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.

rubric, the act of enslavement was considered to be little more than the taking of property, of plunder or chattel with feet.

Pursuant to application of international public purpose strictures, Classical Greece understood public purpose as a normative doctrine of international law that enshrined the inwardness of the parochial world of the πολισ. In this context, it makes sense that the Attic Greek word for foreigner, βἄρβαροσ, originally meant "all who were not Greeks," especially the Medes and Persians. More indicative still of the inwardness that constituted the basis for public purpose and justified sacrificing the rights of "foreigners" is the verb βἄρβαριζειν, meaning to "speak gibberish," or at best, to enunciate broken Greek; an onomatopoeic word that to the ears of Ancient Greeks resembled the guttural babble of languages other than their own.[3] The root of the English word *barbarian* certainly is related to a conceptual disdain for peoples not Greek, but this conceptualization by itself cannot stand as sufficient to explain public purpose in international law at the time.[4] It is also inextricably

> These propositions clearly establish the nature of slaves and of their fundamental quality. A slave is a human being that by nature is not autonomous and cannot be said to belong to himself, but rather belongs to another human being by dint of the very nature of a slave. Now a human being who belongs to another despite being a person also must be considered an article of property. In turn, an article of property is a chattel, item or instrument that is susceptible to being separated or severed from its owner.
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> Politics I. II. 6–8.
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> A person is by nature a slave when that person is such that he can belong to another person, and indeed it is because of this capacity to belong to another person that he so belongs, and such a person is rational enough to understand belonging to another person but not being himself but a slave; for other than man animals are not subservient, animals do not follow reason, but instead are guided by feelings.
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> Politics, I. II. 13–14 (translation from the original Greek by the authors).

[3] *See, e.g.*, An Intermediate Greek-English Lexicon: Founded upon the Seventh Edition of Liddell and Scott's Greek-English Lexicon, 146 (Oxford University Press, 7th ed., December 31, 1945) [hereinafter Liddell & Scotts Greek-English Lexicon].

[4] Plato in his work *The Statesman* suggests that the origins of the word are not based on a theory premised on onomatopoeia. He specifically states:

> It appears as if in classifying peoples (citizens of other States) this classification were to have nearly two parts, a practice that is shared by popular culture among Greeks. On the one hand, one half of all peoples are Greek and the other half, which includes many other peoples unrelated to each other by blood or language, are all classified under the single name of "barbarian," under the thinking that they have identified a single and particular race.
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> The Statesman, Lines 262 D–E (translation by the authors).

According to Plato's account, the origin is based on an "otherness" that is unrelated to a perception of languages other than Greek.

connected to an inward-looking public purpose that is understood as serving the common good of the πολισ.

Significantly, whereas the intuitive nature of public purpose justified the commodification of free citizens now turned slave when wandering into a foreign jurisdiction, "and even the philosopher, who visited foreign countries to enrich his native land with the merchandise of science and art was exposed to be captured and sold as a slave to some barbarian master,"[5] the taking of "property" in the form of a slave based on a public purpose exercised for the common good of the πολισ was not absolute. A solitary but quite significant and now relevant exception was recognized in the form of a treaty that ostensibly bestowed nonforeigner status on peoples who otherwise would be deemed "barbarians." These original and embryonic precursors to the contemporary concept of *national treatment protection* contained in conventional international law were called σπονδαι in the plural. Even though the original source literature that would explain the normative foundation of an agreement preempting public purpose justification for the taking of property is scant, its meaning is settled. It is connected to "the wine poured out to the gods before drinking."[6] There is consensus, however, that the term for treaty, alliance, truce, or agreement is one and the same, with libations first offered to the gods because, upon signing a truce or treaty, "solemn drink-offerings were made on concluding them."[7]

Parties to the treaties were called εν-σπονδοσ, meaning a party to the treaty, or more literally, "included in a truce or treaty."[8] Similarly, persons or peoples outside of the treaty's ambit (i.e., nonparties or nonsignatories to the convention) were referred to as εκ-σπονδοσ (singular), more literally translated as "out of the treaty, [or] excluded from it."[9]

Conceptually, then, it appears reasonable that any exception to a public purpose-based taking or confiscation in furtherance of the common interests of the πολισ would be qualified by the "sanctity" of a treaty or convention and, in this sense, somewhat partaking in an underlying normative premise connected to the divine.

