
UC DAVIS LAW REVIEW

VOL. 52, NO. 3



FEBRUARY 2019

International Indigenous Economic Law

*Sergio Puig**

Scholarship on the links between business and human rights is widespread. However, the specific ways in which globalization accommodates the economically marginalized and those who are likely most vulnerable to its negative effects has received scant attention. The increasingly obvious manifestations of discontent over the effects of globalization — from Brexit, to the election of President Trump —

* Copyright © 2019 Sergio Puig. Associate Professor of Law and Director, International Economic Law and Policy Program, James E. Rogers College of Law, University of Arizona. I would like to thank Derek Bambauer, Tomer Broude, James Cavallaro, Anupam Chander, Seth Davis, David A. Gantz, Negar Katirai, Jason Kreag, Robert A. Hershey, Moshe Hirsch, James Hopkins, Toni Massaro, David Marcus, Christopher T. Robertson, Rebecca Tsosie, Gregory Shaffer, Melissa L. Tatum, Steven R. Ratner, Anna Spain Bradley, Rebecca Tsosie, Robert Williams, Mark Wu, and the participants of workshops in UC Irvine, Colorado, Arizona, and The Hebrew University, for their helpful criticisms, advice and/or suggestions on earlier drafts. Alancay Morales, Andrew J. Shepherd, and Maxmilien Bradley provided excellent research and editorial assistance. Finally, special thanks to the staff of the UC Davis Law Review for professional and diligent editing and helpful substantive suggestions. This Article was made possible by grant NPRP 7-1815-5-272 from the Qatar National Research Fund (a member of Qatar Foundation) and the Arizona Summer Research Grant. All statements and errors are my responsibility. It is dedicated to S. James Anaya for his leadership in the field of international indigenous law and policy and his support and encouragement to write this piece.

combined with the evidence that confirms the very uneven distribution of its benefits, indicate that this is an important scholarly gap.

To bridge it, this Article explores the extent to which the main fields of international law that are tasked with promoting economic interdependence — international finance, investment, trade, and intellectual property — address the rights and interests of indigenous peoples, an expressly protected category of marginalized and/or vulnerable people under international law.

Relying on recent legal practice and four case studies, the Article compares these fields and explains the different ways indigenous peoples' interests are accommodated by international economic law. More broadly, the intersection between international economic law and indigenous rights — what I call international indigenous economic law — provides important lessons to current demands to address the negative effects of globalization. In particular, the Article argues that international economic law must recognize the need to more seriously incorporate the struggle for social and economic justice espoused by human rights law. At the same time, human rights advocates should utilize the growing set of possibilities from instruments that promote economic interdependence to create or renew strategies that advance human rights values and goals. This complex line has been at the core of indigenous rights advocacy, the relative success of which provides some hope for the future of international law at a challenging time.

TABLE OF CONTENTS

INTRODUCTION	1245
I. GLOBALIZATION AND INDIGENOUS PEOPLES	1251
A. <i>Academic Separation</i>	1251
B. <i>Protection</i>	1254
C. <i>Impact</i>	1257
1. <i>Legitimacy</i>	1260
2. <i>Discrimination</i>	1262
3. <i>Re-regulation</i>	1265
4. <i>Inequality</i>	1267
II. INSTITUTIONALIZATION AND INDIGENOUS INTERESTS	1269
A. <i>Intellectual Property</i>	1270
1. <i>Biological and Genetic Resources</i>	1272
2. <i>Traditional Knowledge and Intangible Cultural Heritage</i>	1274
3. <i>Trademarks, Patents and Geographical Indications</i>	1276
B. <i>Finance</i>	1278
C. <i>Trade</i>	1283

2019]	<i>International Indigenous Economic Law</i>	1245
	D. <i>Investment</i>	1286
	E. <i>Case Studies</i>	1290
	1. Intellectual Property: The Kuna People	1290
	2. Finance: The Huave People.....	1292
	3. Trade: The Inuit People.....	1294
	4. Investment: Two North-American Tribes.....	1295
	III. INTERNATIONAL INDIGENOUS ECONOMIC LAW	1297
	A. <i>Normativity</i>	1298
	1. A Shield for Indigenous Rights	1299
	2. A Sword for Indigenous Rights	1303
	B. <i>Limits</i>	1307
	C. <i>Lessons</i>	1311
	CONCLUSION.....	1316

INTRODUCTION

In the early 1920s, the Osage People of North America were among the world’s wealthiest people *per capita*.¹ They enjoyed the fortunes of successful “treaty” negotiations and the fortuitous discovery of oil deposits below their new arid Oklahoma land.² This abundance, however, did not protect them from a bloody and tragic path.

Permeated by a culture of racism that viewed Native Americans as inferior, authorities at different levels of government colluded with greedy citizens to strip this indigenous group of its vast wealth through murder and fraud. To a large extent, the story of the Osage represents the very essence of vulnerability and marginalization in the modern world: even when a group like the Osage managed to succeed in a system stacked against it, that success was quickly cut short by the government and the powerful. While strong today, the Osage barely survived the conspiracy, and most of the tribe’s wealth has been depleted by the descendants of the very same perpetrators of these terrible crimes.

For years — for centuries — the economic, physical, and cultural subjugation of indigenous groups has been recorded, but today, multinational corporations are more likely to be implicated in that subjugation than ever before.³ In 2016, the Standing Rock Tribe in the

¹ DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* 6 (2017).

² *Id.*

³ See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3-4 (2d ed. 2004) (describing European colonization as leading to indigenous “suffering and turmoil on a massive scale”); KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS*

United States mobilized against the development of a pipeline that threatens their water supply.⁴ And in Guatemala, the Maya People rallied against the uncompensated encroachment of their ancestral land (and ensuing gender violence) also by Canadian corporate resource extraction activities.⁵ These well-publicized cases reminded us that even with the increase in legal protections under civil, human, and indigenous rights frameworks and the important coordinated efforts to empower tribes around the world,⁶ indigenous peoples suffer today from the greed and corruption that can accompany power in the form of authoritarian governments, insatiable corporations, and unscrupulous individuals.⁷ 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

DEVELOPMENT: RIGHTS, CULTURE, STRATEGY 1-2 (2010) (referring to “centuries of colonialism, massive acts of violence” and “development projects meant to remove or assimilate” indigenous peoples). See generally DEP’T OF ECON. & SOC. AFFAIRS, DIV. FOR SOC. POLICY & DEV., STATE OF THE WORLD’S INDIGENOUS PEOPLES, at 70-71, U.N. Doc. ST/ESA/328 (2009); BARTOLOMÉ DE LAS CASAS, A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES (Nigel Griffin ed. & trans., 1992) (1552) (Bartolomé de Las Casas’s 1552 account of the Spanish conquest of native peoples in the Americas).

⁴ Nives Dolšak, Aseem Prakash & Maggie Allen, *The Big Fight over the Dakota Access Pipeline, Explained*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/this-is-why-environmentalists-are-targeting-energy-pipelines-like-the-north-dakota-project/?utm_term=.b97549882f99.

⁵ Suzanne Daley, *Guatemalan Women’s Claims Put Focus on Canadian Firms’ Conduct Abroad*, N.Y. TIMES (Apr. 2, 2016), <https://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html>.

⁶ See, e.g., G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); U.N. DEPT. OF ECON. & SOC. AFF., INDIGENOUS PEOPLES AT THE U.N. (“U.N. DESA”), <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited Sept. 14, 2018); Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica,” art. 63, Nov. 22, 1969, O.A.S.T.S. No. B-32, 1144 U.N.T.S. 123; ILO, Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 6(1), June 27, 1989, 28 I.L.M. 138.

⁷ See Alexander Zaitchik, *Sludge Match: Inside Chevron’s \$9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE (Aug. 28, 2014, 1:21 PM), <https://www.rollingstone.com/culture/culture-news/sludge-match-inside-chevrons-9-billion-legal-battle-with-ecuadorean-villagers-71779/> (detailing the struggle for compensation after Chevron contaminated the drinking water of a village of indigenous Ecuadoreans); “Doctrines of Dispossession” — *Racism Against Indigenous Peoples*, WORLD CONFERENCE AGAINST RACISM, <http://www.un.org/WCAR/e-kit/indigenous.htm> (last visited Nov. 14, 2018).

relative terms in that they are less well-off than others who have benefited from the rapid growth and development since the nineties.⁸

This trend has been closely monitored by human rights advocates, but it has been almost entirely ignored by international economic law scholars.⁹ These scholars understand issues of indigenous rights to belong to legal fields other than international economic law — to human rights law, especially.¹⁰ This compartmentalization is misguided and disserves the field, especially at a time when the value of global trade, investment, and finance is being negated or, at least, seriously questioned by a growing wave of economic nationalism. Understanding the treatment of indigenous peoples by international law requires reference not only to human rights law but to *all* its fields, including international economic law.¹¹ Indeed, international economic law provides a particularly relevant, if not fundamental, component in addressing the inequalities exacerbated by globalization and experienced by indigenous peoples.

Though international economic law scholars have failed to methodically address indigenous rights, international economic law institutions as well as governments have had to deal with their systemic incorporation.¹² In 2014, the Appellate Body (“AB”), the

⁸ See generally RAGHUBIR CHAND ET AL., SOCIETIES, SOCIAL INEQUALITIES AND MARGINALIZATION: MARGINAL REGIONS IN THE 21ST CENTURY 1-2 (2017); Ian Anderson et al., *Indigenous and Tribal Peoples’ Health* (The Lancet–Lowitja Institute Global Collaboration): A Population Study, 388 LANCET: CORRESPONDENCE 2867, 2867 (2016).

⁹ Most commentary relates to trade and cultural heritage. See, e.g., Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT’L ECON. L. 623, 631-32 (2005). More recent pieces have addressed other intersections of indigenous rights. See, e.g., Xinjie Luan & Julien Chaisse, *Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 79, 111-20 (2011).

¹⁰ These rights are codified. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter CCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESCR]; ILO, *supra* note 6.

¹¹ It may implicate many others, including international environmental law. For example, in the recent Chagos archipelago case between the United Kingdom and Mauritius — involving an island leased to the U.S. for military purposes — a tribunal under the U.N. Convention on the Law of the Sea (“UNCLOS”) held that the United Kingdom’s creation of a Marine Protected Area was unlawful. As the archipelago’s original inhabitants were forcefully removed by the British government, this ruling has given new hope to the native population that they will have the right to return to their land after fifty years of struggle. See *Chagos Marine Protected Area Arb.* (Mauritius v. U.K.) 215 (Perm. Ct. Arb. 2015).

¹² See Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous

highest adjudicatory body of the World Trade Organization (“WTO”), recognized that the WTO Agreements and other international law instruments authorize the European Union (“EU”) to provide accommodations for indigenous communities in its ban on seal products.¹³ In 2016, the final version of the Trans-Pacific Partnership Agreement (“TPP”), a massive treaty that aimed at regulating one third of global trade and investment, included a carve-out to insulate certain indigenous communities from its most negative effects.¹⁴ That same year, the World Bank Group (“WBG”) updated safeguards policies that protect indigenous peoples against violations by lending recipients and contractors. More recently, Canada has demanded a chapter focused on indigenous rights in the renegotiations of the North American Free Trade Agreement (“NAFTA” or “USMCA”).¹⁵ Thus, as economic treaties have proliferated and international institutions dealing with international trade and finance, foreign direct

Peoples), *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples*, ¶ 59, U.N. Doc. A/70/301 (Aug. 7, 2015).

¹³ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/13 (June 19, 2014).

¹⁴ TPP Full Text, OFF. OF THE TRADE REP. art. 29.6 (last visited Nov. 18, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacificpartnership/tpp-full-text> (stating that “nothing in this agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfillment of its obligations under the Treaty of Waitangi”). While not a result of direct Maori participation in the official negotiations of the TPP, the inclusion of this clause represents the engagement of the Maori people with the government of New Zealand. After the U.S. defection, the TPP has been replaced with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 29 (Mar. 8, 2018), <http://www.trungtamwto.vn/sites/default/files/tpp/29.-exceptions-and-general-provisions.pdf>.

¹⁵ Hon. Chrystia Freeland, Foreign Affairs Minister, Address on the Modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017) (“[W]e can make NAFTA more progressive . . . in line with our commitment to improving our relationship with indigenous peoples, by adding an indigenous chapter . . .”); Catherine Porter, *Canada Wants a New Nafta to Include Gender and Indigenous Rights*, N.Y. TIMES (Aug. 14, 2017) <https://www.nytimes.com/2017/08/14/world/americas/canada-wants-a-new-nafta-to-include-gender-and-indigenous-rights.html>. The final version of the new U.S., Mexico, Canada trade agreement or USMCA, in addition to other reservations, exceptions and exclusions “incorporates a general exception that clearly confirms that the government can adopt or maintain measures it deems necessary to fulfill its legal obligations to Indigenous Peoples.” Government of Canada, Trade and Indigenous Peoples Issue Summary (Oct. 10, 2018), <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/indigenous-autochtones.aspx?lang=eng>.

investment (“FDI”), or intellectual property (“IP”) have broadened their reach, institutions and governments have worked to understand and include into economic treaties the special protections afforded to indigenous peoples by international law.

International economic law scholars should work to understand these protections, too. To nurture this understanding, this Article surveys and dissects the manners in which international economic law “recognize[s] the specific challenges that may be faced by indigenous peoples.”¹⁶ It does so by advancing three related claims: one conceptual, one descriptive/evaluative, and one normative.

First, Part II provides a *conceptual* framework; 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 law-making) and the indirect shift in governance priorities that results from enacting and enforcing treaty provisions (and resulting interpretations). Economically, the focus on non-discrimination among economic actors results in *de facto* discrimination against indigenous peoples and a consequent rise in inequality. What tools does international economic law provide to limit these effects? How effective are these tools?

Second, Part III *describes* and *contrasts*, both in theory and in action, the effectiveness of the four main fields of international economic law — namely trade, FDI, finance, and IP — in the accommodation of indigenous peoples. Regimes within international trade and, to some degree, investment have attempted to address indigenous concerns by creating exceptions and reserving policy space or some degree of regulatory autonomy when making decisions that implicate non-economic values — a *substantive, state-driven* solution. Regimes within finance and IP regulation, on the other hand, have attempted to address indigenous concerns by institutionalizing participation and recognizing mechanisms for direct benefits of productive activities — a *procedural, market-driven* solution. The analysis of these distinct

¹⁶ James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 77, U.N. Doc. A/HRC/18/35 (July 11, 2011).

approaches evidences 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) expose the negative effects of the operations of multinational corporations (“MNCs”) on indigenous communities; (2) strengthen the capacity of states and international organizations to protect indigenous rights; (3) condition access to economic benefits on the support of indigenous interests; and (4) provide policy incentives that promote indigenous products and the practices associated with their production.

