Latin American Journal of International Trade Law / Revista Latinoamericana de Derecho Comercial Internacional
Volume 5, Issue 1, Year 2017 ISSN: 2007-7440

BOOK REVIEW

PEDRO J. MARTINEZ-FRAGA AND C. RYAN REETZ; *PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA*; CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2015 (423 PP.), • 74.99 (HARDCOVER)

Maciej Żenkiewicz*

* Assistant Lecturer, Chair of International Law, Nicolaus Copernicus University

The scope and the margin of appreciation of State regulatory sovereignty are the main concern and focus of the book. The on-going, vivid controversies on the issue will be certainly enriched by this contribution of Martinez-Fraga and Reetz. Their analyses, arguments and approach to the vague doctrine of "public purpose" shall certainly advance further the discussions on the subject as they induce directly important elements to try to come to grips with its intricacies. Most of the authors have ignored them or simply have accepted these self-evidences put forward by the existing doctrine, while Martinez-Fraga and Reetz endeavour to go further, looking to re-define and re-think its application within the new political reality – global era.

The book opens with a chapter on introduction and sketch of historical origins, tracing back the "public purpose" to ancient Greece. In that part the authors introduce their main overall argument to be refined and developed throughout all the following chapters of the book that is : that the present notion of public purpose, which has not really progressed much far from its ancient Greek roots, is "a bankrupt doctrine that is narrowly eviscerating itself" (p. 1) This legacy of the public purpose doctrine

which is being applied subjectively by States as a self-sufficient, intuitive and almost absolute, self-evident truth is, in authors' opinion, quite inadequate in an era of economic globalization. The Westphalian concept of sovereignty is obsolete; the conceptualization of sovereignty should give the priority to needs of the international community over the national interests of particular States, and the "public purpose" doctrine should incorporate principles of proportionality and transparency as the objective criteria replacing its current "all-or-nothing" application. Such is the leitmotiv put for the readers from the beginning of the book till the very end.

Authors' understanding of the "public purpose" is very broad indeed. In the doctrine one may find not only the reference to public purpose – as one of the prerequisites for expropriation / nationalization – but also all attributes of the regulatory sovereign power of state, both in its context of reservations and of exceptions. The authors treat the doctrine of "public purpose" within the large spectre of areas such as health, security, environment, labour and economic regulations, human rights, and sustainable development, including therein the concept of permanent sovereignty of natural resources. For them, the "traditional notions of territorially based Westphalian sovereignty are no longer responsive to the common needs of nations" (p.7) and therefore in the era of economic globalization the new paradigm of independence is to be introduced. They develop this argument all along the six following chapters, supplemented with three useful annexes.

Chapter one reviews the "public purpose" within the framework of NAFTA, where it "serves as a microcosm of public international law" (p.11). This framework allows them to explore the role, the scope and the content of "public purpose" and to draw conclusions valid not only for this self-contained treaty structure but also for the conventional and customary international law. The authors' broad understanding of the "public purpose" doctrine, when it is explicitly referred to in the treaty and when it conceptually addresses the public purpose different denominations is being taken into account. It should be noted that in this search for the public purpose sediments the authors skillfully and surely scrutinize the NAFTA treaty text as well as the most significant arbitral decisions thereto (e.g. Methanex, Metalclad,Tecmed), to demonstrate that even the NAFTA system is lacking of objective test and of hierarchical structures of "public purpose" doctrine, which disproportionately emphasizes the State's regulatory authority over the investment protection; NAFTA judicial decisions thus contribute to adding another touch of uncertainty to doctrine's meaning and role instead of clarifying it.

The second chapter turns back to the more general questions with regard to the relationship between the doctrine of "public purpose" and customary international law (CIL). General comments are followed

here by the analysis of the status of "public purpose" in customary international law. In the pursuit of their survey, the authors examine the position that the public purpose doctrine is taking up in international instruments such UNCTAD, WTO, the South African Development Community, or in particular BIT's (especially in the context of the sustainable development). Here again elements of "public purpose" are being scrutinized and carefully described in order to draw the conclusion that expensive regulatory space, as conceived in the orthodox doctrine of public purpose, is harmful to Foreign Direct Investments.

The third chapter is dedicated to the presence of the doctrine in human rights (HR) conventions, namely on three HR systems: the European, the African and the Inter-American. After a detailed description of the seeds of the doctrine within the systems, the authors eventually find what they are looking for – i.e. a scant evidence that the doctrine results in a hierarchy of human rights and also a departure from the mainstream canons of "all-or-nothing" approach. They ponder these elements as "a meaningful contribution to the crafting of public purpose rubric that [...] satisfies a global paradigm among nations of interdependence and not independence" (p. 234-235). However, the analysis of the HR jurisprudence once again shows the predominance of subjectively defined public purpose.

