

Introduction

The images are harsh, ubiquitous and recurrent. As this book goes to print, the Navajo Nation in the United States continues to grapple with what is America's worst Covid-19 outbreak. In 2019 Jair Bolsonaro, Brazil's authoritarian, racist leader praised the genocide of Indigenous people and moved to revoke the protected status of indigenous lands. In the Philippines, 164 environmental activists – most of them indigenous – were murdered at the hands of Duterte's government in 2018 for defending their homes, lands and natural resources from exploitation. In 2017 a homeless girl from the indigenous Mbya Guarani was captured drinking unclean water from a puddle to relieve her thirst in the midday sun as the temperature topped 100°F (38 °C) degrees in Argentina. In 2016 police with water cannons violently cleared, in 28 °F (–2 °C) weather, activists protesting to stop the development of a pipeline that threatens the Standing Rock Indian Reservation's water supply. Sadly, one can go on and on with heartbreaking vignettes of different forms of indignity, injustice, discrimination and violence suffered by Indigenous peoples all across the world.

Despite the tremendous progress in the development of scientific knowledge, in the understanding of the structural causes of poverty and inequality and in the role of politics and governance in addressing modern challenges, social inclusion, poverty, marginalization and despair is a reality across the world – from wealthy America to middle-income Argentina to the less wealthy Philippines. And very often this reality has an indigenous face.

This reality is particularly painful for many who like me, enjoy visiting Mexico, the beautifully complex country where I grew up. Despite some progress and the tremendous wealth of many who are economically privileged, including the once richest man on Earth (Carlos Slim), marginalization in Mexico tends to follow skin color; the imperfect, accented Spanish that results from speaking another language; a huipil (a traditional

indigenous dress) the smell of copal; the wearing of sandals. For years, I was aware of this (and of my privilege as a white man), but in assisting Professor James Anaya's work on the Duty to Consult and with the Committee for the Legal and Constitutional Reform regarding Indigenous and Afromexican Peoples' Rights, I realized that many of Mexico's current problems are rooted in the unspoken structural racism against Indigenous peoples. I am not alone in this sentiment. It is now well accepted by the main UN agencies, scholars and policymakers that tackling "gross inequalities" within and between countries is necessary for addressing the major issues impacting our global community, including conflict, climate justice and mass "irregular" migrations.

This book is an attempt to contribute to the search for solutions to inequality and marginalization. It does so first by dissecting how the frameworks and institutions that encourage economic interdependence between countries tend to aggravate problems – such as poverty, political disfranchisement and social exclusion – already faced by indigenous communities. Second, the book describes the goals and functioning of the protections included in these arrangements to illuminate some avenues for reform based on the (limited) successful experiences of indigenous advocates in navigating the complex web of institutions for global economic governance. In providing these plausible but modest solutions, I am well aware that resolving globalization's negative effects on marginalized groups will not result from simple administrative or technical solutions. The current dysfunction of liberal capitalistic societies, many embedded in a culture of unconstrained freedom, individual choice and consumption with limited responsibility toward both our planet and our shared futures, calls for a more active and radical reimagining of the state and its relationship with production, distribution and consumption. Moreover, as an international economic law professor specializing in the notoriously controversial field of international investment law, I am keenly aware of the failures of international law. Too often, international law has been used to dismiss Indigenous peoples with arrogant and ignorant opinions and statements, including that "[s]ome tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society."¹

That being said, I also believe that understanding the ways in which international economic law can exacerbate marginalization is necessary. At the same time, the notion that "For our nations to live, capitalism must die" – a popular

¹ In re Southern Rhodesia (60) (1919) AC 211, pp. 233–234, per Lord Sumner, quoted in Mabo decision, p. 39. See *Race and Empire in the Mabo Decision. Symposium Issue of Social Identities*, Autumn 1997, at SSRN: <https://ssrn.com/abstract=1002209>.

refrain for many indigenous activists opposed to international investment and trade – is rather vague, improbable in the short term and impossible to cross-examine with more objective analysis. Trade and investment agreements are unlikely to go away, and the inclusion of human rights provisions have made a positive difference in the lives of some of the people they are intended – on paper, at least – to protect. We can build from this success.