Finally, Part IV argues that there is an important place for indigenous rights within the field of international economic law, and takes a stance against the retrenchment of human rights law suggested by prominent legal scholars and influential policy-makers.¹⁷ This normative claim does not suggest that indigenous peoples should be incorporated into international economic law while other disenfranchised groups should not. Instead, it 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 global economic interdependence currently under attack by the nationalistic right (e.g., May, Trump, Le Pen) who see too much international redistribution, and the populist left (e.g., Sanders, Warren, Syriza) who see too little national redistribution.¹⁸ It

¹⁷ E.g., Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 279 (2017) (arguing that international law “should focus on a stronger, more limited core of international legal norms that protects international peace and security, not human rights”); Rex Tillerson, U.S. Sec’y of State, Remarks to U.S. Department of State Employees (May 3, 2017) (“[I]t’s really important that all of us understand the difference between policy and values, and in some circumstances, we should and do condition our policy engagements on people adopting certain actions as to how they treat people. They should. We should demand that. But that doesn’t mean that’s the case in every situation. And so we really have to understand, in each country or each region of the world that we’re dealing with, what are our national security interests, what are our economic prosperity interests, and then as we can advocate and advance our values, we should.”). *But see* John McCain, *Why We Must Support Human Rights*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/opinion/john-mccain-rex-tillerson-human-rights.html> (criticizing Tillerson’s foreign policy approach).

¹⁸ Anthea Roberts, *Being Charged by an Elephant: A Story of Globalization and Inequality*, EJIL: TALK! (Apr. 19, 2017) <https://www.ejiltalk.org/being-charged-by-an-elephant-a-story-of-globalization-and-inequality/#more-15131> (noting that both nationalists and populists shared a distaste for interdependence, but that “[o]ne tells a story of too much international redistribution, the other a story of too little national redistribution”); *see also* Alan Johnson, *Why Brexit Is Best for Britain: The Left-Wing*

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. More importantly, it dissects the important links of international economic law to fields concerned with political marginalization and economic vulnerability. An *international indigenous economic law*, one 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.¹⁹ If 2016 — the year of Brexit’s vote and Trump’s election — showed us anything, it is that such argument is obsolete and does nothing to enhance the political sustainability of international economic agreements and international cooperation more broadly.

I. GLOBALIZATION AND INDIGENOUS PEOPLES

A. *Academic Separation*

Lawyers and scholars in the field of international economic law rarely collaborate professionally with lawyers and scholars in the field of human rights law. Except for the occasional shared conference or workshop, these fields are typically separated into distinct, often insular, epistemic communities. Human rights lawyers tend to work in the field fighting for the underprivileged or endangered. International economic lawyers, on the other hand, tend to work in economic capitals like London, Geneva, and New York, representing powerful economic actors and litigating grievances before a growing number of international courts and tribunals. But even with these differences, both legal communities may ultimately aspire to the same goals: advancing global welfare, improving living conditions, and raising the credibility of and respect for international law.²⁰

Case, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/opinion/why-brex-it-is-best-for-britain-the-left-wing-case.html>.

¹⁹ For a treatment of this topic, see SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 214-16 (2018); IMF ET AL., MAKING TRADE AN ENGINE OF GROWTH FOR ALL: THE CASE FOR TRADE AND FOR POLICIES TO FACILITATE ADJUSTMENT 22-23 (2017), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2017/04/08/making-trade-an-engine-of-growth-for-all>.

²⁰ See Milton C. Regan, Jr., *Lawyers, Globalization, and Transnational Governance Regimes*, 12 ANN. REV. L. & SOC. SCI. 133, 136 (2016) (arguing that international economic lawyers view the furtherance of globalization as dependent on *both* markets

At least two reasons may explain why historically there has not been a strong connection between human rights law and international economic law, especially international trade and investment law.²¹ While international trade and FDI regulation have developed through the General Agreement on Tariffs and Trade (“GATT”), the WTO, free trade agreements (“FTAs”), and bilateral investment treaties (“BITs”), human rights institutions have evolved around the U.N. and, more recently, regional systems.²² The result is, in Robert Wai’s words, that “each field utilize[s] distinct discourses and frameworks for addressing similar problems.”²³ In particular, human rights frameworks use a discourse of universal values, self-determination, and accountability, whereas international economic law uses a language of reciprocity and restraint, non-discrimination, self-interest, and joint gains.²⁴

Nonetheless, officials have recognized the parallel goals towards which both international economic law and human rights law strive. In fact, the then-WTO Director-General Pascal Lamy in 2010 suggested that “[o]ne could almost claim that trade is human rights in practice! . . . [The WTO shall] ensure that trade does not impair human rights, but rather strengthens them.”²⁵ Furthermore, the WBG and other international financial institutions (“IFIs”) have increasingly recognized the need to address compliance with human rights in their practices, operations and development programs.

Efforts have also been made to address the link between the business activities promoted by international economic law and human rights. Chief among these efforts is the U.N. Human Rights Council’s Guiding Principles on Business and Human Rights.²⁶ The Guiding Principles reiterate the human rights duties that apply to all

unfettered by national regulation and human rights that constrain business activities).

²¹ Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 EUR. J. INT’L L. 35, 45 (2003).

²² *Id.* For a discussion on trade and investment regimes, see Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT’L L. 1, 39 (2015). For human rights, see Philip Alston, *Does the Past Matter?: On the Origins of Human Rights*, 126 HARV. L. REV. 2043 (2013) (reviewing JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012)).

²³ Wai, *supra* note 21, at 43.

²⁴ For human rights, see, e.g., CCPR, *supra* note 10, art. 1(1); CESCR, *supra* note 10, art. 1(1); see also UN DESA, *supra* note 6, art. 3.

²⁵ Pascal Lamy, Director General, WTO, Remarks at the Colloquium on Human Rights in the Global Economy (Jan. 13, 2010).

²⁶ U.N. Human Rights Council, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, at 1 (June 16, 2011).

states, international organizations, and business enterprises, “regardless of their size, sector, location, ownership and structure.”²⁷ The Guiding Principles reflect the general effort to understand how states, as well as non-state actors, may be implicated when commercial activities conflict with human rights. Partly because of this effort, many large corporations have taken active steps to prevent violations through the adoption of and compliance with corporate social responsibility (“CSR”) policies.²⁸

To be sure, states, international organizations, and private businesses have distinct but complementary duties concerning human rights. States are obligated to respect, protect, and fulfill human rights within their jurisdiction. International organizations are obligated to ensure that their activities, like financing infrastructure or peacekeeping in conflict zones, conform with (and in some cases protect) human rights.²⁹ Business actors may not have the same responsibility as states or international organizations. However, due to the increase in international mechanisms of accountability, it is becoming very much in their interest to, at the very least, respect this body of law. Moreover, in most states, human rights are protected under domestic law (including often under a constitution), and a business implicated in the violation of human rights may be subject to civil, criminal, or other proceedings under that body of law. Some

²⁷ *Id.* at 15. Other international organizations incorporated aspects of the U.N. Guiding Principles. For example, the Organization for Economic Co-operation and Development (“OECD”) revised its Guidelines for Multinational Enterprises. OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises* (2017), <http://mneguidelines.oecd.org/2017-Annual-Report-MNE-Guidelines-EN.pdf>; see also *Business and Human Rights*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> (last visited Sept. 24, 2018).

²⁸ See, e.g., *Accountable and Inclusive Governance*, NESTLE, <http://www.nestle.com/csv/what-is-csv/governance> (last visited Sept. 24, 2018); *Addressing Human Rights Impacts*, NESTLE, <http://www.nestle.com/csv/communities/human-rights-impacts> (last visited Sept. 24, 2018); *Our Approach to Human and Workplace Rights*, COCA-COLA, <http://www.coca-colacompany.com/our-company/human-workplace-rights> (last visited Sept. 24, 2018); *PepsiCo*, BUS. & HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/pepsico-0> (last visited Nov. 17, 2018).

²⁹ See *Nuhanović v. Netherlands*, Case No. LJN:BR5388, Judgment, ¶¶ 5.8, 5.9, (July 5, 2011), <http://opil.ouplaw.com/view/10.1093/law:ildc/1742nl11.case.1/law-ildc-1742nl11>; Int’l Law Comm’n, Rep. of the Sixty-Third Session, Draft Articles on the Responsibility of International Organizations with Commentaries, U.N. Doc. A/66/10, at 52 (2011); ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 142-43 (2006); see also, e.g., Roberto Danino, *Legal Opinion on Human Rights and the Work of the World Bank* 17 (Jan. 27, 2006), <http://opil.ouplaw.com/view/10.1093/law-oxio/e215.013.1/law-oxio-e215-regGroup-1-law-oxio-e215-source.pdf>.

states extend these obligations further. In India, for instance, the 2013 Companies Act, somewhat uniquely, requires companies incorporated under the laws of the country to implement CSR policy.³⁰

The responsibility imposed on state and non-state actors to follow human rights norms when carrying out official and business activities is best developed in the Guiding Principles, or the “Protect, Respect and Remedy” Framework. The framework calls on both states and businesses in laying its foundation on the following three pillars:

- (a) States’ existing obligations to respect, protect, and fulfill human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.³¹

Thus, the framework confirms that states are the primary duty-bearers, but private actors such as business enterprises are not insulated from the demands of international human rights law. In this way, international law complements the state’s prerogative to regulate business activities.³² Notably, the Guiding Principles explicitly focus on avoiding adverse impacts on human rights by economic actors. The emerging field of business and human rights offers limited, but much needed, conceptual clarity for linking human rights law and its norms with states and non-state businesses and their activities. Nevertheless, international economic law and human rights law continue to attract practical and academic treatment as two almost unrelated fields.

B. Protection

Human rights law includes protections for indigenous peoples. No authoritative definition of “indigenous peoples” exists. Rather, a series of factors are considered relevant for determining who is indigenous.³³

³⁰ Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 UC DAVIS BUS. L.J. 175, 217-18 (2014).

³¹ U.N. Human Rights Council, *supra* note 26, at 1.

³² For a comprehensive treatment of the topic, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466-67 (2001).

³³ For a discussion of the emergence and conceptual complexities of the field, see Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L. L. 414, 419-20 (1998); *see also* Erica-Irene A. Daes (Chairperson-Rapporteur on the Concept of “Indigenous

Among these, the “experience of subjugation, marginalization, dispossession, exclusion or discrimination” is key.³⁴ These elements are rooted in economic, social, and political considerations, and have justified the development of rights owed to indigenous peoples as a protected category or class — a group of people with common characteristics whose interests are legally protected.³⁵

Today, few, if any, dispute the need for the recognition of such protections. Despite the fact that indigenous peoples make up only five percent of the world’s population, they represent fifteen percent of the world’s poor.³⁶ More dramatically, some estimate that indigenous peoples represent one-third of the world’s one billion extremely poor rural people.³⁷ These numbers are rather vexing considering that indigenous peoples’ traditional territories often coincide with the world’s most biologically diverse areas and are rich in natural, mineral, and other resources.³⁸ Today, such lands comprise eighty percent of the Earth’s remaining healthy ecosystems.³⁹

People”), *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, ¶ 69, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (stating “the factors which modern international organizations and legal experts . . . have considered relevant to the understanding of the concept of ‘indigenous’ include: (a) Priority in time, with respect to the occupation and use of a specific territory; (b) The voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist”).

³⁴ Daes, *supra* note 33, at 22. See generally ANAYA, *supra* note 3.

³⁵ A strand of literature in the law and development field has focused on human rights and indigenous peoples. See, e.g., James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1043 (2007) (discussing the relationship between English common law and international law and its effects on the decolonization of British protectorates); see also, J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa*, 18 AM. U. INT’L L. REV. 851, 866-67 (2003) (examining the case of the Ogoni peoples of Nigeria).

³⁶ STATE OF THE WORLD’S INDIGENOUS PEOPLES, *supra* note 3, at 21.

³⁷ *Id.*; see also World Bank, *Decline of Global Extreme Poverty Continues but Has Slowed* (Sept. 19, 2018), <http://www.worldbank.org/en/news/press-release/2018/09/19/decline-of-global-extreme-poverty-continues-but-has-slowed-world-bank> (defining extremely poor people as those who live on less than US\$1.90 per day).

³⁸ CLAUDIA SOBREVILA, *THE ROLE OF INDIGENOUS PEOPLES IN BIODIVERSITY CONSERVATION: THE NATURAL BUT OFTEN FORGOTTEN PARTNERS*, at xii (2008).

³⁹ See GLOB. ENVTL. FACILITY, *INDIGENOUS COMMUNITIES AND BIODIVERSITY* 9 (2008), https://www.thegef.org/sites/default/files/publications/indigenous-community-biodiversity_0.pdf.

Historically, indigenous peoples' struggles relate to the denial of recognition of autonomy and self-determination, the protection of their culture and territories, and the property and resources therein.⁴⁰ While indigenous peoples have won a few important victories in recent years, such victories were not won easily. For instance, it took twenty years of international advocacy and negotiation until the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples, now a decade old.⁴¹ Other successes followed, including the adoption of the American Declaration on the Rights of Indigenous Peoples and the recognition of indigenous protections in different policy instruments.⁴² In the field of business and human rights, the U.N. Guidelines recommend particular attention to specific groups and populations, including indigenous peoples.⁴³

Though indigenous rights and minority rights have much in common, analytically, under international law, indigenous rights are derived from a very distinct type of legal obligation.⁴⁴ While there is academic disagreement as to the extent and reach of these protections, the distinction between minority rights and indigenous rights is well

⁴⁰ See, e.g., JAMES (SA'KE') YOUNGBLOOD HENDERSON, *INDIGENOUS DIPLOMACY AND THE RIGHTS OF PEOPLES: ACHIEVING UN RECOGNITION* 11 (2008) (providing an indigenous activism within the international human rights movement).

⁴¹ G.A. Res. 61/295, *supra* note 6; see INT'L LAW ASS'N, *THE HAGUE CONFERENCE: RIGHTS OF INDIGENOUS PEOPLES* 51 (2010) (stating it is "indisputable that indigenous peoples are of concern of customary international law").

