Public Purpose in International Law

Rethinking Regulatory Sovereignty in the Global Era

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PUBLIC PURPOSE IN INTERNATIONAL LAW

Rethinking Regulatory Sovereignty in the Global Era

This text explores how the public purpose doctrine reconciles the often conflicting, but equally binding, obligations that states have to engage in regulatory sovereignty while honoring host-state obligations to protect foreign investment. The work examines the multiple permutations and iterations of the public purpose doctrine and concludes that this principle needs to be reconceptualized to meet the imperatives of economic globalization and of a new paradigm of sovereignty that is based on the interdependence, and not independence, of states. It contends that the historical expression of the public purpose doctrine in customary and conventional international law is fraught with fundamental flaws that, if not corrected, will give rise to disparities in the relationship between investors and states, asymmetries with respect to industrialized nations and developing states, and, ultimately, process legitimacy concerns.

Pedro J. Martinez-Fraga is a partner in Bryan Cave LLP's International Arbitration and Litigation Practice Group, where he is the firm's coleader and the cofounder of the Miami office. He has represented eight countries as lead counsel, and he has served as an arbitrator in ICSID (World Bank) proceedings. Martinez-Fraga graduated from St. John's College, Annapolis (BA, Institutional Awards); and Columbia University (J.D.), where he was Harlan Fiske Stone Scholar; and he holds a PhD (international law) (cum laude) from Universidad Complutense de Madrid. He has published more than fifty articles in fifteen countries, which have been translated into five languages, and he has written five books on public and private international law.

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To my mother, Anita Nuñez Aragón, my wife Liza, and my daughters Alejandra Sofía and Valentina Lucía, and in memoriam, *Andrés Fábian Sommerfeld:*

*"My hands are of your colour but I shame to wear a heart so white."**

– Pedro J. Martinez-Fraga

For my parents, Heather and Gene; my wife, Susanne; and our daughter, Samantha, from whom I have learned all that matters most.

– C. R. R

* William Shakespeare, *Macbeth* (Simon & Brown 2011).

Our concern here is not with philanthropy, but with right, and in this context *hospitality* (hospitableness) means the right of an alien not to be treated as an enemy upon his arrival in another's country. If it can be done without destroying him, he can be turned away; but as long as he behaves peaceably he cannot be treated as an enemy. He may request the *right* to be a *permanent visitor* (which would require a special, charitable agreement to make him a fellow inhabitant for a certain period), but the *right to visit*, to associate, belongs to all men by virtue of their common ownership of the earth's surface; for since the earth is a globe, they cannot scatter themselves infinitely, but must, finally, tolerate living in close proximity, because originally no one had a greater right to any region of the earth than anyone else. Uninhabitable parts of this surface – the sea and deserts – separate these communities, and yet ships and camels (the *ship* of the desert) make it possible to approach one another across these unowned regions, and the right to the *earth's surface* that belongs in common to the totality of men makes commerce possible. The inhospitableness that coastal dwellers (e.g., on the Barbary Coast) show by robbing ships in neighboring seas and by making slaves of stranded seafarers, or of desert dwellers (the Arabic Bedouins), who regard their proximity to nomadic peoples as giving them a right to plunder, is contrary to natural right, even though the latter extends to the right of hospitality, i.e., the privilege of aliens to enter, only so far as makes attempts at commerce with native inhabitants possible. In this way distant parts of the world can establish with one another peaceful relations that will eventually become matters of public law, and the human race can gradually be brought closer and closer to a cosmopolitan constitution.

Immanuel Kant, To Perpetual Peace: A Philosophical Sketch 1, 15–16 (Ted Humphrey trans., Hackett Publishing Co., Inc. 2003)

Foreword

Pedro J. Martinez-Fraga and Ryan Reetz open their very important study with two observations that frame and situate the question they address: What, under international law, may be understood to be State action for a public purpose? On the one hand, the authors observe that ancient Athens – existing in a time of distinct polities – would have no hesitation in concluding that the public purpose of Athens was, of course, what Athens concluded it to be: an approach "championing the polity's public purpose objectives often to the detriment of the rights of foreigners" and providing "an inward-looking public purpose that is understood as achieving the common good" of that particular polity. On the other hand, public purpose today – existing in a time of economic globalization – *must* have a meaning other than that given by a particular nation at a particular time. The first observation, the authors argue, fits a world of independence "where national interests were perceived to be segregated from the common concerns of the international community of states." The second observation, in the authors' view, fits a world of interdependence, one that results from economic globalization and where both Home and Host States have expectations about the fate of capital investment flows.