Without discounting the fact that the shift of the required magnitude to address the issue of marginalization and the challenges faced by globalization can only be procured and legitimized through politics; through the contest of values, morals, beliefs and feelings; and through the transformation of domestic rules and regulations, this book relates to three different strands of literature of international law.

On the one hand, there is a rich debate regarding the role of human rights law as a source to constrain multinational businesses. This literature has been advanced by business and human rights, corporate social responsibility as well as social justice and international law scholars. Here, the book adds two interesting dimensions to such literature: First, it reveals how human rights advocacy can effectively be expanded using tools from outside the contours of what is traditionally defined as international human rights law and its institutions. It also provides an additional layer of analysis by incorporating Indigenous peoples' rights and policy perspectives as an example of marginalized populations. Here the contribution of the book is to describe and contrast, both in theory and in action, the effectiveness of international trade, investment, finance and intellectual property laws in the accommodation of Indigenous peoples' rights and interests. The analysis renders some evidence that the regimes of economic interdependence provide a growing set of possibilities for those who seek to advance indigenous rights and interests using international economic law. In addition to reinforcing economic freedoms for business actors, these regimes could be used to: (1) to expose the negative effects of the operations of multinational corporations on indigenous communities; (2) to strengthen the capacity of states and international organizations to protect indigenous rights; (3) to condition access to economic benefits on the support of indigenous interests; and (4) to provide policy incentives that promote indigenous products and the practices associated with their production.

On the other hand, a related line of literature, exemplified by S. James Anaya's classic study *Indigenous Peoples in International Law* (Oxford University Press) and Patrick Macklem's *The Sovereignty of Human Rights* (Cambridge University Press) emphasize the emancipatory capacity of human rights law in providing tools to safeguard against (but also advocate within) the state. This book draws from these rich descriptions and analyses to argue for

the expanded use of human rights of Indigenous peoples within international economic arrangements as a mitigating force against the imbalance of power created by these international business frameworks. As framed, the book explains how international economic law fails to promote liberal values by creating a potentially devastating political economy when international law is advanced, unconstrained, as a tool to facilitate a “neutral” market order system. This dynamic exacerbates vast disparities in capabilities and material resources in both political and economic domains. Not only does the book provide a rich set of potential innovations to limit such impacts on Indigenous peoples (and potentially other marginalized and/or vulnerable populations), but links this argument to more theoretical approaches regarding the role of law (in this case, international law) in modern capitalistic societies.

Finally, the apparently endemic failure of globalization to address market-driven inequalities in income, wealth or access to goods and services has reinvigorated a debate over the effectiveness of international law. In particular, calls to limit the role of international law are growing among influential policymakers. Many have advocated “economic nationalism” and the termination of international economic agreements. This book is a response in part to the ways in which the failures of globalization have been framed, ignoring the years of calls for social inclusion and a fairer playing field. Here the book suggests that there is a place for vulnerable and marginalized groups, Indigenous peoples among them, within international economic law, and serves as a qualified defense of international law. It is also a call to reorient the debate about the future of globalization and to move beyond the false claims that the excesses of globalization are imposed by exogenous forces (e.g., immigrants and refugees, Muslims, China) and felt mostly by semi-skilled industrial workers. An international economic law that focuses on the vulnerable and marginalized can provide a limited yet important pathway for improving the unequal distribution of the benefits of globalization and for moving beyond the standard academic reply that redistribution should be a purely domestic policy response.

In addition to this introduction and a brief conclusion, the book is divided into seven chapters. The chapters are organized in three parts as I briefly summarize now.

Setting the Stage: The Negative Faces of Globalization

For centuries, indigenous groups have faced economic, physical and cultural subjugation. This does not seem to be ending anytime soon. Even if Indigenous peoples are not being intentionally deprived of land and wealth, they are being deprived of opportunity. In most countries, Indigenous peoples are worse off in relative terms than others who have benefited from a period of

rapid growth and development. While this trend has been closely monitored by human rights advocates, it has been registered as white noise in the current debates over globalization's damaging effects.