⁴² Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, June 14, 2016, AG/RES 2888 (XLVI-O/16); see also U.N. Development Programme, *Social and Environmental Standards*, at 36-41 (June 2014), <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDPs-Social-and-Environmental-Standards-ENGLISH.pdf>; Int'l Fund for Agricultural Dev., *IFAD Policy on Engagement with Indigenous Peoples*, U.N. Doc. EB 2009/97/R.3 (Sept. 14, 2009), https://www.ifad.org/documents/38711624/39417924/ip_policy_e.pdf/a7cd3bc3-8622-4302-afdf-6db216ad5feb; Global Env'tl. Facility, *GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards*, at 24, U.N. Doc. GEF/C.41/10/Rev.1 (Nov. 18, 2011), https://www.thegef.org/sites/default/files/council-meeting-documents/C.41.10.Rev.1.Policy_on_Environmental_and_Social_Safeguards.Final%20of%20Nov%2018.pdf; U.N. Food and Agriculture Org., *FAO Policy on Indigenous and Tribal Peoples* (2010), http://www.fao.org/fileadmin/user_upload/newsroom/docs/FAO_policy.pdf; *Guidelines on Free, Prior and Informed Consent*, UN-REDD (Jan. 2013), <https://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf>. Among the International Financial Institutions, see *Environmental and Social Framework*, WORLD BANK, <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework> (last visited Sept. 24, 2018).

⁴³ U.N. Human Rights Council, *supra* note 26, at 1.

⁴⁴ ANAYA, *supra* note 3, at 134 ("International practice has . . . tended to treat indigenous peoples and minorities as comprising distinct but overlapping categories subject to common normative considerations.").

established.⁴⁵ What makes indigenous rights different is that they are recognized because of a political or economic status, often connected with the conditions of historically subjugated communities that have been dispossessed, brutalized, and discriminated against. Hence, the normative goals of indigenous rights include political empowerment (by means of rights to participation and self-determination to pursue their own priorities for economic, social, and cultural development) and expansion of economic opportunity and participation (by means of rights to property, culture, and non-discrimination in relation to lands, territories, and natural resources), among other laudable goals.⁴⁶

C. Impact

The intersections of indigenous rights and international economic law deserve in-depth academic treatment. As vulnerable and often marginalized segments of the world's population, indigenous peoples are at a heightened risk of experiencing the negative consequences of globalization. Understanding this reality could provide pathways for effective interventions to alleviate, overcome or, at the very least, minimize such effects.⁴⁷ For the most part, these negative effects result

⁴⁵ Indigenous people may rely on minority rights if their role as a minority is also accepted. However, even if minority rights are relied upon, such rights may fail to address issues central to indigenous peoples, such as self-determination, land use, and governance. See Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 376 (1991).

⁴⁶ S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INTL. COMP. L. 7, 7 (2005) ("In asserting property rights, indigenous peoples seek protection of economic, jurisdictional, and cultural interests, all of which are necessary for them to pursue their economic, social, and cultural development."); see also ANTHONY J. CONNOLLY, *INDIGENOUS RIGHTS* xvii (2017) (categorizing indigenous rights as "the political rights of self-determination, self-government and sovereignty; treaty rights; land and natural resources rights; and cultural 'property' rights"). For a discussion of the historical underpinnings of the struggle of indigenous peoples for self-determination in North America, see Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INTL. COMP. L. 51, 52 (1991) ("The cultural racism of Europeans . . . denied the idea that indigenous tribal peoples should be in control of their own destinies, and imposed upon them instead a legal regime of alien domination that refused recognition of their fundamental human rights of self-determination.").

⁴⁷ See Committee on the Elimination of Racial Discrimination ("CERD"), *Concluding Observations on the Combined Twenty-Second and Twenty-Third Periodic Reports of Peru*, ¶ 15, U.N. Doc. CERD/C/PER/CO/22-23 (May 23, 2018); CERD, *Concluding Observations on the Combined Initial and Second to Fifth Periodic Reports of Honduras*, ¶ 20, U.N. Doc. CERD/C/HND/CO/1-5 (Mar. 13, 2014); CERD, *Concluding Observations on Belize, Adopted By the Committee Under the Review Procedure at Its*

from the diminished ability of indigenous peoples to enjoy the widely documented benefits of economic interdependence, mainly a large increase in global trade and investment and rapid economic development.⁴⁸ In some cases and under certain conditions, indigenous groups can substantially improve their standing (think, for instance, of the Seminole Tribe of Florida that expanded its Hard Rock cafe, hotel and casino business around the world thanks to the same process of globalization).⁴⁹ The general conditions of some indigenous groups may also have improved in absolute terms in recent times as a consequence of economic interdependence.⁵⁰ Yet a lot more remains to be done.

To start a productive conversation about how best to advance their general interests, it is important to understand and acknowledge how international economic law, in its promotion of ideas like efficiency, innovation, freedom, and entrepreneurship, creates or exacerbates systemic challenges for indigenous peoples. Other populations, such as women, people with disabilities, and national and ethnic minorities, suffer similar challenges (that should also be thoroughly explored),

Eighty-First Session (6-13 Aug. 2012), ¶ 10, U.N. Doc. CERD/C/BLZ/CO/1 (May 3, 2013); see also Comm. on Econ., Social and Cultural Rights, *Concluding Observations on the Initial Report of Indonesia*, ¶ 39, U.N. Doc. E/C.12/IDN/CO/1 (June 19, 2014); Human Rights Comm., *Concluding Observations On Belize in the Absence of a Report, Adopted by the Committee at Its 107th Session (11-28 March 2013)*, ¶ 25, U.N. Doc. CCPR/C/BLZ/CO/1 (Apr. 26, 2013); Olivier De Schutter (Special Rapporteur on the Right to Food), *Mission to Cameroon*, ¶ 47, U.N. Doc. A/HRC/22/50/Add.2 (Dec. 18, 2012); CERD, *Consideration of Reports Submitted By States Parties Under Article 9 of the Convention*, U.N. Doc. CERD/C/GUY/CO/14 (Apr. 4, 2006).

⁴⁸ Comm'n on Human Rights, *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/AC.4/2003/2, at 4 (June 16, 2003), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/146/61/PDF/G0314661.pdf?OpenElement> (“Indigenous peoples particularly tend to be left out of the benefits of globalization at the political, economic and social levels. They are often excluded from political life, as they lack adequate political participation and self-representation. Moreover, they often suffer from economic inequalities reflected in the lack of access to productive assets, services and opportunities.”).

⁴⁹ Lauren Gensler, *An Alligator Wrestler, A Casino Boss and a \$12 Billion Tribe*, FORBES (Oct. 19, 2016, 9:00 AM), <https://www.forbes.com/sites/laurengensler/2016/10/19/seminole-tribe-florida-hard-rock-cafe/#456d2f105bbc>.

⁵⁰ See, e.g., Daniel R. Faber & Deborah McCarthy, *Neo-Liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 38, 50 (Julian Agyeman et al. eds., 2003); MARK NUTTALL, PROTECTING THE ARCTIC: INDIGENOUS PEOPLES AND CULTURAL SURVIVAL 53-56 (1998); Megan Davis, *Preliminary Observations: Indigenous Australia and the Australia-United States Free Trade Agreement*, 2 NGIYA: TALK L. 76, 80-81 (2008).

but globalization is particularly unforgiving for indigenous peoples. For example, indigenous peoples face special threats to their environment, cultural heritage, and ability to access medicines, as well as general threats to their economic and social wellbeing, when some foreign investors obtain the right to extract, exploit, and export raw materials. They face similar threats when trade liberalization in sectors like textiles results in the relocation of production or the increase in competition.⁵¹ Some authors locate the root of the problem not in international economic law but in international law itself, as it tends to exclude indigenous peoples “from its distribution of sovereign power and [include] them within the sovereign power of states established on the territories they had inhabited.”⁵²

Before explaining how different fields deal with the particular protections that international law provides indigenous populations, it is important to dissect the general systemic effects international economic law frameworks — mainly, modern trade and investment frameworks with IP provisions like the WTO Agreements, ASEAN Free Trade Agreement, NAFTA (or USMCA), and the now uncertain TPP (or CP-TPP) and Trans-Atlantic Trade and Investment Partnership (“TTIP”) agreements — have on indigenous peoples. I term these effects, taken together, “the cycle of susceptibility and exclusion.” This “cycle” results from the interaction of four categories of related but distinct negative systemic consequences of international economic law frameworks, which work both direct and indirect harms on indigenous groups. Such harms can be political (a lack of legitimacy and a shift in governance priorities) or economic (discrimination and a rise in inequality). For conceptual clarity, the *cycle* can be simplified and visualized as follows:

⁵¹ See IACHR: *Demands on Indigenous Consultation to Ratify Free Trade Agreements*, IWGIA (Dec. 15, 2016), <https://www.iwgia.org/en/panama/2474-iachr-demands-on-indigenous-consultation-to-ratify> [hereinafter *Demands on Indigenous Consultation*].

⁵² Patrick Macklem, *Human Rights in International Law: Three Generations or One?*, 3 LONDON REV. INT'L. L. 61, 89 (2015). For a discussion of different perspectives of sovereignty, see Benedict Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, 88 AM. SOC'Y OF INT'L L. PROC. 1, 1 (1994).

Table 1: The Cycle of Susceptibility and Exclusion Framework

	Political	Economic
Direct	(Lack of) Legitimacy	Discrimination
Indirect	Re-regulation	Inequality

1. Legitimacy

Politically, the fundamental flaw of international economic agreements is the lack of procedural and democratic legitimacy. Indigenous peoples have had, not without sharp resistance, extensive opportunities to participate in shaping the development of the modern human rights system. However, with some notable exceptions and like many other groups, they have very often been excluded from providing input and/or effectively participating in the main processes that create international economic law — including treaty negotiations and adjudicatory law-making before dispute settlement bodies. As explained by Thomas Pogge, “the contest over international rules and procedures is essentially confined to small elites of agents —MNCs, industry associations, banks, hedge funds, billionaires — who can effectively influence the negotiating position of the most powerful governments.”⁵³

Systemic barriers prevent indigenous peoples from advancing their interests in the processes of international economic law creation.⁵⁴ State obligations grant indigenous peoples rights to participate in public affairs,⁵⁵ but the influence is limited by the lack of indigenous

⁵³ Thomas Pogge, *International Law Between Two Futures*, 5 J. INT'L. DISP. SETTLEMENT 432, 432 (2014). To be sure, indigenous groups are not the only ones effectively excluded from the process; think labor unions in many countries and the rural poor. For a decision excluding indigenous people from investment arbitration participation, see *Bernhard von Pezold v. Republic of Zim.*, ICSID Case No. ARB/10/15, Procedural Order No. 2, ¶ 56 (June 26, 2012) (rejecting the participation of “indigenous groups” for “apparent lack of independence or neutrality”).

⁵⁴ Human Rights Council, Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, ¶ 10, U.N. Doc. A/HRC/EMRIP/2011/2 (May 26, 2011) (“Mechanisms enabling the participation of indigenous peoples . . . can be problematic for various reasons.”).

⁵⁵ *Id.* at ¶ 3; see also Office of the High Comm’r for Human Rights, *General Comment No. 23: The Rights of Minorities (Art. 27)*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994); Comm. on the Elimination of Racial

representation and decision-making processes that are tailored to their needs.⁵⁶ Very often, inadequate capacity, assistance, and advice in what are by definition very technical negotiations (e.g., Technical Barriers to Trade Agreement), result in the inability of indigenous peoples to effectively safeguard their interests.

The lack of impactful participation of indigenous peoples in legal disputes — an avenue of crucial importance for the definition of rights and obligations under economic arrangements — is increasingly damaging. These cases occur in different dispute settlement forums ranging from the WTO⁵⁷ to the WBG's International Centre for Settlement of Investment Disputes ("ICSID").⁵⁸ Such cases show that even if indigenous peoples have the means to even present an argument before a dispute settlement body, the argument will be influential only if a state has agreed to advance that argument, which it will not do when its own interest conflicts with that of the indigenous

Discrimination, *General Recommendation No. 23: Indigenous Peoples*, ¶ 4(d), U.N. Doc. A/52/18, annex V (Aug. 18, 1997) (stating "[t]he Committee calls in particular upon States parties to . . . [e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"); *Demands on Indigenous Consultation*, *supra* note 51 ("Consultation is a requirement whenever there are issues that affect indigenous peoples' territories, particularly in the case of extractive industry investments."). *But see* *Hupacasath First Nation v. Minister of Foreign Affairs Can. & the Att'y Gen. of Can.*, [2013] 2013 F.C. 900 (Can.) (holding that Canada does not owe a duty to consult indigenous peoples before the ratification of an IIA).

⁵⁶ To be sure, there are positive experiences of indigenous participation in relation to standards setting. *See, e.g.*, Navin Raj, *Implementation of the World Bank's Indigenous Peoples Policy, A Learning Review (FY 2006-2008)* 22 (Operational Policy & Country Servs., Working Paper No. 64757, 2011).

⁵⁷ Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 99, WTO Doc. WT/DS58/R (adopted May 15, 1998) (stating "[w]e note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel"). This position was later reversed by the Appellate Body. *See* Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004) (acknowledging the receipt of an *amicus* brief submitted by the Indigenous Network on Economies and Trade, yet failing to address the concerns raised).

⁵⁸ *See Bernhard von Pezold*, ICSID Case No. ARB/10/15 at ¶ 56 (rejecting request by four indigenous groups to submit *amicus curiae* briefs to the tribunal); *see also* *Glamis Gold Ltd. v. United States*, Decision on Application and Submission by Quechan Indian Nation (NAFTA Arb. Trib. 2005), <https://www.state.gov/documents/organization/53592.pdf> (granting NAFTA investment dispute panel's request by the Quechan Indian Nation to file a submission detailing its views on the dispute, yet failing to address the concerns advanced by the Quechan Nation in its award).

group. One example is an investment dispute involving tourism developments in the traditional lands of the Ngöbe-Buglé people. While the Ngöbe-Buglé were central actors within that dispute and the decision directly impacted them, they were dissuaded by Panama from presenting an *amicus* brief.⁵⁹

2. Discrimination

Economically, a negative effect of this political disenfranchisement and lack of representation, especially in treaty negotiations, is discrimination — a *de facto* disadvantage of indigenous peoples introduced by attempts to level the playing field between products, services, and investments of foreigners and nationals. This continues the vicious circle: as a result of existing barriers to participation on the part of indigenous peoples, international economic arrangements may further erode their bargaining position and ability to advance their economic interests.