Chapter four comes back to the issues approached in the second chapter with regards to BIT's and elaborates further on the investment law. After reviewing 319 samples BIT's their conclusion is simple: the doctrine of public purpose is not seeking to correct historical asymmetries among the parties, and has been distorted in favour of Host States, thus contributing to the expansive and self-judging character of regulatory sovereignty.

Chapter five brings into the picture the doctrine of permanent sovereignty of natural resources (PSNR). That doctrine is intrinsically connected with the orthodox notion of public purpose doctrine and has materially influenced the latter's development, for the PSNR arose from the reparation of historical inequities. Its historical background and economical utility are no longer relevant (p.309). Moreover, this asymmetrical content threatens the very bilateralism of BIT's as the PSNR does not support proportionality, bilateralism and understanding of interdependence thus fostering insecurity; therefore "the doctrine must be revised and perhaps modified" (p.314).

The sixth and final chapter raises the question: can Foreign Investment Protection Statuses (FIPS), which are part of domestic legislation, rehabilitate the doctrine? The value of this chapter consists in bringing the reader's attention to the very existence and content of FIPS. However, it does not seem rational to expect that domestic legislation of any State, which is often not in consonance with the State's

international obligations (e.g. BIT's), could be apt to cause the radical shift of the legacies of the public purpose doctrine.

As it was already afore-mentioned, the authors' understanding of "public purpose" is as broad as possible. They are tracing down public purpose under its various denominations (public purpose, public interest, public morals, public order, public utility, common interest, general or public welfare, public needs, security or police powers, community interests, social interests, common good) as well as under different notions of doctrine (PSONR, HR, sustainable development). The authors manifestly assume that all these terms are equivalent in the doctrine (p. 127-128), although, as noted e.g. by R. Higgins, each of those terms may have slightly different meanings and implications (see R. Higgins, *'The taking of property by the state: recent developments in international law'* (1982) Collected Courses of the Hague Academy of International Law 176, at p. 288). The authors' attitude on the one hand gives the reader a very wide and full picture of the impact of public purpose but on the other it is not surprising that, by putting together all of those terms and their variations under one label – public purpose doctrine – it seems impossible to look for the norm of customary law comprising such a broad and incoherent doctrine. Searching for such a customary rule was bound to be ineffective. Perhaps for the sake of finding such a rule, the authors could have chosen from the doctrine of public purpose its most traditional and undisputed understanding of the notion – the one of the prerequisites for legal expropriation / nationalization.

The authors base their arguments on the reiterated postulate that traditionally understood state sovereignty ought to be modified by new paradigm of interdependence. But if this paradigm is so overpowering that it can justify not only the shift in understanding of public purpose, but also alter the doctrine of PSNR, which, as underlined by the authors is qualified by some writers as having the character of *jus cogens*, they made no effort to convince the reader of this besides repeating the necessity "to comport with the exigencies of the global era" (p.320).

Obviously the problem of "public purpose" doctrine is placed within the broader prospects: one which favours the traditional understanding of state sovereignty and another which advocates for more complete protection of property abroad. From the problem of gunboat diplomacy or Calvo doctrine, we move into arguing about the scope of investment protection, understanding of indirect expropriation or of state regulatory powers. Alongside them, the authors present the first notion – the orthodox public purpose doctrine as an obsolete one, which should yield to the new paradigm of interdependence, globalization in the new era – that should take precedence over particular interests of States. Of course

the authors are perfectly entitled to make such an argument. However I do not feel convinced by their position in favour of the latter. At the end of the book, we are left with the impression that the investment protection rights are being unfairly restricted by the subjective, out-dated, ill-defined, denaturalized and self-evident "public purpose" doctrine. It might be true that "abroad subjectively based conceptualization of the doctrine [...] cries for greater specificity, clarity and definition" (p. 110), furthermore one must keep in mind that investment protection rights are an exception to the firm notion of state sovereignty, and not the opposite.

Through the authors' painstaking work in the mapping of problems of "public purpose" doctrine and tracing all its manifestations, the level of the dispute has come to a more elevated stage. Finally we find in this book a solid and mind-provoking presentation of the problem on which we may argue and disagree, even it has not been duly identified and fully described. Certainly some initial, mind-provoking solutions and possible ways of addressing them are being offered.

Notwithstanding critical remarks, Martinez-Fraga et Reetz's work represent undoubtedly a valuable contribution to the knowledge of this field of international law. The well-written book is certainly recommended not only to the experts of investment law but to all international lawyers.