As discussed in Chapter 1, to a large extent, the perspectives critical of globalization in international economic law have focused on the relative effects of globalization on the animation of different political causes. As I explain by reference to the work of scholars on globalization, there are multiple frames with which to see its problematic effects (as well as its real or perceived benefits). This book is concerned mainly with one particular frame; that of the groups subjugated and marginalized by the process of globalization. As I argue, these are groups truly left behind by the current form of economic interconnection whose voices have been only slightly and recently taken into account in this current wave of contestation. Conversely, it is precisely this perspective that might provide a fundamental lens for organizing transformative action. To contextualize the discussion, it is important to situate the perspective on globalization of these groups in opposition to other "narratives" driving debates about who wins and loses in modern times. Without a holistic approach to the different perspectives on the discontents of globalization, particularly given that all of the narratives reveal problematic aspects, it would be inadequate and misleading to address the issue of globalization and the marginalized without this context as a reference.

Chapter 2 provides a conceptual framework to understand the negative effects of globalization on vulnerable and marginalized groups. I term this framework "the cycle of susceptibility and exclusion." This framework illuminates the particular susceptibility of Indigenous peoples to the negative consequences of global economic interdependence and provides a point of reference to evaluate the effectiveness of existing and potential legal responses to that susceptibility. In short, the framework explains how international economic agreements often exacerbate vast disparities in capabilities and material resources in both political and economic domains. Politically, disenfranchisement results from the lack of direct participation of Indigenous peoples in the law production processes (treaty and adjudicatory lawmaking) and the indirect shift in governance priorities that results from enacting and enforcing treaty provisions (and resulting practices and interpretations). Economically, the focus on nondiscrimination among economic actors results in *de facto* discrimination against Indigenous peoples and a consequent rise in inequality.

International Indigenous Economic Law: An Emerging Field

Chapter 3 describes how the four main fields accommodate the rights and interests of Indigenous peoples. The question of who is indigenous is a complex question that I do not try to answer, in part because it also has

been extensively debated. Instead, I adopt the definition that requires an “experience of subjugation, marginalization, dispossession, exclusion or discrimination.” These elements are rooted in economic, social and political considerations, and have justified the development of rights owed to Indigenous peoples as a “class” – a group of people with common characteristics whose interests are legally protected. I also accept that there is no one single indigenous experience. Quite to the contrary, the experiences of Indigenous peoples are varied, and groups are occasionally rich and empowered. Yet, for most indigenous groups the likely result of instruments of globalization that enable unconstrained interdependence is an increase in relative inequality.

In summary, what this analysis reveals is that provisions exist within international economic arrangements for the protection of Indigenous peoples, but they are often under-enforced, weak or hamstrung by other forces. Protections tend to be stronger in IP, which creates *sui generis* rights, and finance, which relies on safeguards incorporated in loan agreements. Protections in international trade and investment tend to be weaker. These agreements regulate the relationship between distinct legal obligations through reservations, carve outs or exceptions. In all these regimes, the application of secondary rules of international law, like the rules of treaty interpretation are generally not excluded by treaties. Hence, these secondary rules might result in the elevation of legal protections enshrined in other sources of legal authority. Nevertheless, this analysis suggests that the regimes of economic interdependence provide a growing set of possibilities for those who seek to advance indigenous rights and interests using international economic law.

Chapter 4 describes eight case studies to explore the effectiveness of the four explored fields in the accommodation of Indigenous peoples. The cases involve indigenous communities in Africa and the Americas and show how indigenous interests have used different arrangements to resist the cycle of susceptibility and exclusion or to take advantage of economic liberalization when possible. Some of the cases incorporate my own experiences and perspectives working with different institutions between 2014 and 2019, thanks to Professor S. James Anaya, former United Nations Special Rapporteur on the Rights of Indigenous Peoples, and a (former) colleague at the University of Arizona, and during my visit at University of Colorado (where Professor Anaya sat as Dean of the Law School).