To be sure, trade and investment treaties concluded by states, or financing agreements between states and international financial institutions, can create economic opportunities for entire countries, and these opportunities hopefully can drip down to indigenous groups. Yet, systemic issues further worsen the position of indigenous peoples.⁶⁰ For instance, indigenous peoples' capacity to participate in economic activity is severely affected by limited material resources, overt racism, implicit biases, barriers to distribution networks, limits in technical ability, and different values, notions of responsibility towards the planet, and social and cultural strategies.⁶¹ The net result often is the over-empowerment of economic actors like MNCs and the relative disempowerment of indigenous groups.⁶²

⁵⁹ *Álvarez y Marín Corporación S.A. y Otros c. República de Pan.*, ICSID Case No. ARB/15/14, Motivation of the Decision Concerning the Preliminary Objections of the Plaintiff Regarding Rule 41(5) of the ICSID Arbitration Rules, paras. 13-7 (Jan. 27, 2016); Clovis Trevino, *Panama Faces New ICSID Arbitration over Thwarted Hotel Tourism Development*, INV. ARB. REP. (Apr. 24, 2015), <https://www.iareporter.com/articles/panama-faces-new-icsid-arbitration-over-thwarted-hotel-tourism-development/>.

⁶⁰ See Fergus MacKay, *Indigenous Peoples and International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* (Daniel D. Bradlow & David B. Hunter eds., 2010).

⁶¹ See generally Karla Hoff & Priyanka Pandey, *Discrimination, Social Identity, and Durable Inequalities*, 96 AM. ECON. REV. 206, 206-11 (2006) (showing that economic incentives are heavily influenced by cultural differences).

⁶² See, e.g., SUZANA SAWYER, *CRUDE CHRONICLES: INDIGENOUS POLITICS, MULTINATIONAL OIL, AND NEOLIBERALISM IN ECUADOR* 8 (2004).

Additionally, some treaties require the gradual liberalization of all economic sectors, including that of natural resource exploitation or extraction.⁶³ Many of these natural resources are located in indigenous territories and are the only asset for indigenous peoples to bargain with in negotiations. Again, without adequate protections to empower indigenous peoples' self-representation, the system is unlikely to improve the bargaining position of indigenous groups *vis-à-vis* large multinational corporations like oil and gas companies with resources, deep legal, policy and technical expertise and global presence.

Moreover, treaties often establish rights based on nationality. As interested parties must meet the nationality requirements set out in treaties,⁶⁴ only foreigners can benefit from the substantive and procedural rights they afford. For instance, trade agreements and investment treaties require states to provide national treatment and most-favored-nation ("MFN") status to foreign entities.⁶⁵ Without textual limitations, national treatment obligations (requiring that states provide the same treatment to foreign products, services, and investment that is provided to like domestic products, services, and investment) effectively disallow a state from giving any economic preference to indigenous peoples within its own national borders. Furthermore, MFN obligations (requiring that states do not confer benefits to an entity of a third party state that is more favorable than that which is given to entities of the state that is party to the treaty) make it difficult to enforce any protections for domestic populations like indigenous peoples that may exist in other economic treaties.⁶⁶ Breaches of such obligations give states and foreign investors the right to sue the infringing state, yet such agreements create no rights for

⁶³ The experience under the U.S.-Peru Trade Promotion Agreement, and particularly the annex on tropical hardwoods is illustrative. See MATT FINER ET AL., *Logging Concessions Enable Illegal Logging Crisis in the Peruvian Amazon*, NATURE (Apr. 17, 2014), https://www.nature.com/articles/srep04719/fig_tab.

⁶⁴ See Ecuador Bilateral Investment Treaty art. 2, U.S.-Ecuador, Aug. 27, 1993, S. TREATY Doc. No. 103-15 (1997) (requiring states to provide foreign investors treatment that is "no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third party").

⁶⁵ Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 49-51 (2008).

⁶⁶ For example, if state A and state B have an investment treaty in place that contains protections for lands on indigenous territories, such protections could be more difficult to enforce if either state has other investment treaties without such language thanks, in part, to MFN clauses.

affected local communities or individuals, including indigenous peoples.

In particular, the policy space to grant special protections can be severely limited by the inclusion of limitations to adopt “performance requirements” — government-mandated activities, thresholds, or approvals that investors must undertake to trigger investment opportunities, usually connected with exports and use of local content or suppliers. While not always present, these treaty clauses are becoming more and more prevalent in trade and investment agreements.⁶⁷ In some limited cases, limitations on subsidization in trade agreements may also dissuade governments from adopting similar incentives.⁶⁸

States can and should provide for a level playing field, yet they rarely adequately remedy the discrimination this equalization creates through domestic policy. As a result, indigenous peoples may rightly feel the need to seek all possible means to protect their interests. In many cases their mobilization efforts have resulted in violence, persecution, prosecutions, and death.⁶⁹ Sadly, the criminalization of their movement and the imprisonment of their leaders is both a common and an old story, dating back to years prior to the Zapatista

⁶⁷ See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 11 (2d ed. 2012); Panagiotis Delimatsis & Pierre Sauvé, *Financial Services Trade after the Crisis: Policy and Legal Conjectures*, 13(3) *J. INT'L ECON. L.* 837, 850 (2010).

⁶⁸ For a discussion on the limitations of the WTO on subsidies, see generally, Teoman M. Hagemeyer, *Tied Aid: Immunization for Export Subsidies Against the Law of the WTO?*, 48 *J. WORLD TRADE* 259 (2014).

⁶⁹ See generally Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶ 39, U.N. Doc. A/HRC/33/42 (Aug. 2016) (“The refusal of the Government of Peru to accept proposals made by indigenous peoples triggered mobilization, resulting in the tragic deaths of 30 people when the military was deployed in response.”); Press Release, Inter-Am. Comm'n H. R., IACHR Condemns the Killing of Berta Cáceres in Honduras (Mar. 4, 2016), https://www.oas.org/en/iachr/media_center/PReleases/2016/024.asp; Human Rights Comm., *Concluding Observations on the Third Periodic Report of Paraguay, Adopted by the Committee at its 107th Session*, ¶ 15, U.N. Doc. CCPR/C/PRY/CO/3 (Apr. 29, 2013) (stating “[t]he Committee is concerned about the high number of human rights defenders, particularly campesino and indigenous defenders, who have been assaulted, attacked and killed”); Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations on the Initial Report of Indonesia*, ¶ 28, U.N. Doc. E/C.12/IDN/CO/1 (June 19, 2014) (stating in relation to extractive industries that “[i]n many cases, affected communities have not been afforded effective remedies and have, along with human rights defenders working on these cases, been subject to violence and persecution”).

movement in Mexico that rose up, in part, against the implementation of NAFTA.⁷⁰

3. Re-regulation

Treaties can also indirectly aggravate the problem of extreme poverty and social exclusion by shifting the governance and regulatory priorities of developing states. Often, this looks like prioritizing market efficiency, an increase in trade and investment volumes, and economic growth over poverty alleviation, social mobility, income distribution, and democratic empowerment.⁷¹

Politically, the right to regulate is a basic and legitimate prerogative of states under international law. However, when states enter into international treaties they voluntarily limit their right to regulate in certain areas in favor of inter-state cooperation. Economic treaties, in particular, often have language limiting a state's right to implement legislation or regulation that could negatively impact FDI or the ability of a foreign company or producer to compete fairly against domestic actors.⁷² The scope of such constraints may at times be uncertain, particularly considering the open-ended provisions of many legal instruments.⁷³ As put by Steven Ratner in the context of investment

⁷⁰ See Inter-Am. Comm'n H.R., *Criminalization of the Work of Human Rights Defenders*, OEA/Ser.L/V/II, doc. 49/15 ¶ 49 (Dec. 31, 2015) (stating that “[i]n this regard, the IACHR has received information indicating that in these contexts the criminal justice system is used against indigenous . . . leaders . . .” (footnotes omitted)); Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) *Follow-up Country Recommendations: Colombia*, ¶ 55, U.N. Doc. A/HRC/20/22/Add.2 (May 15, 2012). In a recent case brought before the Permanent Court of Arbitration, South American Silver Mining is seeking \$387 million for the alleged violations of the BIT between the United Kingdom of Great Britain and Northern Ireland by the Plurinational State of Bolivia. The company argued that Bolivia failed to provide full protection and security, based on the “patently unreasonable” decision not to prosecute indigenous leaders protesting the effects of the mining concession. See generally *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, Case No. 2013-15, Notice of Arbitration (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/254>.

⁷¹ Dani Rodrik, *Has Globalization Gone Too Far?*, 39 CAL. MGMT. R. 29, 31-32 (1997); see also Dani Rodrik, *Trading in Illusions*, FOREIGN POLICY (Nov. 18, 2009), <https://foreignpolicy.com/2009/11/18/trading-in-illusions/> (“By focusing on international integration, governments in poor nations divert human resources, administrative capabilities, and political capital away from more urgent development priorities such as education, public health, industrial capacity, and social cohesion.”).

⁷² DiMascio & Pauwelyn, *supra* note 65.

⁷³ For a discussion of the constraints in regulatory space, see generally, Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1 (2014).

law, certain provisions do not enhance “an ideal balance between the need for stability and change.”⁷⁴

Liberalization and economic interdependence rarely, if ever, demand comprehensive de-regulation. However, states may “regulate in the public interest” if they act consistently with their treaty obligations.⁷⁵ This often results in what has been called a process of “re-regulation” — adopting regulations to facilitate, oversee, and check liberalized markets.⁷⁶ This process can be technically complex, as it requires navigating interests, values, and legal texts and may chill measures that are effective in realizing human rights. Some argue, admittedly with limited evidence, that the experience of economic treaties demonstrates that the regulatory function of states and the ability of those states to legislate in the public interest have been put at risk.⁷⁷ Particularly problematic is that governments may be dissuaded from adopting laws because of potential liability under an international investor-state dispute settlement or ISDS — the controversial process for reparation used by investors to enforce investment treaties, contracts and legislations. This “chilling effect” may be felt in various areas and issues, including those concerning indigenous peoples who are generally excluded from regulatory processes.⁷⁸ This phenomenon is exacerbated by the increasing influence of cryptic norms put forth by standard-setting organizations.⁷⁹ As for the WTO, Gregory Shaffer concludes that the institution’s focus on regulation that is “least trade restrictive” influences decisions made by domestic lawmakers and has important distributional effects.⁸⁰ Hence, international economic agreements may constrain policy or regulatory space, and, in some

⁷⁴ Steven Ratner, *International Investment Law through the Lens of Global Justice*, 20 J. INT’L ECON. L. 747, 764 (2017).

⁷⁵ See Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 69, ¶ 82.

⁷⁶ Gregory Shaffer, *How the WTO Shapes Regulatory Governance*, 9 REG. & GOVERNANCE 1, 3 (2015).

⁷⁷ See U.N. Office of the High Commissioner, UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights, (June 2, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>.

⁷⁸ See Alfred de Zayas (Independent Expert on the Promotion of a Democratic and Equitable International Order), *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, ¶ 11, U.N. Doc. A/HRC/33/40 (July 12, 2016) (stating “[t]he regulatory chill caused by the mere existence of investor-State dispute settlements has effectively dissuaded many States from adopting much-needed health and environmental protection measures”).

⁷⁹ Lawrence L. Herman, *The New Multilateralism: The Shift to Private Global Regulation*, C.D. HOWE INST. 4-5 (Aug. 2012), https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_360_0.pdf.

⁸⁰ Shaffer, *supra* note 76, at 17.

instances, may influence the state's decision whether to protect the basic human rights of its inhabitants.

4. Inequality

Too often, poverty is “characterized by a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation.”⁸¹ The combined effects of the vicious cycle that comprises powerlessness to influence the law, that facilitates discrimination, and that results in the exclusion from governance priorities is unlikely to end the material deficit suffered by indigenous peoples. On the contrary, this cycle is likely to entrench the economic effects of an unequal system where powerful and politically influential actors make decisions that affect those already disenfranchised.⁸² Accordingly, this cycle is the textbook example of the conditions that exacerbate inequality.

For indigenous peoples the likely result of the main instruments that enable interdependence is the increase in inequality. Despite the aggregate economic benefits that countries may enjoy, empirical evidence indicates that indigenous peoples are not proportionally better off.⁸³ For instance, Latin America enjoyed a “golden decade” from 2000 to 2010, but the benefits therefrom were unevenly distributed. The disparities in poverty and extreme poverty were, respectively, 2.7 times and 3.0 times higher among indigenous households in comparison to non-indigenous households.⁸⁴ On

⁸¹ Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 12, U.N. Doc. A/HRC/23/36, 11 (Mar 11, 2013).

⁸² *Id.*

⁸³ See generally Dani Rodrick, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12 (2018); WORLD BANK GROUP, INDIGENOUS LATIN AMERICA IN THE TWENTY-FIRST CENTURY: THE FIRST DECADE 15 (2015), <https://openknowledge.worldbank.org/bitstream/handle/10986/23751/Indigenous0Lat0y000the0first0decade.pdf?sequence=1&isAllowed=y> (“[T]he results of the first decade of the twenty-first century — considered by many the golden decade of economic growth for Latin America — have been mixed for indigenous Latin Americans. While important steps have been taken to raise awareness on the special needs and rights of indigenous peoples, most countries and development agencies still lack institutionalized and efficient mechanisms to implement indigenous peoples’ rights.”).

⁸⁴ WORLD BANK GROUP, *supra* note 83, at 59; see also Bello, *The Great Deceleration*, ECONOMIST (Nov. 20, 2014), <https://www.economist.com/the-americas/2014/11/20/the-great-deceleration> (“It was great while it lasted. In a golden period from 2003 to 2010 Latin America’s economies grew at an annual average rate of close to 5%, wages rose and unemployment fell, more than 50m people were lifted out of poverty and the middle class swelled to more than a third of the population. But now the growth spurt

average, an indigenous person makes a third of the income made by a non-indigenous person and possesses less than a tenth of the wealth.⁸⁵

Indigenous peoples are often impacted in other ways that ultimately increase inequality. For instance, they may be dispossessed of their lands or have them encroached upon by concessions for resource extraction, development projects, or even the creation of protected areas for environmental conservation. International and national courts have found that these instances may violate substantive rights and lack procedural guarantees, remediation and compensation,⁸⁶ yet in most cases no reparations are provided, much less any enjoyment of the benefits of the development initiative or projects.⁸⁷ Such loss of control over the use of lands without effective compensation and economic alternatives inevitably leads to lower economic capacity and greater inequality.

