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.

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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)

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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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