Indigenous Harms from Global Development—Can International Economic Law Provide a Cure?

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Tagged as : Native Peoples Law

Date : July 24, 2019

Sergio Puig, International Indigenous Economic Law, 52 **U.C. Davis. L. Rev.** 1243 (2019).

States are the paradigmatic perpetrators of harms to indigenous rights, but this is changing. Increasingly, as Professor Sergio Puig points out, multinational corporations are the source of such harms, ranging from research extraction to commodification of indigenous knowledge and culture. Scholars and advocates typically turn to either domestic law or international human rights law to address these harms, and often treat international economic processes as themselves antithetical to indigenous rights. Professor Puig, however, convincingly lays out the ways that international economic law creates protections for indigenous rights, and analyzes needed enhancements for those protections. More radically, he argues that protecting indigenous rights is not contrary to economic globalization, but is core to justifying its legitimacy. *International Indigenous Economic Law* powerfully breaks down silos between human and indigenous rights and economic law, and will be valuable reading for scholars and advocates from these different fields.

Global economic development, Professor Puig shows, has left many indigenous peoples behind. While comprising only 5% of the world's population, indigenous peoples make up 15% of the world's poor, and a third of the world's one billion "extremely poor." Although their traditional territories encompass some of the earth's most valuable resources, resource development more often leads to displacement and impoverishment than to indigenous prosperity. When indigenous law scholars have studied these harms, they turn to human rights law to solve them, and often treat economic development as a threat. Professor Puig, however, argues that this focus ignores valuable tools provided by economic law, including tools that are more easily enforced against non-state actors than traditional human rights instruments. International economic scholars, in contrast, largely ignore indigenous rights, or at best treat them as exceptions to international economic law. But, Professor Puig demonstrates, international economic instruments themselves have long paid attention to indigenous rights, often in surprisingly progressive ways.

Professor Puig discusses how different areas of international economic law protect (and fail to protect) indigenous interests. The impact of international intellectual property law on indigenous peoples is the most discussed in the legal literature, and several international intellectual property regimes provide at least modest protection for indigenous rights. The Nagoya Protocol on the Convention on Biological Diversity, for example, requires identification of the indigenous and local sources of traditional knowledge, and fair and equitable sharing of benefits from such knowledge. The World Intellectual Property Organization has worked to create norms against exploitation of intangible cultural resources and encourage suis generis regimes to protect such resources. The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, meanwhile, mandates measures to protect indigenous cultural heritage.

Although less discussed, the rules governing international development banks also provide meaningful recognition for indigenous peoples' rights. Long before the UN Declaration on the Rights of Indigenous Peoples, for example, the World Bank Group required development projects to recognize customary and traditional tenure systems and involve indigenous communities in decision-making. World Bank rules now demand that borrowers engage in "free, prior, and informed" consultation and avoidance of adverse impact on affected indigenous groups. Enforcement procedures include, as a last resort, loan cancellation and sanctions against the offending borrower. The Asian Development Bank,

Inter-American Development Bank, and other lending groups have similar protections. The World Bank rules have also led private lenders to adopt the Equator Principles and other voluntary rules that recognize indigenous interests.

International trade and investment agreements, in contrast, have few explicit protections for indigenous peoples. Those that do exist are largely in the form of carve-outs intended to allow domestic protection of indigenous rights in the face of mandates to provide equal treatment to foreign entities. The controversial NAFTA chapter on foreign direct investment, for example, included modest exemptions from key provisions to maintain rights or preferences for aboriginal peoples.

Professor Puig notes the limitations of the protections of each of these regimes. Multinational actors may fail to abide by existing protections or seek a more permissive regime, such as that of a private lender rather than the World Bank. International bodies may not wish or be able to demand accountability to abide by their rules. Indigenous groups, meanwhile, do not have an automatic seat at the table in international economic development discussions, and are deeply under-resourced and disadvantaged in trying to assert their rights. At a deeper level, the language of international economic law, with its emphasis on individual property, commodification, and change, fits uneasily with the indigenous claims of collective rights and tradition. The result has been to rely on carve-outs from economic agreements rather than affirmative rights to make decisions about and benefit from economic development. To address the limitations of international economic law regimes, Professor Puig advocates measures to ensure indigenous representation in economic decision-making, increase indigenous bargaining power and capacity, and clarify that protections for indigenous rights do not violate and are required by international economic law.

Most radically, Professor Puig argues that protecting indigenous interests is a "key litmus test for the very legitimacy of international economic law." (P. 1311.) The alternative is a legal regime concerned solely with facilitating transactions rather than with just distribution to indigenous and other marginalized groups. The result of such a regime is to exacerbate economic inequality and the instability inequality causes. Accepting a focus on transactional efficiency to the exclusion of distribution also fuels the fear that globalization is only about wealth transfers to elites. This in turn, encourages the embrace of isolationism seen in movements from the right and the left. The development of international indigenous economic law, however, shows ways that international economic bodies can incorporate human rights norms, enforce them against non-state actors, and catalyze private and state adoption of those norms. While Professor Puig acknowledges that the limitations of that law and its enforcement reveal "the systemic challenges posed by global economic interdependence," the ways in which international economic law is beginning to address those challenges provide some hope for the future. (P. 1314.) They certainly, at least to this reader, present a convincing case for looking beyond human rights documents to enforce international human rights norms.

Cite as: Bethany Berger, *Indigenous Harms from Global Development—Can International Economic Law Provide a Cure?*, JOTWELL (July 24, 2019) (reviewing Sergio Puig, *International Indigenous Economic Law*, 52 **U.C. Davis. L. Rev.** 1243 (2019)),
https://lex.jotwell.com/indigenous-harms-from-global-development-can-international-economic-law-provide-a-cure/.