In short, indigenous peoples have additional protections under international law. In theory, these protections should help them overcome some of the specific negative effects of globalization that are often stimulated by international law itself — trade, investment, finance, and IP treaties.

It is often argued that dealing with such negative effects is an issue for domestic social policy, rather than international treaties. Yet international economic law fosters rules, policies, and principles that

is over . . . Latin America is decelerating faster than much of the rest of the emerging world . . .”).

⁸⁵ See generally Andy Sumner, *The New Face of Poverty: How Has the Composition of Poverty in Low Income and Lower Middle-Income Countries (Excluding China) Changed Since the 1990s?* (Inst. of Dev. Studies, Working Paper No. 408, 2012), <http://www.ids.ac.uk/files/dmfile/Wp408.pdf>; SAVE THE CHILDREN, BORN EQUAL: HOW REDUCING INEQUALITY COULD GIVE OUR CHILDREN A BETTER FUTURE (2012), <https://www.savethechildren.org.uk/content/dam/global/reports/advocacy/born-equal.pdf>; EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES AND CORPORATE SOCIAL RESPONSIBILITY (Ciaran O’Faircheallaigh & Saleem Ali eds., 2017).

⁸⁶ See Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127 (Nov. 28, 2007) (stating “the Court has previously held that . . . a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society”) (citations omitted).

⁸⁷ *Id.* ¶¶ 138-39 (stating that “[t]he second safeguard the State must ensure when considering development or investment plans within Saramaka territory is that of reasonably sharing the benefits of the project with the Saramaka people. The concept of benefit-sharing . . . can be found in various international instruments regarding indigenous and tribal peoples’ rights”) (footnotes omitted).

support private actors while dissuading states from exercising certain sovereign powers. As a result, groups with the least agency, like indigenous peoples, may end up relatively worse off *if/when* international economic law ignores these effects.⁸⁸ Before elaborating on how to address these imbalances, the next section reviews some of the main protections for indigenous peoples currently available under international economic law, both in theory and in practice.

II. INSTITUTIONALIZATION AND INDIGENOUS INTERESTS

The rise of global trade, foreign investment, and international finance correlates with an increase in preferential trade agreements,⁸⁹ bilateral investment treaties,⁹⁰ financing by development banks and agencies,⁹¹ and treaties containing IP provisions.⁹² Indigenous peoples, their governments, and advocacy groups have sought concrete protections against the potentially negative effects of these instruments

⁸⁸ See Olivier De Schutter (Special Rapporteur on the Right to Food), *Mission to Malaysia*, ¶¶ 64-65, U.N. Doc. A/HRC/25/57/Add.2 (Feb. 3, 2014) (highlighting “problems faced in their access to traditional sources of livelihood as a result of encroachment on their lands and the degradation of ecosystems caused by development projects, logging and the expansion of palm oil plantations”); Rita Izsak (Independent Expert on Minority Issues), *Mission to Cameroon (2-11 September 2013)*, ¶ 37, U.N. Doc. A/HRC/25/56/Add.1 (Jan. 31, 2014) (stating “many Pygmy communities have been displaced by major projects, including a deep-sea port, gas plants, the Chad-Cameroon oil pipeline, and forestry and logging projects. Palm and rubber plantations have also displaced the Bagyeli, and their former forest habitats have become “no-go” areas for them. They rarely receive compensation for their land, jobs, health care or other benefits”).

⁸⁹ *Regional Trade Agreements: Facts and Figures*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Nov. 21, 2018) (noting that between 1948 and 1994, 125 regional trade agreements were sent to the GATT, whereas since 1995, “over 400 additional arrangements” have been sent).

⁹⁰ U.N. Conf. on Trade & Dev., *International Investment Agreements Navigator*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Nov. 21, 2018) (showing that as of October 2018 there were a total of 2953 bilateral investment treaties, with 2358 in force).

⁹¹ Rebecca M. Nelson, *Multilateral Development Banks: Overview and Issues for Congress*, CONG. RES. SERV. 5 (2015), https://digital.library.unt.edu/ark:/67531/metadc795908/m1/1/high_res_d/R41170_2015Dec02.pdf (showing an increase in lending by multilateral development banks from 2000 to 2015).

⁹² Christine Haight Farley, *Trips-Plus Trade and Investment Agreements: Why More May Be Less for Economic Development*, 35 U. PA. J. INT’L L. 1061, 1061 (2014) (noting the rise of intellectual property provisions within free trade agreements and bilateral investment treaties).

within these agreements and through various fora. As explained below, these efforts have been only moderately successful.

In this section, I analyze the relative strength of existing measures. I divide this section into five subsections. The first four address each of the main pillars of the field of international economic law: IP, finance, trade, and investment (in that order). The last section presents four case studies — one for each field. As I explain, there is a rigorous debate as to the efficacy of the measures in place, the appropriateness of the substance and legal form of such protections, and what constitutes the best way forward.

A. Intellectual Property

The debate within the field of international IP focuses on the threats indigenous peoples face from theft and appropriation of, and lack of fair compensation for, traditional knowledge,⁹³ genetic and biological resources,⁹⁴ and intangible cultural heritage and folklore.⁹⁵

Such debates are nuanced and in some areas less ideological than in others.⁹⁶ For one, traditional knowledge has historically been treated

⁹³ The appropriate definition of the term “traditional knowledge” has generated significant debate. The World Intellectual Property Organization (“WIPO”) defines traditional knowledge as “knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.” *Traditional Knowledge*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/tk/> (last visited Nov. 21, 2018). Ikechi Mgbeoji argues that traditional knowledge encompasses “a diverse range of tradition-based innovations and creations arising from intellectual activity in the industrial, literary, or artistic fields of indigenous and traditional peoples.” IKECHI MGBEOJI, *GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE* 9 (2006). However, some scholars disagree with the use of the word “traditional” as it potentially evokes colonial-era imagery and prefer the term “indigenous knowledge.” Fikret Berkes, Johan Colding & Carl Folke, *Rediscovery of Traditional Ecological Knowledge as Adaptive Management*, 10 *ECOLOGICAL APPLICATIONS* 1251, 1251 (2000).

⁹⁴ According to WIPO, “[g]enetic resources (GRs) refer to genetic material of actual or potential value. Genetic material is any material of plant, animal, microbial or other origin containing functional units of heredity.” *Genetic Resources*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/genetic/> (last visited Nov. 21, 2018).

⁹⁵ According to WIPO, folklore (also referred to as “traditional cultural expressions”) “may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.” *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/folklore/> (last visited Nov. 21, 2018).

⁹⁶ Ravi Soopramanien, *International Trade in Indigenous Cultural Heritage: What Protection Does International Law Provide for Indigenous Cultural Goods and Services in International Commerce?*, 53 *STAN. J. INT’L L.* 225, 227 (2017) (describing these positions as a way for “indigenous peoples to assert their right to increased economic

as within the public domain — hence freely available “for exploitation by third parties.”⁹⁷ Without additional protections, third parties would rarely seek the consent of indigenous communities before use of traditional knowledge; even less, to share with indigenous communities the economic benefits stemming from the exclusivity protections and use.⁹⁸ In the cases of biotechnology products, there is the concern that this practice could also deprive indigenous groups of the use of traditional medical remedies without having to pay royalties — a practice referred to as bio-piracy.⁹⁹

Indigenous cultural expressions also may be inadequately protected under IP frameworks.¹⁰⁰ Indigenous communities can register symbols and other expressions under national IP processes. However, these protections tend to be burdensome and partial, and often exclude intangible practices (such as sacred ceremonies or dances) and slightly modified copies.¹⁰¹

To a large degree, these debates reflect the tension between indigenous and “Western” notions of property rights, individual and collective ownership, and differentiation and commoditization of knowledge.¹⁰² At the core of these tensions are two fundamental paradigms of international law: on the one hand, relativism — premised on the overarching character of sovereignty — and on the

independence vis-a-vis their host states”).

⁹⁷ Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971, 982-83 (2007).

⁹⁸ See *id.* at 980-91.

⁹⁹ See MGBEOJI, *supra* note 93, at 12 (biopiracy is used to describe “a misappropriation of indigenous peoples['] knowledge and biocultural resources, especially through the use of intellectual property mechanisms”); Matthew L. M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 KAN. J.L. & PUB. POL'Y 525, 528-29 (2005) (documenting two examples of the bio-piracy of indigenous biological knowledge in North America and discussing the exploitation of indigenous biological knowledge generally); Ian Vincent McGonigle, *Patenting Nature or Protecting Culture? Ethnopharmacology and Indigenous Intellectual Property Rights*, 3 J.L. & BIOSCIENCES 217, 220 (2016) (describing the patenting of a genetically modified version of the Hawaiian plant Taro).

¹⁰⁰ Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 14-17 (2001).

¹⁰¹ Angela R. Riley, “Straight Stealing”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 79-81 (2005).

¹⁰² See Mauro Barelli, *The United Nations Declaration on the Rights of Indigenous Peoples: A Human Rights Framework for Intellectual Property Rights*, in *INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 47, 56 (Matthew Rimmer ed., 2015).

other, universalism — based on the belief of shared human values.¹⁰³ The tension is often perceived as so extreme that some argue international IP is inherently in conflict with indigenous interests.¹⁰⁴ As I now explain, these competing views have led to modest protection of indigenous peoples within different frameworks.

1. Biological and Genetic Resources

The Convention on Biological Diversity (“CBD”) is designed to promote “the sustainable use and the conservation of biological diversity,” and to enable “the fair and equitable sharing of benefits arising out of the utilization of genetic resources.”¹⁰⁵ It requires state-parties to adopt explicit protections for indigenous communities, including arrangements for benefit sharing.¹⁰⁶ While the CBD is generally considered a step in the right direction,¹⁰⁷ some scholars argue that because the “outputs from biotechnology and industrial developments are [still] considered private property,” the CBD allows for indigenous communities to be “cut off” from lucrative phases of commercialization.¹⁰⁸

In order to address these and related criticisms,¹⁰⁹ in 2010 the governing body (representing all state-parties to the treaty) adopted the Nagoya Protocol, an addition to the CBD (and other guidelines)¹¹⁰

¹⁰³ See Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RIGHTS Q. 400, 400-19 (1984).

¹⁰⁴ Preston Hardison & Kelly Bannister, *Ethics in Ethnobiology: History, International Law and Policy, and Contemporary Issues*, in ETHNOBIOLOGY 27, 41 (E. N. Anderson et al. eds., 2011).

¹⁰⁵ Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79.

¹⁰⁶ See *id.* at preamble. The CBD recognizes “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.” *Id.*

¹⁰⁷ See McGonigle, *supra* note 99, at 221.

¹⁰⁸ *Id.*

¹⁰⁹ See Susette Biber-Klemm & Danuta Szymura Berglas, *Problems and Goals, in RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE* 3, 21 (Susette Biber-Klemm et al. eds., 2006) (criticizing the “economic orientation of the CBD”).

¹¹⁰ SECRETARIAT OF THE CONV. ON BIOLOGICAL DIVERSITY, NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY (2011), <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> [hereinafter NAGOYA PROTOCOL]; see Convention on Biological Diversity, *supra* note 105, art. 23 (providing state-parties the power to adopt protocols to the CBD). Other guidelines include the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of

that sought to regulate the fair and equitable sharing of benefits.¹¹¹ The Nagoya Protocol expresses a commitment to “the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities[.]”¹¹² Interestingly, the protocol requires state-parties to take active measures, including domestic procedures for the identification of holders of rights associated with genetic resources.¹¹³ Overall, the main concern with the Nagoya Protocol seems to be its reach: it is solely aimed at deterrence as there is limited enforcement available for its provisions.¹¹⁴

the Benefits Arising out of Their Utilization. SECRETARIAT OF THE CONV. ON BIOLOGICAL DIVERSITY, BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF THE BENEFITS ARISING OUT OF THEIR UTILIZATION (2002), <https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>. These are nonbinding provisions adopted by the COP designed to, among others, “promote the adequate and effective transfer of appropriate technology to providing Parties, especially developing countries, in particular least developed countries and small island developing States among them, stakeholders and indigenous and local communities.” *Id.* para. 11. Paul Kuruk, *Regulating Access to Traditional Knowledge and Genetic Resources: The Disclosure Requirement as a Strategy to Combat Biopiracy*, 17 SAN DIEGO INT’L L.J. 1, 21-22 (2015). At the WIPO, some actions are also addressing similar concerns. See U.N. World Intellectual Property Organization, Consolidated Document Relating to Intellectual Property and Genetic Resources, at 6, U.N. Doc. WIPO/GRTKF/IC/34/4 (Mar. 15, 2017), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=368344 (stating goal to prevent the misappropriation or patenting of resources). For discussion, see Achmad Gusman Siswandi, *The Nagoya Protocol: Unfinished Business Remains Unfinished*, in INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH, *supra* note 102, at 334, 337 (arguing that the Nagoya Protocol “marks a new chapter” regarding access and benefit sharing).

¹¹¹ Convention on Biological Diversity, *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting*, U.N. Doc. UNEP/CBD/DEC/X/1, annex I (Oct. 29, 2010).

¹¹² NAGOYA PROTOCOL, *supra* note 110, at Preamble.

¹¹³ See *id.* art. 21.

¹¹⁴ See *id.* art. 30. Kuruk instead proposes a disclosure requirement that would force those applying for patents to indicate whether “a claimed invention was based on or derived from traditional knowledge or genetic resources.” Kuruk, *supra* note 110, at 36. See also KEITH AOKI, SEED WARS 86 n.113 (2008) (noting that previous international regimes, such as the International Treaty on Plant Genetic Resources (ITPGR), also left implementation of the treaties to national governments). While the Nagoya Protocol is, on the whole, a step in the right direction, many shortcomings have been noted by indigenous rights experts. See generally World Intellectual Property Organization, Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices Relating to Indigenous Peoples’ Human Rights 4, (Jul. 11-15, 2011), https://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf.

