ed., Trubner and co 1871) 242; Dubber (n29)68-69.

S/N	INSTITUTIONS/REGULATORY BODIES	ROLES
1	World Trade Organization (WTO)	The WTO oversees global trade, setting rules for trade in goods and services, intellectual property, and dispute resolution.
2.	General Agreement on Tariffs and Trade (GATT)	GATT aims to reduce tariffs and other trade barriers, promoting free trade.
3.	General Agreement on Trade in Services (GATS)*	GATS regulates international trade in services, such as finance, tourism, and telecommunications.
4	Trade-Related Aspects of Intellectual Property Rights (TRIPS)	TRIPS sets standards for intellectual property protection, including patents, copyrights, and trademarks
5.	International Investment Agreements (IIAs)	IIAs regulate foreign investment, protecting investors' rights and promoting investment flows.
6	International Monetary Fund (IMF)	The IMF promotes international monetary cooperation, exchange rate stability, and economic growth.
7.	Bank for International Settlements (BIS)	The BIS sets standards for banking supervision, risk management, and financial stability.
8	United Nations Commission on International Trade Law (UNCITRAL)	UNCITRAL develops harmonized rules for international trade, including contracts, arbitration, and insolvency
9	International Chamber of Commerce (ICC)	The ICC publishes rules and guidelines for international trade, including arbitration, mediation, and dispute resolution.
10	European Union (EU) Economic Regulations	The EU has its own set of economic regulations, including competition law, state aid rules, and financial regulation.

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INNOVATIONS IN INTERNATIONAL ECONOMIC LAW

International Economic Law (IEL) is constantly evolving, with innovations and developments emerging regularly. Here are some recent innovations:

1. Digital Trade Agreements: The Singapore-Australia Digital Economy Agreement (2020) and the US-Japan Digital Trade Agreement (2019) are examples of agreements that address digital trade issues, such as data localization and cyber-security.

2. Sustainable Investment Treaties: The EU's Sustainable Investment Treaties aim to promote environmentally friendly and socially responsible investments.
3. Green Finance Initiatives: The Green Climate Fund and the Climate Bonds Initiative promote green finance and sustainable development.
4. Blockchain-based Trade Finance: Blockchain technology is being used to enhance trade finance, making it more efficient, secure, and transparent.
5. Artificial Intelligence (AI) in International Trade: AI is being used to analyze trade data, predict trade trends, and optimize trade agreements.
6. The Belt and Road Initiative (BRI): China's BRI aims to promote economic cooperation and development among participating countries through infrastructure development and trade agreements.
7. The African Continental Free Trade Area (AfCFTA): The AfCFTA aims to create a single, unified market for African countries, promoting economic integration and development.
8. The United Nations' Sustainable Development Goals (SDGs)*: The SDGs aim to promote sustainable development and address global challenges such as poverty, inequality, and climate change.
9. The International Labour Organization's (ILO) Decent Work Agenda: The ILO's Decent Work Agenda promotes fair labour standards, social protection, and employment opportunities.
10. *The World Trade Organization's (WTO) Trade Facilitation Agreement (TFA): The TFA aims to simplify and streamline international trade procedures, reducing costs and increasing efficiency.

These innovations reflect the evolving nature of IEL, as it adapts to new challenges and opportunities in the global economy.

CHALLENGES AND PROSPECTS OF POLICE POWERS DOCTRINE.

In Nigeria, the idea of police powers is captured in the Constitution, when it provides that the government through its legislature shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter.²⁵ One essential fact to note about police power is that it is not absolute, reference is often made to the legitimate, valid or normal exercise of police power. In other words, the exercise of police powers must be seen to be legitimate before it can be excused or justified.

The area where the doctrine of police powers intersects with international Economic law is on the issue of expropriation and the liability that ought to accrue to the government where a foreign investor is affected by the same. Hence, disputes arising from these situations are usually submitted to investment tribunals for their decisions.

In the case of *Philip Morris v Uruguay*,²⁶ The majority of the tribunal members upheld the legality of two tobacco control measures enacted by the Uruguayan government for the purpose of

²⁵ Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

²⁶ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay*, ARB/10/7.