Observing that a shift from the first observation to the second is needed, the authors argue that the concept and content of "public purpose" in international law remains "elusive" and is "not rigorously defined." Even as globalization calls for clarity, the authors argue that the public purpose doctrine instead "reflects a substantively bankrupt doctrine that is nearly eviscerating itself."

In setting for themselves the task of taking a "modest step toward this now quite necessary undertaking," the authors give us a learned volume that is rich in its reference to practice, masterfully broad in its reach to associated fields, and unusually deep in its reflection on how a complex river of judicial decisions and international and national instruments is shaping the course

of what we will come to know as public purpose. Their study nimbly goes from treaty to custom and back again. Their investigation starts with the rambling text of the North American Free Trade Agreement (NAFTA) and the jurisprudence it has spawned, and it treats with great care the relevance and significance of trade conceptions but then dives deeply into public purpose as a part of the jurisprudence of human rights courts. The study examines the subtle influence of the fact that investment protection is, for the most part, bilateral rather than multilateral – although this fact may yet shift. Finally, in a deft juxtaposition reframing their initial two observations, the authors revisit the principle of sovereignty over natural resources as an expression of a world of independent states and illuminate the modern national practice of foreign investment statutes that "may be used in concert among interested members of the international community to render the public purpose doctrine relevant to the needs of nations and to the struggle for transparency in the quest for process legitimacy."

Fifteen years into the twenty-first century, the investor-states arbitration system is, quite appropriately, held to a very high standard and, not surprisingly, is often found wanting in particular cases or in particular respects. This study is a part of the answer to the dilemma facing the investor-state arbitration system that will be with us for the foreseeable future. Tribunals necessarily rely on counsel to argue the facts and the law. But counsel, in presenting cases to tribunals, cannot for reasons of time and expense undertake to understand "public purpose" and other difficult terms as the authors do here. Even if counsel were to attempt this work, they would necessarily do it imperfectly, given that they look from the perspective of their client. It is for the academy and the international arbitration bar to together undertake works such as this. That the authors do so without apparent bias to the position of investor or State is to their great credit. To look consistently beyond the perspective of investors or States is an achievement; they do so by looking consistently to understand the definition of "public purpose." As the authors are the first to acknowledge, the process of defining the standard has only begun. But, with their work, Pedro J. Martinez-Fraga and Ryan Reetz have initiated a very important debate. In that debate, their guidelines will play no small part.

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David D. Caron, Dean of the Dickson Poon School of Law, King's College London, was sufficiently gracious to accept the authors' invitation to write a prologue. The Foreword alone justified the writing of the book. The authors appreciate his contribution and valuable insight. Michael H. Graham, professor of law and Dean's Distinguished Scholar for the Profession at the University of Miami School of Law, offered extremely valuable suggestions, particularly regarding the text's structural organization.

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aspect of the text's conceptual coherence. Antonio Vasquez Alvarez, a distinguished member of the Ilustre Colegio de Abogados de Madrid, and likely the most versatile lawyer with whom the authors have had the privilege of working, was giving of his time and energy, particularly with respect to those portions of the text comparing and contrasting bilateral investment treaties. His rigor improved the work product. The late Sir Ian Brownlie was extremely generous in offering his thoughts on early formulations of the ideas here. Enrique de Marchena Kaluche, managing partner of Estudio Legal DMK Abogados, read and reread every iteration of the manuscript and offered helpful insights from a civil law perspective. Special acknowledgment is extended to Peter Pantaleo, a gifted New York practitioner who taught the authors that, more often than not, form and substance are one and the same. The authors wish to thank Christian Cameron and Hope Zelinger, who at the time of the initial idea for this book served as research assistants to the authors and were students at the University of Miami School of Law, as well as Kamal Sleiman, who provided further assistance and worked on the Appendices. Fernando Alvarez-Pérez, now an IDR associate at the Bryan Cave Miami office, provided the authors with valuable research during his third year at the University of Chicago School of Law.

It is important, however, to add a disclaimer. Whatsoever inconsistencies or ill-witted propositions may be present are all of the authors' doing and have nothing to do with the valuable contributions of those mentioned.