Lastly, and related to the CBD, the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture provides similar protections for indigenous communities.¹¹⁵ This framework is concerned with “farmers rights,” but applies indirectly to indigenous communities that rely on subsistence agriculture. Designed to provide for the “conservation and sustainable use of plant genetic resources for food and agriculture,” this treaty is meant to operate in harmony with the CBD.¹¹⁶ It places obligations on states to adopt legislation, rather than creating self-executing obligations.¹¹⁷ Ultimately, the genetic resources treaty is similar to the CBD in that it mandates the fair and equitable sharing of benefits and is designed to incorporate many of the CBD’s provisions into the agricultural sector.¹¹⁸

2. Traditional Knowledge and Intangible Cultural Heritage

The World Intellectual Property Organization (“WIPO”) is a specialized agency of the UN tasked with promoting balanced IP protections worldwide.¹¹⁹ Due to the increasing visibility of arguments against misappropriation and misuse of indigenous resources, WIPO has “become increasingly involved in norm-setting in the[se] areas.”¹²⁰

As for traditional knowledge, WIPO has pursued two important objectives: to establish defensive protections against its misuse and to encourage positive protections in the form of *sui generis* legislation.¹²¹

¹¹⁵ See Peter-Tobias Stoll & Anja von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 7, 42 (Silke von Lewinski ed., 2nd ed. 2008).

¹¹⁶ Plant Genetic Resources for Food and Agriculture art. 1, Nov. 3, 2001, T.I.A.S. No. 17-313; see also *id.* art. 9.3 (“Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.”). The term “farmer” may include many indigenous communities primarily involved in this activity. *Id.* art 9.1.

¹¹⁷ See *id.* art. 4.

¹¹⁸ See H. David Cooper, *The International Treaty on Plant Genetic Resources for Food and Agriculture*, 11 *RECIEL* 1, 15 (2002); Stoll & Hahn, *supra* note 115, at 41-44.

¹¹⁹ Sara Bannerman, *The World Intellectual Property Organization and Traditional Knowledge*, in *INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 102, at 83.

¹²⁰ *Id.*

¹²¹ *Id.* at 84; see also Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 49-50 (2009) (explaining that a defensive traditional knowledge claim is one that is used to “block the enforcement of or to invalidate another variety of IP, such as a patent, owned by outsiders who used [traditional knowledge] in forging the patented

In this context, WIPO also oversees indigenous knowledge issues through discussions held by an intergovernmental committee.¹²²

Presently, WIPO is in the process of facilitating the negotiation of a series of new instruments to expand protections, including those of traditional knowledge¹²³ and cultural expressions.¹²⁴ Some important indigenous scholars like James Anaya argue that the draft documents have inherent flaws.¹²⁵ Among the most obvious are an excessive reliance on a “defensive mechanism of disclosure” (for instance, a requirement that patent applicants disclose elements of indigenous resources used in the creation of the product) and a lack of any “affirmative recognition of or specific measures of protection for indigenous people’s rights.”¹²⁶ Despite these and other criticisms, WIPO has institutionalized methods to recognize the interests of indigenous peoples.¹²⁷

Finally, protections for indigenous property, including intangible property, have been established in international treaties dealing with cultural heritage.¹²⁸ While other treaties recognize ownership over

invention” and that a positive protection is used if the knowledge holder wants “the economic value that would result from IP protection”).

¹²² *Intergovernmental Committee*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/igc/> (last visited Sep. 15, 2018) (“The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is, in accordance with its mandate, undertaking text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).”).

¹²³ U.N. World Intellectual Property Organization, *The Protection of Traditional Knowledge: Draft Articles*, at 1, U.N. Doc. WIPO/GRTKF/IC/28/5 (June 2, 2014), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_5.pdf.

¹²⁴ U.N. World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions: Draft Articles*, at 1, U.N. Doc. WIPO/GRTKF/IC/28/6 (June 2, 2014), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf.

¹²⁵ See James Anaya, U.N. World Intellectual Property Organization, *Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, annex at 4-6, U.N. Doc. WIPO/GRTKF/IC/32/INF/8 (Oct. 3, 2016), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_32/wipo_grtkf_ic_32_inf_8.pdf [hereinafter *Technical Review*]. Bannerman notes that traditionally WIPO served to advance Western notions of IP. See Bannerman, *supra* note 119, at 87. Bannerman also points to at least two examples of WIPO efforts to address some of the concerns held by indigenous peoples: the WIPO Performances and Phonogram Treaty 1996 (which protects “performances of expressions of folklore”) and the Patent Cooperation Treaty 1970 (which “enhance[s] recognition of traditional knowledge as prior art”). *Id.* at 88.

¹²⁶ *Technical Review*, *supra* note 125, annex at 4.

¹²⁷ See Bannerman, *supra* note 119, at 104.

¹²⁸ See Convention Respecting the Laws and Customs of War on Land arts. 23, 28,

indigenous intangible heritage and expressions to varying degrees, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is the most explicit and comprehensive.¹²⁹ This 2005 UNESCO treaty mandates its state-parties to enact a broad range of measures to protect indigenous cultural heritage, including licensing restrictions, quotas, and preferential treatment. It also creates the International Fund for Cultural Diversity to promote sustainable development and poverty alleviation for vulnerable groups — regrettably without a funding mandate.¹³⁰ Notably, the Convention states that nothing under its terms shall be interpreted as “modifying rights and obligations of the Parties under any other treaties to which they are parties.” This text was included, in part, anticipating possible tensions with trade obligations under the WTO Agreements (as I explain below).¹³¹

3. Trademarks, Patents and Geographical Indications

Indigenous peoples can also rely on national IP regimes to guard their creations, but these regimes seldom offer indigenous peoples tailored protection. Recently, a commentator has explained that “the requirements and limitations built into trademark law make it particularly difficult . . . to protect [indigenous] cultural products, [and that] trademark law is largely ineffective for, or even counterproductive to, the deterrence of cultural appropriation.”¹³²

46-47, 56, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 1-4, May 14, 1954, 249 U.N.T.S. 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property arts.1-2, Nov. 14, 1970, 823 U.N.T.S. 231.

¹²⁹ See generally UNESCO General Conference, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, U.N. Doc. CLT-2005/Convention Diversite-Cult Rev.2 (Oct. 20, 2005) [hereinafter 2005 Convention]. For a more detailed discussion on trade and cultural heritage, see generally Tania Voon, *Substantive WTO Law and the Convention on the Diversity of Cultural Expression*, in *THE UNESCO CONVENTION ON THE DIVERSITY OF CULTURAL EXPRESSIONS: A TALE OF FRAGMENTATION IN INTERNATIONAL LAW* 273 (Toshiyuki Kono & Steven Van Uytsel eds., 2012).

¹³⁰ Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515, 537 (2006).

¹³¹ *Id.* at 543; see also Mary E. Footer & Christopher Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT'L ECON. L. 115, 122-26 (2000).

¹³² Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, STAN. L. SCH. 35 (Sept. 6, 2016), <https://law.stanford.edu/publications/the-mark-of-a-culture-the-efficiency-and-propriety-of-using-trademark-law-to-deter-cultural-appropriatio/>.

Even so, to the extent that national IP regimes *can* protect cultural resources, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which applies to “copyright, trademarks, geographical indications, patents and undisclosed information”¹³³ creates some level of harmonization between national IP regimes and “minimum standards of IP” protection across its current 164 members.¹³⁴

The TRIPS Agreement includes no explicit protections for indigenous peoples.¹³⁵ However, one of the protective tools outlined under the treaty, geographical indications, could potentially be employed to protect tribal resources (if governments decide to move beyond wine, cheese, or cigars). Geographical indications protect the names “which identify a good as originating in the territory of a Member, or a region or locality in that territory.”¹³⁶ Hence, if officially recognized, geographical indications can prevent outside exploitation, generic imitations, and unfair patenting of indigenous resources. Moreover, TRIPS Article 27 allows for member states to exclude “plants and animals other than micro-organisms, and essentially biological processes” from patentability.¹³⁷ While some aspects of this Article are unclear, it can arguably be employed to protect against illegitimate appropriation of biological and genetic resources and traditional knowledge consistent with the WIPO and the CBD agreements.¹³⁸ Some argue that this overlap leaves ambiguity regarding

¹³³ Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 9-24, 27-34, 39, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

¹³⁴ See Tania Voon, *The World Trade Organization, the TRIPS Agreement and Traditional Knowledge*, in *INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 102, at 64, 67.

¹³⁵ Stoll & Hahn, *supra* note 115, at 37. Among international trade law specialists, there is debate regarding the extent of application of GATT Article XX exceptions to TRIPS. These exceptions could be used to excuse violations of the encompassed legal agreements when protecting other values, including the interest of indigenous peoples. See Chang-fa Lo, *Potential Conflict Between TRIPS and GATT Concerning Parallel Importation of Drugs and Possible Solution to Prevent Undesirable Market Segmentation*, 66 *FOOD & DRUG L.J.* 73, 80 (2011); Yenkong Ngangjoh-Hodu, *Relationship of Gatt Article XX Exceptions to Other WTO Agreements*, 80 *NORDIC J. INT'L L.* 219, 230-34 (2011).

¹³⁶ TRIPS, *supra* note 133, art. 22.

¹³⁷ *Id.* art. 27(3)(b).

¹³⁸ Part of the problem is that Article 27 states that members “shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” *Id.* See generally *GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE: FOCUS ON ASIA-PACIFIC* (Irene Calboli & Ng-Loy Wee Loon eds., 2017).

the extent of the legal obligations and “allow[s] different states to take different views on the matter.”¹³⁹

In short, multiple difficulties are associated with incorporating indigenous protections into international IP regimes. These include the use of public domain, incorporation of collective ownership, the separation of commercial values from cultural values, and the differing concepts of property in general. These difficulties have yet to be adequately considered in the agreements, some of which provide limited *sui generis* protections for indigenous peoples. Nevertheless, perhaps in no other area of international economic law has the debate over how best to accommodate the rights and interests of indigenous peoples been more vibrant. This has led to the adoption of exceptions to general rules that prevent the misuse of the IP of indigenous peoples and, in more narrow cases, positive protections granted through rules to domestically enforce such rights that focus primarily on consent and monetary benefits.

B. Finance

Multilateral and regional development banks such as the WBG, the Asian Development Bank (“ADB”), and the Inter-American Development Bank (“IDB”) provide capital for development projects — such as resource extraction or large infrastructure projects — that ultimately impact indigenous peoples.¹⁴⁰ Over time, procedures designed to ensure compliance with indigenous rights and to hear the concerns of indigenous peoples have been adopted. These standards or “safeguards” are generally incorporated into lending agreements

¹³⁹ Susette Biber-Klemm et al., *The Current Law of Plant Genetic Resources and Traditional Knowledge*, in *RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE*, *supra* note 109, at 56, 62; *see* AOKI, *supra* note 114, at 83. In addition to TRIPS, many other bilateral and multilateral investment and trade agreements contain IP provisions or protect IP protections from unreasonable regulation. These provisions, known as TRIPS-Plus, often require states to put protections in place that are even greater than those found in TRIPS. Like TRIPS, TRIPS-Plus provisions tend to ignore any type of collective rights. *See generally* Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447 (2011).

¹⁴⁰ Andrew Gray, *Development Policy — Development Protest: The World Bank, Indigenous Peoples, and NGOs*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOs, AND GRASSROOTS MOVEMENTS* 267, 268 (Jonathan A. Fox & L. David Brown eds., 1998).

signed between institutions and states, sub-national entities, or even private MNCs who are recipients of the financing.¹⁴¹

After a series of pitfalls and controversies, the WBG has been a leader in this field.¹⁴² In the eighties, it issued the first policy specifically dedicated to indigenous peoples.¹⁴³ In the nineties, the WBG adopted a directive which sought to “ensure that the development process fosters full respect” for indigenous rights and culture.¹⁴⁴ The directive required borrowers for investment projects affecting indigenous peoples to “prepare an indigenous peoples development plan,”¹⁴⁵ work to recognize “the customary or traditional land tenure systems,”¹⁴⁶ and incorporate indigenous communities in the decision-making process.¹⁴⁷ In 2005, the directive was revised and an *Operational Policy on Indigenous Peoples* (or “OP/BP 4.10”) was replaced in 2016 by the WBG’s *Environmental and Social Framework*.¹⁴⁸

¹⁴¹ See, e.g., INTER-AM. DEV. BANK, OPERATIONAL POLICY ON INDIGENOUS PEOPLES AND STRATEGY FOR INDIGENOUS DEVELOPMENT 6 (2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032081>; INT’L FIN. CORP., OVERVIEW OF PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 1 (2012), https://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES.

¹⁴² One notorious example is the WBG’s funding of the Chixoy dam in Guatemala. Despite flooding the territory of nearby Mayan communities, the dam was constructed without any finalized plans on resettlement and compensation. When residents began to protest, the Guatemalan government used force, allegedly killing hundreds of the community members. Barbara Rose Johnston, *Chixoy Dam Legacies: The Struggle to Secure Reparation and the Right to Remedy in Guatemala*, 3 WATER ALTERNATIVES 341, 342-43 (2010). Unknown to many, it was a conflict that resulted from the Pangué project that catalyzed the strengthening of WBG’s institutional capacity to address environmental and social issues. The conflict resulted from the flooding of the land of Indigenous Pehuenche communities. See International Finance Corporation, *Lessons Learned: Pangué Hydroelectric* (Sept. 2008), https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_loe_pangué_wci_1319578750067.

¹⁴³ NAVIN RAI, IMPLEMENTATION OF THE WORLD BANK’S INDIGENOUS PEOPLES POLICY: A LEARNING REVIEW (FY 2006–2008) 1 (2011), <http://documents.worldbank.org/curated/en/427941468163488772/pdf/647570WP0Box360s0review0august02011.pdf>.

¹⁴⁴ THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE 4.20: INDIGENOUS PEOPLES para. 6 (Sept. 1991), https://www.ifc.org/wps/wcm/connect/835cc5004885270ab94fb6a6515bb18/OD420_IndigenousPeoples.pdf?MOD=AJPERES.

¹⁴⁵ *Id.* para. 13.

¹⁴⁶ *Id.* para. 15(c).

¹⁴⁷ *Id.* para. 15(d).