The analysis shows that while imperfect, international economic law could perform the function of *shield* for indigenous rights. As I explain, states have an undeniable right under international law to protect the public interest through reasonable government action. In the case of Indigenous peoples,

different sources of authority demand effective actions in favor of this protected category of rightsholders. Though measures to protect the rights of Indigenous peoples *domestically* will no doubt be challenged, the unique recognition of Indigenous peoples by international law as politically vulnerable and economically marginalized justifies broad efforts to protect Indigenous peoples – in effect enlarging states’ policy, regulatory or police space. Moreover, international economic institutions have offered a more expansive interpretive approach to relevant flexibilities included in treaty texts. Institutions like the WTO have drawn an actual connection to the concerns of Indigenous peoples, effectively reading those concerns as a potentially suitable justification. Similarly, in the investment terrain, recent decisions have recognized the duty of governments to protect against human rights violations and the potential contributory role of multinational corporations. This recognition, I argue, expands the capacity to utilize international economic law as a *shield* for the protection of indigenous rights.

Less effective is the use of international economic law to develop the social, economic, or cultural activities of Indigenous people. With some caveats, this possibility is also available, especially in trade and investment regimes. And while international finance safeguards are protective in nature, their presence has arguably triggered the inclusion of indigenous interests in financing and “development” programs – opening economic opportunities, one may hope, for indigenous groups. All this is caveated by the fact that to advance their interests, Indigenous peoples must sustain an active role in setting standards, safeguarding regulatory autonomy and maintaining constant representation before domestic authorities. In addition, with the judicialization of these fields, strategic litigation becomes much more relevant to test the limits of legal obligations; promote a sensible relationship between treaties; and expand the flexibilities included in legal instruments. Access to legal and policymaking expertise is therefore particularly critical for the defense or advancement of indigenous interests in an interconnected world.

There is another, more hopeful aspect. The relationship goes both ways and the analysis also shows that indigenous rights are transforming the field – for the better. As I explain there is evidence of three potentially transformational impacts that could serve as a (broad) guide for the improvement of international economic frameworks at a disruptive time. These three impacts are: (1) the incorporation of new standards, metrics and tools available in international economic treaties; (2) the modification of the practice of international economic lawmaking; and (3) the use of international economic arrangements to lock in social and economic policy for vulnerable and/or marginalized populations.

A New Path: Indigenous Peoples As Core Participants of Globalization

The last two chapters formulate proposals for actions to improve the way in which the field of international law addresses the claims and concerns of marginalized communities. In Chapter 6, I make some basic recommendations. These recommendations are only partial; they are insufficient to address the current wave of discontent with globalization's negative effects or the deep existing structural inequities between and within countries – especially as the global pandemic resulting from Covid-19 exacerbates them. But, within the realm of limited possibilities, there is incremental change and I believe deeply that the relative success of Indigenous peoples shows precisely that over time, change can happen. “They teach the importance of “resistance from within” – the development, use and importation of human rights norms, concepts and strategies into frameworks used to address economic interdependence.”

The recommendations include four basic idea: (1) the idea that governing structures must, to the extent possible, include representatives of marginalized groups in the upstream and downstream law production processes – that is, in treaty negotiations and international dispute settlement proceedings; (2) the idea of using international economic agreements to give special treatment to indigenous communities and to force legal reform through them; (3) the idea that international economic law should have a basic commitment to democracy; and (4) the idea that international economic agreements should include more provisions that condition economic benefits on the implementation of processes for fair compensation and direct sharing of benefits.

Finally, in Chapter 7, I reengage with the debate over the discontents of globalization. This chapter has a twofold objective. First, I seek to highlight some of the systemic elements of disempowerment often ignored in the main “narratives” over the negative effects of globalization. Second, I seek to provide a critique more consistent with the main argument of this book. To that end, the book concludes by advocating the incorporation of indigenous perspectives in debates about the future of international economic law, including: (a) respect for distinct beliefs about and forms of economic organizations; (b) active commitment with communal self-determination; and (c) recognition of individual and corporate duties toward our planet and future generations. These, I believe, are the three most powerful insights that international economic law has failed to understand by leaving Indigenous peoples at the margins of globalization.