Except for a treaty or convention blessed by the gods, public purpose-based confiscations or takings for the benefit of the πολισ constituted a settled doctrine of international law well-established in Classical Greece. But for

[5] *See* Henry Wheaton, Elements of International Law: With a Sketch of the History of the Science 1 (originally published 1836 by Carey, Lea & Blanchard, reprinted 3d ed. 2002).
[6] Liddell & Scotts Greek-English Lexicon, *supra* note 3, at 740.
[7] *Id.*
[8] *Id.* at 265.
[9] *Id.* at 244.

this qualification, public purpose was supreme, preempting all considerations and justifying disregard for foreigners for the benefit of the πολισ. Wheaton, in his venerable chestnut published in 1836, *Elements of International Law: With a Sketch of the History of the Science*,[10] observed that:

> Thucydides has correctly stated the leading political maxim of his countrymen, – "that to a king or commonwealth, nothing is unjust which is useful." The same idea is openly avowed by the Athenians, in their reply to the people of Melos. Aristides distinguished in this respect between public and private morality, holding that the rules of justice were to be sacredly observed between individuals, but as to public and political affairs, a very different conduct was to be followed. He accordingly scrupled not to invoke upon his own head the guilt and punishment of a breach of faith, which he advised the people to commit in order to promote their national interests.[11]

The self-evident and nearly absolute character of the public purpose doctrine as a protagonist in public international law keeps close to its origins and has persisted unchanged into the twenty-first century concerning its (i) attribution of the self-evident status and (ii) virtually unqualified standing and preempted only by *jus cogens*. Consequently, the public purpose doctrine when invoked as part of the exercise of regulatory sovereignty by a State in furtherance of its national interests is generally accepted as application of an intuitive, self-evident truth no different from, for example, fundamental human rights that are not subject to mitigation, exception, or qualification, such as the right to humane treatment,[12] freedom from slavery,[13] the right to a name,[14] and the right to not be subjected to torture or to inhuman or degrading treatment or punishment.[15]

The public purpose doctrine is practically ubiquitous in the form of a material doctrinal and conceptual principle in both customary and conventional international law. It is foremost present in tempering and regulating a State's legitimate right to regulate and in its equally genuine and binding obligation to protect foreign investors and investments. Illustrative in this regard is the conventional and customary international law on expropriation and the taking of property. As a general principle, it is universally accepted that

[10] *See* WHEATON, *supra* note 5.
[11] *Id.*
[12] *See, e.g.*, American Convention on Human Rights art. 5, November 22, 1969, 1144 U.N.T.S. 123 (entered into force on July 18, 1978) [hereinafter American Convention].
[13] *Id.* at art. 6.
[14] *Id.* at art. 18.
[15] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 & 14, art. 3, November 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

a State has a right to expropriate or nationalize directly or indirectly or to undertake acts tantamount or equivalent to an expropriation or nationalization of property pertaining to a noncitizen so long as such a measure is taken (i) for a public purpose, (ii) in a nondiscriminatory manner, (iii) in accordance with due process of law, and (iv) on payment of compensation. In addition to being central to any analysis concerning the protection of foreign investor rights, defining the scope of a sovereign's regulatory space, and harmonizing conflicts between international trade law and domestic regulations, the doctrine is pivotal to the application of international human rights and to the workings of such public international law doctrines as permanent sovereignty over natural resources and numerous iterations of sustainable development (i.e., health, safety, environment, labor, and economic regulation).

Despite the public purpose doctrine's preeminence in public international law and its time-honored historical prominence, public purpose remains an elusive concept. It is not rigorously defined anywhere in customary or conventional law. What sparse pronouncements exist on "the jurisprudence of public purpose in international law" are mostly inconclusive and merely suggest that, although not without limits, States enjoy wide discretion in determining what constitutes public purpose. Such pronouncements are of little utility for use of the doctrine in the present and inspire little hope for greater understanding in the future.[16] Moreover, the treatment of the doctrine as encompassing "all things public," based on a subjective content that is self-judging on the part of States and therefore not susceptible to challenge, may have been viable in an

[16] Commenting on this issue Schrijver observes:

> In most relevant arbitral decisions, the view has been taken that a lawful nationalization or expropriation must serve a public purpose [citation omitted] but sometimes with qualifications. For example, in the *Liamco case* it was held:
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> > As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international theory that public utility is not a necessary requirement for the legality of a nationalisation' [citation omitted]
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> .... While many conclude that the demand of a "public interest" or "public purpose" should be maintained, there is recognition of the fact that ultimately it is the taking government which determines the public purpose or utility of a particular expropriation, and that in many cases, it can be taken as impossible that an international court or organization can form a reasonable judgment on the accuracy of a claim by a State that an action served a public purpose [citation omitted].
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> In Summary, a State is not completely free to determine the justification and conditions for a nationalization but is bound by certain international law requirements. In practice, however, it has wide margins of discretion.
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> Nico Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge University Press, 1997) at pp. 291–92.

international law framework based on orthodox understandings of sovereignty, in turn premised on territoriality in an environment of pre-economic globalization. Such "practical or functional success" was possible where States asserted "*international-independence*" within a rubric where national interests were perceived to be segregated from the common concerns of the international community of States. This paradigm no longer exists.

The advent of economic globalization has introduced a paradigm of interdependence. Traditional notions of territorially based Westphalian sovereignty are no longer responsive to the common needs of nations. International human rights law serves as a model of a new sovereignty that is neither absolute nor any longer resting on geopolitical borders. In this new space and era that economic globalization delineates, a legacy public purpose doctrine that is self-judging (subjective), based on models of dependence, and conducive to "all-or-nothing" results will frustrate the expectations of both capital-exporting and capital-importing States, as well as the answers to fundamental questions of process legitimacy in the adjudication of investor-state disputes. Can this legacy public purpose doctrine be redefined so as to comport with paradigms of interdependence, the exigencies of economic globalization, and the expectations of Home and Host States? Are there nongovernmental organizations appropriately positioned and sufficiently credentialed to lead this effort? Is the legacy public purpose doctrine susceptible to substantive reconfiguration so as to account for international principles of *proportionality* and *bilateralism*? What would be the mechanics pursuant to which the content, scope, and application of the doctrine may be conditioned in order to satisfy an objective standard? Is the prevailing paradigm of global interdependence sufficiently developed so as to cause the international community of nations to set aside competing interests and reach a consensus on a neutral and objective-based understanding of public purpose in customary and conventional international law?

More fundamentally still, are the various iterations of public purpose, such as environmental concerns; human, animal, and plant life; national security; and exercise of police powers susceptible to being classified under the overarching umbrella nomenclature of "public purpose"? Is the doctrine of public purpose susceptible to hierarchical categorization, if indeed there are multiple subject-matter public purposes? Can a government by decree transform a governmental initiative and objective, such as the "institutionalization" and perpetuation of a political revolutionary agenda, into a public purpose within the purview of the public purpose doctrine? This latter inquiry is particularly applicable in the context of nationalizations or expropriations undertaken in furtherance of the alleged public purpose of promoting purported revolutionary and political ideological principles.

Although not seeking to provide conclusive answers to these inquiries and other equally relevant queries, this contribution does aspire to address these concerns within the framework of six chapters, each of which contains multiple subparts.

The first chapter uses the framework of the North American Free Trade Agreement (NAFTA) as a microcosm of customary and conventional international law to explore the public purpose doctrine as an exception – more precisely a reservation – to treaty obligations addressing investment protection provided to the NAFTA parties. Thus, emphasis is placed on Chapter Eleven of the NAFTA ("Investment Services and Related Matters"). As to methodology, the NAFTA Chapter Eleven first is analyzed strictly within the chapter's context and then more generally in select chapters where public purpose serves a foundational role in defining the scope, content, and application of specific provisions. The treatment of the public purpose doctrine in the NAFTA's text beyond the Chapter Eleven framework is used as a predicate to tracing the doctrine's contours in conventional international law. Foundational NAFTA arbitral opinions (i.e., the NAFTA's "decisional law") also is used as a tool for penetrating the orthodox view of the public purpose doctrine in customary international law. Thus, as Chapter Eleven is to the remainder of the NAFTA framework, so is the entirety of the NAFTA to conventional international law. It also draws a distinction between treaty-based reservation exceptions and public purpose exceptions.