The principal typist, Alexandra Rincones, deserves this recognition and the honors of a Purple Heart. Regrettably, the authors can only provide her with the former. The authors' legal assistants, Ericka Garcia and Nivia Lascaibar, certainly deserve more recognition than we could ever provide to them by reason of this mention.

Contents

Introduction and Sketch of Historical Origins

Economic globalization and non-territorially based understandings of sovereignty have underscored a need to revisit – or perhaps just simply visit – the role of the public purpose doctrine in customary and conventional international law. The tension between a State's legitimate right to regulate and its equally genuine and binding obligations concerning foreign investment protection often rests on the scope and application of this doctrine. Unlike the orthodox territorially grounded principle of sovereignty, the public purpose doctrine has commanded little attention from jurists and scholars. Therefore, it has not developed to meet the multiple demands of capital-exporting and capital-importing countries in a global environment. The legacy public purpose doctrine[1] reflects a substantively bankrupt doctrine that is nearly eviscerating itself. Economic globalization has called for a qualification of public purpose in international law. This text seeks to contribute the mere suggestion of a first modest step toward this now quite necessary undertaking.

In order to contextualize the nature of the relevant issues that place in high relief the inadequacies of the legacy-orthodox application of the public purpose doctrine in an era of economic globalization and of an attendant conceptualization of sovereignty that prioritizes the needs of the international community over the perceived national interests of particular States, the

[1] The term "legacy public purpose doctrine" is used throughout the text. For purposes of this writing, the term "legacy public purpose doctrine" refers to the common juridical public purpose doctrine that arises from a governmental pronouncement pursuant to which the term is one applied by the States subjectively (self-judging) that purports to concern the general interests of citizens within a single State that overrides – because of its "public" nature – the interests of a particular citizen in favor of bestowing benefits for the collective members of a polity. It defies an objective standard and is conducive to "all-or-nothing" results because it does not embrace principles of proportionality. The legacy iteration of this principle also is understood to be based on traditional notions of territorially based sovereignty.

origins of the public purpose doctrine in international law, which the authors identify as resting in Classical Greece, need to be summarily reviewed.

The doctrine of public purpose in international law is not a self-evident truth. Its rich origins in Homeric and later Classical Greece, however, have contributed to a modern understanding of the doctrine as a concept that is intuitive, self-evident, and, therefore, one that would only be obscured by discursive reasoning seeking to reduce to syllogistic form its normative foundation. To explain a self-evident truth in order to submit to the light of reason its underpinnings, so the argument suggests, is to obscure the very object sought to be explained. The incomplete conception of the public purpose doctrine developed in Classical Greece as a principle of international law and justice provided very limited conceptual space for the consideration of "foreign" interests while championing the polity's public purpose objectives, often to the detriment of the rights of foreigners.

The Greece of Homer, Socrates, Plato, Aristotle, the great playwrights, and the elegant analytics of Euclidean geometry that gave birth to the founding tenets of Western philosophy, literature, and mathematics, simply did not recognize a common public purpose doctrine that enveloped multiple city-states, expanding beyond the geopolitical subdivisions of a single πολισ ("polis"). The original and legacy origins of public purpose as a principle of international law were sufficiently circumscribed to the political boundaries of the πολισ and to language so as to justify slavery and the taking of a slave's property for the public purpose of serving the common good. It provided for two takings, the first of which was the very act of enslaving (i.e., the taking of a slave as property, as further discussed later in the analysis of terms). Thus, the mere crossing of a political/territorial boundary of one πολισ to the next would transform a free citizen into a slave. The perceived public purpose and benefit to the πολισ was deemed sufficient to justify a dehumanized status of captives from person to commodity. This slave status is most eloquently explained by the actual words used for slaves first appearing in Homer (δμῶσ *f.* or δμοσ *m.*) and later in Attic-Classical Greek (ανδραποδων), both of which not too loosely may be translated as "plunder with feet."[2] It thus follows that, under this

[2] Even Greece's keenest philosopher argued in favor of the commodification of human beings when concerning slave status. In *Politics*, Aristotle argues:

> Just as the phrase "an article of property" is used akin to the word "part," anything that is a part not only forms by definition part of something else, but also must necessarily belong to such other thing. It is no different as concerns an item of property. Therefore, while it is clear that a master is only the slave's master and cannot belong to the slave, a slave is not just the slave of the master, but also belongs to the master in its entirety.