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 *Biloune and Marine Drive Complex Ltd v Ghana*²⁷, which was decided between 1989 and 1990 wherein Mr Antonine Biloune, who owned 60% of the company (MDCL) was deported by the Ghanaian government following some existing disputes with the government about the building project of the company in a choice site at the seat of the Ghanaian government. The government failed to accommodate all efforts made by the Claimant to reach an amicable settlement of the issues they raised, which centered mostly on the failure of the Claimant's company to secure a building permit before commencing the building project.²⁸

In her judgment, the Tribunal determined whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr Biloune's interest in MDCL. The motivations for Ghanaian governmental authorities' actions and omissions are unclear. However, the Tribunal does not need to establish those motivations to conclude the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without the possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing, and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.²⁹

Again, in the exercise of its regulatory powers the National Agency for Food and Drug Administration and Control³⁰ banned the importation, manufacture, distribution and use of alcoholic beverages in containers of 200ml and below which essentially constitutes regulatory policy on the part of this Nigeria government agency. According to Onyema,³¹ The NAFDAC directives fall within the police powers of the Nigerian 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., bear protection over acts that ordinarily could have been seen as expropriation, and attracting compensation to the investor affected by the same.

The reason behind the regulatory policy is that NAFDAC in January 2022 stopped the registration of alcoholic beverages in sachet and small volume PET and Glass bottles below 200ml. This decision was based on the recommendation of a high-powered committee of the Federal Ministry of Health and NAFDAC on the 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

²⁷ Awards of 27 October 1989 and 30 June 1990

²⁸ *Biloune and Marine Drive Complex Ltd. v. Ghana*, <<https://jsumundi.com/en/document/decision/en-biloune-and-marine-drive-complex-ltd-v-ghana-investments-centre-and-the-government-of-ghana-award-on-jurisdiction-and-liability-friday-27th-october-1989>>, accessed 5/02/2025.

²⁹ *Ibid.*

³⁰ Hereinafter abbreviated and referred to as "NAFDA"

³¹ Onyema Otitodiri Ogadinma, 'Legal Regulation for Innovation: A Review Of NAFDAC Ban On Importation, Manufacture, Distribution and use of Alcoholic Beverages in Containers of 200ml and Below' *op. cit* p. 30.

December 2018.³² As a commitment to the decision reached at the end of the Committee meeting, producers of alcohol in sachets and small volume agreed to reduce the production by 5 per cent with effect from 31st January 2022 while ensuring the product is completely phased out in the country by 31st January 2024³³. This regulatory policy which was made to avoid drug abuse amongst the youth's population and reduce the health risks associated with flagrant consumption of such alcoholic drinks by them later generated controversies that led to the suspension of the policy by the National Assembly.

It is therefore, a rational conclusion to state that, so long as the NAFDAC regulatory policy is made for public welfare, particular public safety and health, the 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 any 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.³⁴

Finally, it remains to consider the factors bearing on a valid exercise of police powers. There are two viewpoints in this respect. The first proceeds on the basis that there are fixed and cumulative criteria which condition an exercise of police powers.³⁵ The second is that there are no freestanding or determinative criteria to be met and that the doctrine calls instead for a broad assessment of the reasonableness of an impugned measure, where the presence or absence of certain indicia might tell against its presumptive validity.³⁶ For its consistency with the notion that the doctrine embodies a plenary right of reasonable regulation, the latter is to be preferred. However, the legal concepts used to fill the content of the doctrine are similar under either approach.³⁷ They include bona fides,³⁸ non-discrimination,³⁹ compliance with due process,⁴⁰ the absence of specific assurances to the investor,⁴¹ and (to a less settled extent) proportionality. A recent formulation was that in *Servier v Poland*,⁴² where it was held that Finally, it remains to consider the factors bearing on a valid

³² *Ibid*, at p.33

³³ *Ibid*.

³⁴ *Ibid* at p.45.

³⁵ Omer Erkur Bulut, 'Drawing Boundaries of Police Powers Doctrine: A Balanced Framework for Investors and States' (2022) 13 J Int Dis Settl, 594–95.

³⁶ Jorge Vinuales, 'Defence Arguments in Investment Arbitration' (2020) 18 ICSID Rep 9, para 93

³⁷ 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, for instance, stipulated that to be non-compensable, a taking of alien property must not be 'discriminatory', in 'violation of the rules of the state', 'an unreasonable departure from the principles of justice', or an 'abuse of power': See also 'Restatement of the Law Third, the Foreign Relations of the United States', in American Law Institute (American Law Institute Publishers 1987) 712. 1

³⁸ *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 para 255; *Philip Morris Brands S., Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 305; *Marfin Investment Group Holdings SA, Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No ARB/ 13/27, Award, 26 July 2018, para 909;

³⁹ *Methanex Corporation v United States of America*, UNCITRAL, Award, 3 August 2005, Part IV, ch D, para 7; *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, para 266

⁴⁰ *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para 207. *Methanex Corporation, op.cit*, Part IV, ch D, para 7.