This first chapter sets forth the analytical methodology used in subsequent chapters to identify the workings of the doctrine within the parameters of specific subject-matter treaties, such human rights conventions, but also within international law instruments concerning macroeconomics that have contributed to the formation and transformation of the public purpose doctrine in customary international law. Finally, Chapter 1 aspires to understand whether the cross-fertilization between public purpose-based exceptions imported from international trade law into international investment protection law may affect the relationship among the delicate and competing interests of capital-exporting States and their capital-importing counterparts. The chapter concludes with reflections on conventional international law's use of public purpose.

Chapter 2 aspires to identify both the role and status of the public purpose doctrine in customary international law. It does so, however, first by testing the quantity and content of the public purpose doctrine in customary international law and rejecting an a priori judgment even as to the doctrine's very existence. This chapter posits that common elements of public purpose compellingly argue in favor of a single public purpose doctrine that, even

when embedded in instruments that limit a State's domestic regulatory space, the doctrine despite its multiple iterations broadens the regulatory authority of States. The chapter further advances the proposition that meaningful contributions to the content and scope of the public purpose doctrine arose from the tension between capital-exporting and capital-importing countries. Here, careful consideration is accorded to the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), the WTO General Agreement on Trade in Services (1994), and the WTO Doha Ministerial Declaration of November 14, 2001, all of which are used as analytical and synthetic instruments that help explain the existing shortcomings of the legacy public purpose doctrine and also are suggestive of detailed ways in which the doctrine can be developed to meet the demands of economic globalization, the interests of both industrialized and underdeveloped countries, and the often conflicting requirements of a paradigm of transnational political and economic interdependence. The recurring motif of the right to regulate and this right's relationship to a State's international obligations is viewed in the context of the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2012 and the Principle of Sustainable Development.

The public purpose doctrine's role in the law of international human rights is examined through the lenses of (i) the African Charter on Human and People's Rights, (ii) the European Convention on Human Rights, and (iii) the Inter-American Convention on Human Rights in Chapter 3. These three conventions are used to analyze the extent to which the public purpose doctrine has been influenced by regional historical developments as to scope and content. In this context, historicity is understood as a temporal and constraining element that need not form part of the public purpose doctrine of the twenty-first century. Chapter 3 also asserts that delineating the public purpose doctrine as it appears in international human rights law serves as a tenet that is fundamental in identifying a hierarchy of human rights precepts that enjoy a status akin to that of *jus cogens*. The analysis advanced in this chapter helps to facilitate an understanding of public purpose in international law as a doctrine that must be subjected to discursive reasoning and, therefore, cannot be treated as a self-evident truth the normative foundations of which are intuitively known and knowable.

Chapter 4 chronicles the effect of bilateral investment treaties (BITs) on the public purpose doctrine, as well as the doctrine's distortion of symmetry and bilateralism in the conventional international law of investment protection. Specifically, the virtually ad hoc and decentralized framework of BITs is considered from the perspective of the manner in which structural framework

issues attendant to BITs have contributed to the contemporary understanding of the legacy public purpose doctrine.

Chapter 5 primarily advances the proposition that the principle of permanent sovereignty over natural resources (PSNR) constitutes an expression of the legacy public purpose doctrine. This chapter also attempts to identify formal and substantive connections between PSNR and the principle of sustainable development; the latter also is treated as an important iteration of the legacy public purpose doctrine. The status of the public purpose doctrine in customary international law is critically revisited in this chapter. The conceptual effects of PSNR on regulatory sovereignty and Host-State investor protection obligations are also reviewed.

Finally, Chapter 6 addresses domestic legislation purporting to protect foreign investors in order to attract foreign direct investment (FDI). This chapter compares and contrasts foreign investment protection statutes (FIPS) to BITs, focusing on structure, content, and the role of the public purpose doctrine. In addition, it is suggested that the FIPS' structural configuration may serve as a practical and effective instrument of reform that may contribute to the much needed remedial work that is required to redeem the public purpose doctrine's promise to harmonize the right to engage in regulatory sovereignty with the obligation to enforce juridically binding foreign investor protection obligations. This final chapter aspires to demonstrate the subtle and more immediate relationships between the preceding five chapters and eight very particular suggestions of ways in which FIPS 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.