1

Globalization and Its Multiple Discontents

The election of President Donald Trump, which followed an indecisive vote by the citizens of the United Kingdom to leave the European Union, evidenced a deep crisis. Among others, this crisis reflects a lack of democratic support to, and appetite for projects that aim to increase economic interdependence. Old and new perspectives on this issue joined forces against a shared, common enemy – the distrust of the process often referred to as globalization.

Perspectives critical of the process of globalization are by no means new. For centuries, groups disfavored by the destabilizing forces that such processes entail, such as competition or new forms of social and business organization, or that see in it the formalization of power structures have attempted sometimes successfully to organize and protect against economic interdependence.¹ Trade policy has international but also domestic distributional effects that affect interests and prospects. Notably, however, the events of 2016 are qualitatively different as they signaled a deep division and generalized mistrust even in countries that have substantially benefited – at least from a macroeconomic perspective – from the post-World War II consensus and the neoliberal institutions that followed the fall of the Berlin Wall.² The once vibrant middle classes, which were propelled in part by industrialization in many Western countries, frustrated with grim perspectives about their future joined other popular and populist movements. Many of these critics pointed at (neo)economic liberalism as the culprit.

¹ See Robert E. Litan, *The “Globalization” Challenge: The U.S. Role in Shaping World Trade and Investment*, BROOKINGS, Mar. 1, 2000, visit <https://www.brookings.edu/articles/the-globalization-challenge-the-u-s-role-in-shaping-world-trade-and-investment>.

² See Robert Kuttner, *Neoliberalism: Political Success, Economic Failure*, THE AMERICAN PROSPECT, June 25, 2019, visit <https://prospect.org/economy/neoliberalism-political-success-economic-failure>.

In their view, this form of internationalization promotes nothing but a form of regressive redistribution – a way of making the rich even richer. Many of those disaffected chose to vote for candidates with nationalistic tendencies and, in some cases, racist undertones.³

To a large extent, this grim perspective that led to our current crisis of trust is not an incorrect perspective of one (among many other) effect of globalization. The interconnection of markets has facilitated the large accumulation of capital for a few with the skills, social networks and political access to participate in the global financing, servicing, trading or investing with limited constraints (compared with prior periods of humanity) – leaving many behind. It has facilitated the underinvestment in key areas that helped to underpin social cohesion, while motivating enormous dislocations of workers. At the same time, in some places more than others, globalization is perceived as the continuation of colonization that exacerbated the existing inequalities between nations. For instance, UN bodies have declared that it is necessary to contribute to the current debate to defend the interest of all and to move away from the hegemony of the major powers. Colonialism has returned under a new guise.⁴ In addition, in many countries, governments have been unable or unwilling to sufficiently address these well-known effects with the adoption of policies to protect the disaffected – for instance, with retraining programs, the expansion of the social safety net or increasing access to affordable healthcare and education. To make things even worse, the volatility of intensely interconnected economies also made traditionally stable societies much more vulnerable to recurrent systemic exogenous shocks and, as seen in recent months, susceptible to epidemics.⁵

More problematically, the responses to the cyclical crises have had – sometimes by design – the effect of benefiting the same sophisticated, wealthy or already empowered actors who can insulate from volatility and take advantage of bailouts and other rescue programs *with a tilt*. Take, for instance, the effects of the policy responses to the financial crisis of 2008: despite its potentially beneficial effects that may have avoided disastrous consequences

³ See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, HARVARD KENNEDY SCHOOL, FACULTY RESEARCH WORKING PAPER SERIES, Aug. 2016, visit <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>.

⁴ See United Nations, *Impact of Globalization on Various Areas of World Discussed by Heads of UN Regional Commissions*, Feb. 14, 2000, visit <https://www.un.org/press/en/2000/20000214.tad1908.doc.html>.

⁵ Monica Potts, *The American Social Safety Net Does Not Exist*, THE NATION, Oct. 13, 2016, visit <https://www.thenation.com/article/archive/the-american-social-safety-net-does-not-exist>.