¹⁴⁸ WORLD BANK GROUP, WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK: SETTING ENVIRONMENTAL AND SOCIAL STANDARDS FOR INVESTMENT PROJECT FINANCING (2016), <https://consultations.worldbank.org/Data/hub/files/consultation-template/review->

Most notably, under the current policy, borrowers have the duty to engage in “free, prior and informed” consultation,¹⁴⁹ as well as to avoid “adverse impacts” on indigenous communities.¹⁵⁰ A breach of these standards can result in accountability proceedings, remedial plans of different sorts, and cancelling loan disbursements and sanctions (as a last resort) through the inspection panel of the WBG — a mechanism for grievance redress and accountability that has analogous compliance systems under other development financial institutions.¹⁵¹

Efforts of this nature have been mirrored or expanded upon in other institutions. For instance, the ADB’s *Safeguard Policy Statement* requires the bank to “implement projects in a way that fosters full respect for Indigenous Peoples’ identity, dignity, human rights, livelihood systems, and cultural uniqueness.”¹⁵² The IDB’s *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development* is designed “to prevent or minimize exclusion and adverse impacts . . . [on] indigenous peoples and their rights.”¹⁵³ Other similar bodies in the business of international development finance, like the U.S. Agency for International Development or Japan’s International Cooperation Agency, have similar protections and enforcement processes.¹⁵⁴ Yet, the recent emergence of new financial institutions —

and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf. This Policy replaces among other Operational Policies (“OP”) and Bank Procedures (“BP”): OP/BP4.10, Indigenous Peoples, OP/BP4.11, Physical Cultural Resources, OP/BP4.12, Involuntary Resettlement, OP/BP4.36, Forests, and OP/BP4.37, Safety of Dams.

¹⁴⁹ *Id.* at 21.

¹⁵⁰ *Id.* at 32-33.

¹⁵¹ *Id.* at 22; see *Panama Land Administration Project: World Bank Approves Action Plan After Reviewing Inspection Panel Findings*, WORLD BANK (Feb. 4, 2011), <http://www.worldbank.org/en/news/press-release/2011/02/04/panama-land-administration-project-world-bank-approves-action-plan-after-reviewing-inspection-panel-findings>. One recent example of a compliance action involved the Naso and Ngäbe peoples of Panama. There, the WBG’s Inspection Panel investigated a project designed to simplify and modernize Panama’s land registration system. After finding that the project managers had failed to prepare an Indigenous Peoples Development Plan, they were required to create a compliance plan, which was later adopted by the WBG. *Id.*

¹⁵² ASIAN DEV. BANK, SAFEGUARD POLICY STATEMENT 55 (2009), <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>.

¹⁵³ INTER-AM. DEV. BANK, *supra* note 141, art. 4.

¹⁵⁴ See CARIBBEAN DEV. BANK, GUIDELINES FOR THE SOCIAL ANALYSIS OF DEVELOPMENT PROJECTS ¶ 3.08 (2004), http://www.caribank.org/uploads/2013/11/C4.2-SIA_Guidelines_2004.pdf; AFRICAN DEV. BANK, DEVELOPMENT AND INDIGENOUS PEOPLES IN AFRICA 3 (2016), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Development_and_Indigenous_Peoples_in_Africa_En_-_v3_.pdf.

namely the Asian Infrastructure Investment Bank or AIIB — threatens to erode the near universality of these protections, as some believe newer banks will settle for less protective policies.¹⁵⁵ For now, this concern seems unfounded as the AIIB has adopted standards similar to other IFIs.¹⁵⁶

Though safeguards are generally incorporated in lending agreements, their efficacy has been questioned, especially in light of the broad scope of exceptions to the adopted standards. Moreover, several cases have been brought to the compliance bodies of these institutions to investigate failures to comply with safeguards.¹⁵⁷ One core weakness is that if a violation is found, it triggers an investigation that can lead to remedial actions, including the cancellation of disbursements and possibly, the temporary or permanent suspension of eligibility to participate in future projects. Additionally, some hold that institutions have either failed or refused to “discipline either governments or [MNCs] for violating the [safeguards].”¹⁵⁸ Other

¹⁵⁵ See ALEX MOURANT ET AL., ENSURING SUSTAINABILITY IN THE ASIAN INFRASTRUCTURE INVESTMENT BANK AND THE NEW DEVELOPMENT BANK 21-22 (2015).

¹⁵⁶ See ASIAN INFRASTRUCTURE INV. BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK 42-45 (2016), https://www.aiib.org/en/policies-strategies/_download/environmental-framework/20160226043633542.pdf (in particular “Environmental and Social Standard 3”) (“To design and implement Projects in a way that fosters full respect for Indigenous Peoples’ identity, dignity, human rights, economies and cultures, as defined by the Indigenous Peoples themselves, so that they: (a) receive culturally appropriate social and economic benefits; (b) do not suffer adverse impacts as a result of Projects; and (c) can participate actively in Projects that affect them.”).

¹⁵⁷ E.g., INTER-AM. DEV. BANK, *Mexico-Mareña Renovables Wind Project*, MICI002-2012 (Dec. 26, 2012), <https://www.iadb.org/en/mici/complaint-detail-2014,1804.html?id=ME-MICI002-2012> (“The Requesters also alleged that the harm was caused in part by the Bank’s failure to request an evaluation of the adverse effects on the indigenous communities and its failure to consider the same communities as potential beneficiaries of the Project to be developed on their lands.”); INTER-AM. DEV. BANK, *Rural Land Titling & Registration Project in Peru: Third Phase (PTRT-3)*, MICI-PE-2015-0094 (Aug. 27, 2015), <https://idblegacy.iadb.org/en/mici/mici-word,20069.html?ID=MICI-PE-2015-0094&isAjaxRequest> (“Specifically, the Requesters believed that project will violate their property owner’s rights and the use of the indigenous territories, by allocating the titles in the first instance to colonists.”).

¹⁵⁸ Edmund Terence Gomez & Suzana Sawyer, *State, Capital, Multinational Institutions, and Indigenous Peoples*, in *THE POLITICS OF RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS, AND THE STATE* 33, 35 (Edmund Terence Gomez & Suzana Sawyer eds., 2012). According to other authors, IFIs still limit their “involvement in future projects in the country from fear of further noncompliance” and staff of the organizations “who fail to enforce the standards are subject to investigation by [the internal accountability mechanisms].” Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 *YALE L.J.* 1791, 1799 (2005) (citing Benedict Kingsbury, *Operational Policies of International*

important criticisms include the failure of the safeguards to explicitly link the substantive and procedural requirements to other, more robust sources of international legal authority.¹⁵⁹ These links could strengthen protections and ultimately incorporate human rights obligations derived from customary international law.

Despite the opposite sentiment of some human rights scholars as to the effect on development projects,¹⁶⁰ there is wide agreement that safeguards have played a major role in the development of indigenous protections worldwide.¹⁶¹ Two effects are often considered. First, as international organizations “influence their member states” they can pressure governments to deal more effectively with indigenous rights.¹⁶² Second, the efforts to implement social safeguards have led to the adoption of similar efforts by private lenders. One such example is the Equator Principles, a set of guidelines based on the WBG policies that seek to increase public accountability of private lenders.¹⁶³ Adopted by ninety-four private financial institutions in thirty-seven countries, the Equator Principles are voluntary but may affect the majority of international project finance debt within developed and emerging markets.¹⁶⁴

Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 323, 330-32, 338-39 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999)).

¹⁵⁹ Daniel D. Bradlow, *The Reform of the Governance of the IFIs: A Critical Assessment*, in *THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE* 37, 52 (Hassane Cissé et al. eds., 2012) (stating “it is striking that the MDBs’ policies do not explicitly reference either the applicable international legal standards or the applicable decisions, declaration, or other legal instruments of those institutions and bodies”).

¹⁶⁰ Some have noted the failure of the World Bank to put requirements for “free, prior, and informed consent” into its operational policies and its use of the term “consultation” instead. S.J. ROMBOUTS, *HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT* 210 (2014). Arguably, however, “consultation” here implies an international standard that can be linked to important instruments. Specifically, the International Labour Organization’s Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 6, June 27, 1989, 1650 U.N.T.S. 383, embodies the international legal duty to carry out consultations “whenever consideration is being given to legislative or administrative measures which may affect [indigenous peoples] directly.”

¹⁶¹ Sarfaty, *supra* note 158, at 1801.

¹⁶² Bradlow, *supra* note 159, at 55.

¹⁶³ See generally *The Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/about/> (last visited Nov. 14, 2018).

¹⁶⁴ *Id.* Like the safeguards put in place by IFIs, the Equator Principles require recipients of loans to conduct social impact assessments, obtain the free, prior, and informed consent of any affected indigenous peoples, and develop plans to mitigate

In short, international financial institutions, primarily led by the WBG, have sought to finance development projects in a more sustainable, appropriate, and culturally sensitive manner. Protections outlined in their operational policies are incorporated by reference as binding obligations in lending agreements and, overall, seek to ensure the participation of indigenous communities in the planning process and to prevent adverse impacts on tribes. The enforcement is imperfect as it takes place within the accountability and justice systems of the financial institutions themselves. But safeguards have the potential to establish international norms regarding foreseeable harm, and influence the actions of governments and private parties. What is unclear, however, is the role such institutions will continue to play as competition from private lenders in development projects increases.

C. Trade

The impact of trade agreements on indigenous communities has been widely documented. Yet, express protections for indigenous peoples are only just emerging within these instruments.¹⁶⁵ These protections thus only imperfectly advance the interest of indigenous peoples. Where protections do exist, they usually entail reservations and exceptions to, or carve-outs and exemptions from, obligations that restrict states from granting advantages — such as an exclusive or preferential treatment — to indigenous communities, their products, or production methods. An interesting example of more general application is the Māori exception included in the CP-TPP, and in other trade deals of New Zealand. These carve-outs protect against the narrowing of the group's advantages secured under the Treaty of Waitangi, permits more favorable treatment to the Maori People and guarantee the substantive rights recognized under other legal instruments.¹⁶⁶

any adverse impacts. Nonetheless, as adoption of the Equator Principles is entirely voluntary, questions of their efficacy are not unreasonable. The Principles themselves state that they “do not create any rights in, or liability to, any person, public or private.” *Id.* at 11.

¹⁶⁵ See generally Wai, *supra* note 21, at 45 (2003) (discussing the increase of human rights concerns in international trade regulation).

¹⁶⁶ Trans-Pacific Partnership (TPP) art. 29.6, Jan. 26, 2016, Art. 29.6, <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/29.-Exceptions-and-General-Provisions.pdf> (protections concerning the Maori people and the Treaty of Waitangi).

Provisions like these tend to be consistent with the goals and the interpretation of trade treaties and have been welcomed by specialists.¹⁶⁷ Nonetheless, some argue that indigenous and human rights issues should not be addressed through a global trading system and doubt that the system even has the institutional capacity to address these complexities.¹⁶⁸ Instead, they argue for stronger enforcement alternatives in regional institutions that have the appropriate knowledge, resources, and capacity to adequately address social issues — for instance, the Inter-American Court of Human Rights or the International Labour Organization.¹⁶⁹ One noteworthy example of a shift to address indigenous concerns in this space but outside of trade institutions is the 2005 UNESCO Convention, which mandates a broad list of trade-related measures to protect indigenous cultural heritage, including cultural goods and services.¹⁷⁰

Others, however, view the international trade system as compatible with and necessary for the protection of human rights. For example, Harold Koh notes that WTO treaties do not generally conflict with obligations enumerated in other instruments and that trade adjudicators have begun to display more toleration to regulations designed to address the goals of human rights obligations that have “discriminatory” or “trade-restrictive” effects.¹⁷¹ In particular, governments can rely on exceptions designed to protect specified objectives, such as the protection of human health, life, and public morals, or to secure compliance with laws or regulations to defend policies of that nature.¹⁷² For example, the Appellate Body (“AB”) of

¹⁶⁷ See e.g., CHARLES M. GASTLE, *SHADOWS OF A TALKING CIRCLE: ABORIGINAL ADVOCACY BEFORE INTERNATIONAL INSTITUTIONS AND TRIBUNALS* 5 (2002) (explaining that “nations jealously guard their sovereignty and the recognition of aboriginal groups”).

¹⁶⁸ See MIKE MOORE, *A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE* 101 (2003).

¹⁶⁹ *Id.*; James Cavallaro & Jamie O’Connell, *Stopping Mass Atrocities: How do International Criminal Courts and Regional Human Rights Systems Compare?* 49-58 (2018) (unpublished manuscript) (on file with the UC Davis Law Review).

¹⁷⁰ 2005 Convention, *supra* note 129. For a more detailed discussion on trade and cultural heritage, see generally T. Voon, *Substantive WTO Law and the Convention on the Diversity of Cultural Expression*, in *THE UNESCO CONVENTION ON THE DIVERSITY OF CULTURAL EXPRESSIONS: A TALE OF FRAGMENTATION IN INTERNATIONAL LAW* 273 (Toshiyuki Kono & Steven Van Uytsel eds., 2012).

¹⁷¹ Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 *HARV. INT’L L.J.* 433, 440-41 (2016).

¹⁷² General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]; The General Agreement on Tariffs and

the WTO recently held that key provisions can be used to excuse a treaty breach when trade restrictive measures are adopted to protect the interests of indigenous groups.¹⁷³ As a result, advocates for indigenous peoples have begun to push for further acknowledgement of their interests within the trading system.¹⁷⁴ Specifically, the recognition of the duty to consult with indigenous peoples when a potential agreement could affect those peoples is a priority.¹⁷⁵ Such recognition has also begun to take place in certain domestic courts and other bodies; notably, the Inter-American Commission of Human Rights has demanded indigenous consultation prior to ratifications of FTAs and the Costa Rican Constitutional Court struck down draft legislation aimed at implementing the Central America Free Trade Agreement because the government failed to consult with indigenous peoples beforehand.¹⁷⁶

One thing is clear: international trade features few explicit protections of indigenous peoples. Those that do exist are almost always in the form of reservations, exceptions, or carve-outs that allow discriminatory (*de jure* or *de facto*) or trade restrictive measures to be adopted in order for a state to comply with human rights obligations or better accommodate the interests and practices of indigenous peoples. The limited reliance on such legal provisions to build more robust protections may be explained by a states' tendency to favor economic interests over indigenous rights. And, even when trade agreements may provide sufficient flexibility to accommodate indigenous rights — an issue that I discuss below — indigenous groups often lack mechanisms to influence domestic trade policy or the outcomes of proceedings before dispute settlement bodies like the WTO-DSU.¹⁷⁷

Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. For the reliance on the exceptions, Members must satisfy the requirements that the measures at issue are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade . . .” *Id.*

¹⁷³ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.338, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (May 22, 2014).

¹⁷⁴ *Demands on Indigenous Consultation*, *supra* note 51.