⁴¹ *Methanex Corporation, op.cit*, Part IV, ch D, para 7

⁴² *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v Republic of Poland*; See also *Phillip Morris v Uruguay*, op.cit, para 305 ('... the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate') UNCITRAL, Award, 14 February 2012, paras

exercise of police powers. There are two viewpoints in this respect. The first proceeds on the basis that there are fixed and cumulative criteria which condition an exercise of police powers.⁴³ The second is that there are no freestanding or determinative criteria to be met and that the doctrine calls instead for a broad assessment of the reasonableness of an impugned measure, where the presence or absence of certain indicia might tell against its presumptive validity.⁴⁴ For its consistency with the notion that the doctrine embodies a plenary right of reasonable regulation, the latter is to be preferred.⁴⁵ However, the legal concepts used to fill the content of the doctrine are similar under either approach.⁴⁶ They include bona fides,⁴⁷ non-discrimination,⁴⁸ compliance with due process,⁴⁹ the absence of specific assurances to the investor,⁵⁰ and (to a less settled extent) proportionality. A recent formulation was that in *Servier v Poland*,⁵¹ where it was held that no expropriation could be found where ‘a host state’s regulatory and/or administrative actions “... [are] taken (i) in good faith, (ii) for a public purpose, (iii) in a way proportional to that purpose, and (iv) in a non-discriminatory manner”’. Therefore, the possible purposes for the exercise of police powers poses further challenge to the doctrine.

CONCLUSION AND RECOMMENDATIONS

Expropriation of property is not illegal under international law. The state has a right to expropriate the property of nationals and of foreigners but it must be subject to conditions such as public interest, absence of discrimination, due process of the law and compensation that is prompt, adequate and effective. Again, regulation and innovation are good when done within the limits of law. Governments should consider supporting international standards that promote global trade and innovation, rather than reinforcing national standards that may hinder competitiveness in the global market. Additionally, while the trend towards de-globalization is emerging, policies should

569; This was also the position in *WNC Factoring Ltd v The Czech Republic*, PCA Case No 2014-34, Award, 22 February 2017, paras 377–99

⁴³ Omer Erkur Bulut, ‘Drawing Boundaries of Police Powers Doctrine: a Balanced Framework for Investors and States’ (2022) 13 J Int Dis Settl, 594–95.

⁴⁴ Jorge Vinuales, ‘Defence Arguments in Investment Arbitration’ (2020) 18 ICSID Rep 9, para 93

⁴⁵ Oliver Hailes, ‘Police Powers in a Pandemic: Investment Treaty Interpretation and the Customary Presumption of Reasonable Regulation’ in Panos Merkouris, Andreas Kulick, J. Manuel A-Zarate and Maciej Zenkiewicz _ (eds), Custom and Its Interpretation in International Investment Law (CUP forthcoming) 10–13

⁴⁶ 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, for instance, stipulated that to be non-compensable, a taking of alien property must not be ‘discriminatory’, in ‘violation of the rules of the state’, ‘an unreasonable departure from the principles of justice’, or an ‘abuse of power’: See also ‘Restatement of the Law Third, the Foreign Relations of the United States’, in American Law Institute (American Law Institute Publishers 1987) 712. 1

⁴⁷ *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 para 255; *Philip Morris Brands S., Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 305; *Marfin Investment Group Holdings SA, Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No ARB/ 13/27, Award, 26 July 2018, para 909;

⁴⁸ *Methanex Corporation v United States of America*, UNCITRAL, Award, 3 August 2005, Part IV, ch D, para 7; *Chemtura Corporation v Canada*, UNCITRAL, Award, 2 August 2010, para 266

⁴⁹ *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para 207. *Methanex Corporation, op.cit.*, Part IV, ch D, para 7.

⁵⁰ *Methanex Corporation, op.cit.*, Part IV, ch D, para 7

⁵¹ *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v Republic of Poland*; See also *Phillip Morris v Uruguay, op.cit.*, para 305 (‘... the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate’) UNCITRAL, Award, 14 February 2012, paras 569; This was also the position in *WNC Factoring Ltd v The Czech Republic*, PCA Case No 2014-34, Award, 22 February 2017, paras 377–99

ensure that these shifts do not stifle innovation by adopting regulatory measures that will hinder rather than promote foreign investment.

This work, therefore, recommends that the United Nations through its relevant agencies should come together to enact an international treaty with the aim of regulating police powers doctrine. This will eliminate the existing confusions as to its roots, scope and possible applications in International Economic Law. Also, contracting parties shall streamline in concrete terms in their international Investments Agreements (IIAs) measures that constitutes non compensable expropriation. Each party shall therefore, develop a Foreign Investment Protection Agreement (FIPA) as part of their enforceable regulatory policy.