

## Contents

<i>Foreword by David D. Caron</i>	<i>page</i> xiii
<i>Acknowledgments</i>	xv
<b>Introduction and Sketch of Historical Origins</b>	<b>1</b>
<b>1 Public Purpose in NAFTA</b>	<b>11</b>
A. Public Purpose in the Context of Reservations	24
B. Chapter Eleven of the NAFTA Does Not Develop an Objective Test	32
C. Public Purpose in the NAFTA Lacks Hierarchical Structure	34
D. The Chapter Eleven Framework Indiscriminately Incorporates and Commingles Terms of Art from the GATT: An Unwanted Cross-Pollenization	34
E. The NAFTA Standard Public Purpose Exceptions and the Treaty Reservation Public Purpose Category: Harmonizing a Dichotomy	39
F. Beyond the NAFTA Chapter Eleven Framework: The NAFTA's Anatomy Provides for an Expansive Construction of the Public Purpose Doctrine and the "Legitimate Objective" Standard	44
G. Conclusions and Observations	53
H. The Jurisprudence of Public Purpose in the NAFTA	55
1. The <i>Metalclad</i> Legacy: One Extreme	59
2. An "Effects Test" Beyond the Purview of Public Purpose	65
3. Revisiting <i>Methanex</i> through the Prism of the Public Purpose Doctrine	70
	vii

I.	The <i>Methanex</i> Approach and a Swing of the Pendulum	71
J.	Beyond <i>Metalclad</i> and <i>Methanex</i> : The NAFTA Jurisprudence	80
1.	The Public Purpose Legacy of <i>Metalclad</i> and <i>Methanex</i>	84
2.	A Broader Examination of the NAFTA's Jurisprudence and Other Investor-State Decisional Law: In Search of a Viable Public Purpose Framework	85
3.	The <i>Tecmed</i> Contribution	91
4.	The Police Power Dichotomy and <i>Feldman v. Mexico</i>	104
5.	Reflections on Conventional International Law's Use of Public Purpose	109
2	<b>Identifying Public Purpose in Customary International Law: Select International Instruments</b>	113
A.	The Place of the Public Purpose Doctrine in Customary International Law	113
1.	Revisiting Fundamentals of Customary International Law	113
B.	Foundational Concerns Endemic to Customary International Law Challenging the Development of a Public Purpose Doctrine	118
C.	Discovering and Reviving the Public Purpose Doctrine in International Instruments	124
D.	The Many Names of the Public Purpose Doctrine: Exploring Uniformity and Multifarious Nomenclature	126
E.	Evidence of Scope and Substance of the Public Purpose Doctrine in Select International Instruments	129
1.	Identification, Scope, and Content of the Public Purpose Doctrine within International Instruments Concerning Transnational Trade and Investment: A Doctrine That Expands Sovereignty within Instruments That Limit State Authority	129
2.	Public Purpose in UN Conference on Trade and Development and World Trade Organization Instruments	129

3. Public Purpose and the United Nations Conference on Trade and Development	131
4. UNCTAD World Investment Report 2012	139
5. The Public Purpose Doctrine and Sustainable Development	145
6. The Public Purpose Doctrine and Lessons from UNCTAD	158
F. What Does It All Mean?	160
1. The South African Development Community Model Bilateral Treaty Template	161
2. The Sustainable Development Expression of the Public Purpose Doctrine in BITs	177
a. The Canada-China BIT	178
b. The Colombia-Japan BIT	185
c. The Croatia-Azerbaijan BIT	190
d. The Japan-Independent State of Papua New Guinea BIT	193
G. The Public Purpose Doctrine in WTO International Instruments	195
1. WTO Doha Ministerial Declaration: November 14, 2001	196
2. Public Purpose and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)	200
3. The Public Purpose Doctrine in the WTO General Agreement on Trade in Services (1994)	202
<b>3 Defining the Profile of the Public Purpose Doctrine in Human Rights Conventions</b>	<b>206</b>
A. Public Purpose Doctrine as a Fulcrum for a Hierarchy of Human Rights	227
1. The African Charter on Human and Peoples' Rights	228
2. The Findings and Effects of the European and American Human Rights Conventions and the African Charter on the Customary International Law Development of the Public Purpose Doctrine	233
3. The Jurisprudence of the European Court of Human Rights and Public Purpose Constraints on Regulatory Sovereignty	235



	a. <i>Farrugia v. Malta</i>	236
	b. <i>Leyla Sahin v. Turkey</i>	241
4	<b>The Complex Interaction between the Public Purpose Doctrine and BITs: Discerning Order and Structure</b>	254
	A. An Analysis of the Relationship between Structure and Content: A Fragmented Framework within a Decentralized Body of International Law and a Legacy Public Purpose Doctrine	254
	1. Unsettled Structural Issues in the Framework of Bilateral Investment Treaties	254
	2. The Findings of Empirical Analysis of Public Purpose in BIT Clauses	256
	B. Public Purpose in the Form of Sustainable Development Language in BITs and Combinations of Sustainable Development; Health, Safety, and Environment; and Labor	258
	1. A Rich Preamble: Sustainable Development, Health, Safety, and Environment; and Labor	259
	2. The GATT Article XX Exceptions in BITs	264
	C. Comprehensive Conclusions	290
5	<b>Permanent Sovereignty over Natural Resources</b>	293
	A. PSNR: The Structural Foundations of a Doctrine	295
	1. General Assembly Resolutions 523 and 626	295
	B. The Development of the Nomenclature "Permanent Sovereignty over Natural Resources" and the Creation of a Commission	301
	C. Seminal Decisional Law on PSNR	314
6	<b>The Role of Public Purpose in Foreign Investment Protection Statutes: Can FIPS Rehabilitate the Doctrine?</b>	318
	A. The Public Purpose of FIPS Investor Protection	323
	B. FIPS Carve-outs and Public Purpose	331
	C. Dispute Resolution Clauses in FIPS and Public Purpose	339
	D. The Teachings of FIPS Public Purpose Analysis and the Use of FIPS as Remedial Doctrinal Instruments	344
	<b>Conclusion</b>	349

APPENDIX I	A Comparison between the Performance Requirements Articles of the Canada-Jordan and the Colombia-Japan Bilateral Investment Treaties	355
APPENDIX II	An Empirical Review of the Preeminence of the Public Purpose Doctrine throughout the Ever-Expanding Universe of Bilateral Investment Treaties	359
APPENDIX III	A Spatial Comparison of Provisions Relating to Investment Protection, Incentives, and Dispute Resolution in Foreign Investment Promotion Statutes and Bilateral Investment Treaties	388
APPENDIX IV	Table of Citations	424
	<i>Index</i>	437