¹⁷⁵ *Id.*

¹⁷⁶ INT'L CTR. FOR TRADE & SUSTAINABLE DEV., *Costa Rica's Long Road to CAFTA*, BRIDGES (Nov. 6, 2008), <http://www.ictsd.org/bridges-news/bridges/news/costa-rica's-long-road-to-cafta>.

¹⁷⁷ See Soopramanien, *supra* note 96, at 242.

D. Investment

Indigenous peoples are especially susceptible to the effects of treaties that attempt to encourage FDI by granting special rights to foreign investors.¹⁷⁸ However, according to the current Special Rapporteur on the Rights of Indigenous Peoples, even in the absence of investment treaties “foreign and domestic investment has a serious impact on indigenous peoples’ rights.”¹⁷⁹

As is the case with trade regimes, specific protections for indigenous peoples in investment treaties are rare and, when they *do* exist, relatively weak. One example is the controversial investment chapter of NAFTA, in which Canada and the United States obtained exemptions from investment obligations in order to adopt or maintain any measure denying investors rights or preferences provided to indigenous peoples.¹⁸⁰ Specifically, exemptions of this nature aim at reinforcing state discretion to protect indigenous land and natural resources from exploitation by foreign investors. Indigenous peoples also receive some protection in BITs that occasionally impose more general obligations to protect human rights. For instance, the 2016 Morocco-Nigeria BIT imposes obligations to “ensure that their laws, policies and actions are consistent with the international human rights agreements” and imposes obligations on investors to “not manage or operate the investments in a manner that circumvents international . . . human rights obligations.”¹⁸¹ While there are other notable exceptions to the general trend,¹⁸² compliance with indigenous

¹⁷⁸ Victoria Tauli-Corpuz (Special Rapporteur of the Human Rights Council), *Report of the Special Rapporteur on the Rights of Indigenous Peoples — International Investment Agreements, Including Bilateral Investment Treaties and Investment Chapters of Free Trade Agreements*, ¶¶ 31-40, U.N. Doc. A/HRC/33/42 (Aug. 11, 2016).

¹⁷⁹ *Id.* ¶ 78.

¹⁸⁰ North American Free Trade Agreement, Can.-Mex.-U.S., art. 1102, Dec. 17, 1992, 32 I.L.M. 612, 641 (1993) (“Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.”) [hereinafter NAFTA Annex II]; *id.* (including in the list of exceptions for the United States, similar exceptions also apply to “socially or economically disadvantaged minorities”). Provisions similar to these protections have been reported in the USMCA, *supra* note 15.

¹⁸¹ Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Niger, arts. 15 & 18, Mar. 12, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409>.

¹⁸² See, e.g., UNCTAD, NORWAY MODEL BILATERAL INVESTMENT TREATY art. 6 (2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3350> (“Paragraphs 1 to 6 of this Article do not in any circumstances apply to a measure or a series of measures,

rights (or human rights for that matter) often is not explicitly referred to as a cause to justify conduct inconsistent with investment arrangements.¹⁸³ Some argue that this is due to the desire by states to encourage investment from MNCs and that explicit exceptions may discourage investment.¹⁸⁴ Empirical evidence, however, seems to run counter to the hypothetical correlation that less legal protections for vulnerable groups entails lower levels of investment.¹⁸⁵

The lack of stronger language to protect the interests of indigenous peoples may also have something to do with the structure of investment law (and its enforcement system) as a regime designed to protect MNCs. Because investment law involves assessing how the state deals with business actors, some scholars argue that putting human rights requirements expressly in investment treaties is unnecessary. According to this argument, states already possess the power to protect human rights against private (mis)conduct within their own respective domestic legal frameworks.¹⁸⁶ And other international institutions may have competing authority (e.g., African Court on Human and Peoples' Rights) over state actions or omissions relating to the investment projects that violate indigenous rights. In its most refined version, the argument also suggests that the obligations *vis-à-vis* the investor shall not be read by interpretative bodies, *prima facie*, in an inconsistent manner with other protections afforded under human rights obligations. Moreover, even if it were the case that inconsistency exists, states have the right to implement measures designed to protect human rights; the state simply has to pay compensation to any investor whose investment has been unduly affected when it does so. Therefore, if states were to add justificatory

other than nationalizing or expropriating, by a Party that are designed and applied to safeguard public interests, such as measures to meet . . . human rights . . . concerns.”).

¹⁸³ See Tauli-Corpuz, *supra* note 178 ¶ 71.

¹⁸⁴ *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1764 (2016).

¹⁸⁵ See, e.g., Robert J. Flanagan, *Labor Standards and International Competitive Advantage*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 15, 29-31 (Robert J. Flanagan & William B. Gould IV eds., 2003).

¹⁸⁶ See generally Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689 (2014). According to some views, in case of conflict international law recognizes the primacy of human rights over investor protection, see, Sawhoyamaya, *Indigenous Community v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128. (Mar. 29, 2006). See also *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 109 (Aug. 24, 2010).

exceptions (like in international trade), it would signal that investment obligations may not be easily reconcilable with human rights, or that investment tribunals should not balance different state interests when interpreting treaty obligations.

Beyond the doctrinal debates, there are important legal and practical consequences of not including specific exception or carve-out language. Nevertheless, there may be some value in this approach. For one, specific protections are already established in other human rights treaties that regulate the relationship between indigenous peoples and the state, and provide for the potential responsibility of the latter.¹⁸⁷ Moreover, after all, when interpreting *all* economic treaties, international adjudicators are required to adhere to the Vienna Convention on the Law of Treaties, which provides that other applicable rules of international law be considered.¹⁸⁸ Through this rule of interpretation, the protections established elsewhere may have some bearing in the interpretation of the relationship between the investor (or right holder) and the state regulated by the BIT — either as a relevant context (emerging as a duty of care) or as a rule between the treaty parties. Moreover, if a breach of indigenous rights results from the implementation of an investment treaty, the rules on state responsibility demand mitigation efforts, and domestic or human rights law may provide a cause of action for reparation.¹⁸⁹ For the

¹⁸⁷ See, e.g., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001) (holding that in granting a concession to two foreign companies to log land claimed by the indigenous Awas Tingni group, Nicaragua had violated the American Convention on Human Rights by infringing upon the Awas Tingni Community's right to “the use and enjoyment of their property”); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 12, 142 (Nov. 28, 2007) (condemning the environmental degradation caused by foreign companies within territory traditionally owned by the Saramaka community); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 75, 147, 305 (June 27, 2012) (the Court ruled that the failure to consult the indigenous peoples and obtain their free, prior and informed consent, and the use of force by the State, had put the indigenous peoples' survival at risk.); *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶¶ 200-01 (Nov. 25, 2015).

¹⁸⁸ Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331; see also Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 866 (2011).

¹⁸⁹ See Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 43-50 (2001).

investor, it may result in “contributory responsibility, by reason of its acts and omissions,” potentially affecting any compensation due.¹⁹⁰

To be sure, many arbitrators in investor-state arbitration, currently the preferred mechanism to enforce rights conferred to investors, often lack experience in human rights law.¹⁹¹ This may explain why some tribunals seem reluctant to give broader consideration to these elements (effectively reducing the scope of indigenous rights) and can make the above analysis seem a little naïve.¹⁹² Moreover, for the most part, arbitrators lack jurisdiction to find business actors in breach of international law. For these reasons, many scholars argue that BITs should include explicit language that in conflicts regarding human rights and investment, certain human rights treaties shall prevail.¹⁹³

While drops in a big bucket, 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. The first regulates the relationship between distinct legal obligations through reservations, carve-outs or exceptions, and the latter mostly through reservations. In all of these regimes, the application of secondary rules of international law, like the rules of treaty interpretation or rules of state responsibility, are generally not excluded by treaties. Hence, these secondary rules may result in the

¹⁹⁰ Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶¶ 3-4 (Nov. 30, 2017) <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf> (Sands also suggests that at the very least the company had an obligation to obtain “social license.”).

¹⁹¹ Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENVER J. INT’L L. & POL’Y 483, 495-96 (2011).

¹⁹² *Id.* For example, in Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2, ¶ 60 (June 26, 2012) the Tribunal composed by Mr. L. Yves Fortier, Professor David A.R. Williams, and Professor An Chen decided that “the putative rights of the indigenous communities as “indigenous peoples” under international human rights law, [was] a matter outside of the scope of the dispute.” It also determined that it was up to the Tribunal to “decide whether the indigenous communities constitute “indigenous peoples” for the purposes of grounding any rights under international human rights law.” *Id.*

¹⁹³ See Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT’L L. 670, 688, 711 (2011).

elevation of some legal protections enshrined in other sources of legal authority and result in contributory responsibility. Before discussing the operation of such arrangements in practice, below is a table summarizing this descriptive section:

Table 2: Institutionalization of Indigenous Interest under Economic Regimes

FIELD	INTEREST PROTECTED	LEGAL FORMS	EXAMPLES
Intellectual Property	<ul style="list-style-type: none"> - Cultural 'Property' & Heritage. - Collective Ownership. 	<ul style="list-style-type: none"> - Legal Obligations. - Domestic Enforcement of Protections. - Secondary Rules of IL. 	<ul style="list-style-type: none"> - Fair & Equitable Sharing of Benefits. - Disclosure Requirements.
Finance	<ul style="list-style-type: none"> - Self-Determination. - Self-Governance. 	<ul style="list-style-type: none"> - Safeguards & Operational Policies. - Secondary Rules of IL. 	<ul style="list-style-type: none"> - Impact Assessments Requirements. - Free, Prior, & Informed Consultation.
Trade	<ul style="list-style-type: none"> - Social, Cultural, & Religious Practices. - Economic Preferences. 	<ul style="list-style-type: none"> - Exceptions, Reservations & Exemptions (Carve-Outs). - Secondary Rules of IL. 	<ul style="list-style-type: none"> - Preferential Treatment. - Protection for Economic Development Initiatives.
Investment	<ul style="list-style-type: none"> - Land & Natural Resources. - Economic Preferences. 	<ul style="list-style-type: none"> - Reservations & Exemptions (Carve-Outs). - Secondary Rules of IL. 	<ul style="list-style-type: none"> - Exemption of Non-Discrimination Requirements. - Reserved Sectors.

E. Case Studies

1. Intellectual Property: The Kuna People

Based on and consistent with international treaties, Panamanian law recognizes and provides various protections for indigenous peoples.¹⁹⁴ On that basis, Panama adopted IP provisions that “protect the collective intellectual property rights and traditional knowledge of indigenous peoples in their creations . . . as well as the cultural

¹⁹⁴ Organo Del Estado [Law No. 2 of September 16, 1938], http://www.utp.ac.pa/documentos/2010/pdf/kuna_yala.PDF (creating indigenous jurisdictions).

elements of their history.”¹⁹⁵ Thus, Panama’s Law 20 of 2000 recognizes and protects the collective nature of these cultural expressions, instead of solely protecting the creation of an individual or company.

The Kuna People are a vibrant indigenous group that make up the second largest in Panama. One of the most well-known cultural expressions of the Kuna is the *mola*, a unique textile typically designed and worn by Kuna women.¹⁹⁶ It is created by carefully sewing textiles of various colors into a design that reflects elements of nature, such as the figure of an animal or a plant. The *molos* are important elements of culture and trade: they are commercialized in boutiques and souvenir shops and can be found in most, if not all, tourist areas of Panama.¹⁹⁷

The *mola*’s popularity has also led non-Kuna to copy and imitate the designs and use them for commercial purposes.¹⁹⁸ In the case of products imported into Panama with designs imitating or copying that of the *mola*, a procedure has been established where customs officials contact the Kuna representatives and inform them of the products.¹⁹⁹ The Kuna experts then assess whether the products are an imitation and/or if the company or individual has a license to use the designs. If either one of the conditions is not met, the Kuna traditional authorities initiate a criminal action against those who are illegally using their designs and may also block the imports.²⁰⁰

¹⁹⁵ Special System for the Collective Intellectual Property Rights of Indigenous Peoples, Código Fiscal No. 24,083, act 20, ch. I, art. 1 (Gaceta Oficial 2000) (creating “a special system to register, promote and market [indigenous IP] rights, in order to highlight the social and cultural values of indigenous cultures and guarantee social justice for them”).

¹⁹⁶ Diana Marks, *Appropriating the Mola: Forms of Borrowing by Textile Artists*, 3 J. TEXTILE DESIGN RES. & PRAC. 87, 88 (2016).

¹⁹⁷ Lynn Stephen, *Culture as a Resource: Four Cases of Self-Managed Indigenous Craft Production in Latin America*, 40 ECON. DEV. & CULTURAL CHANGE 101, 108, 111 (1991).

¹⁹⁸ Irma de Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT’L L.J. 337, 359 (2005) [hereinafter *Panamanian IP*] (“In the 1980s, the popularity of the *molos* prompted a wave of imported imitations that flooded the market.”).

¹⁹⁹ Law No. 20 of 2000 adds a subparagraph to Article 439 of the Administrative Code (Código Fiscal), which prohibits the importation of any “article that imitates, completely or partly, the workmanship of the traditional dress of indigenous peoples, as well as said peoples.” See Special System for the Collective Intellectual Property Rights of Indigenous Peoples, Código Fiscal No. 24,083, act 20, ch. VI, art. 17 (Gaceta Oficial 2000).

²⁰⁰ See Panama New Criminal Code, Second Book, tit. VII, ch. IV (Pan.). Specifically Arts. 274 and 275 address crimes against the Collective Rights of Indigenous Peoples and their Traditional Knowledge available <https://www.oas.org/>

To date, all cases have been settled by the authorities, but licensing deals have resulted in handsome royalties for the Kuna.²⁰¹ Moreover, for any party interested in using the designs for commercial purposes, a system has been created to negotiate directly with the Kuna traditional authorities. The agreement is registered before the Directorate General of Copyright under the Ministry of Commerce and Industries. If no licensing agreement exists, a proceeding may be initiated against the unauthorized users and imports, which can result in hefty penalties.²⁰²

In some ways, the Kuna's is an uncommon but rosy textbook case: a well-endowed tribe empowered by law may profit from the commercialization of its resources. When implemented correctly in domestic law, indigenous IP protections recognized internationally may give way to the collective enjoyment of royalties from, among other resources, its cultural expressions.

2. Finance: The Huave People

Mexico has a robust and diverse array of indigenous peoples. In the "isthmus" (*itsmo*) region of Oaxaca, a region that has been identified as optimal for the development of wind power, the Mexican government and a concessionaire financed by the IDB sought to build the largest wind farm in Latin America.²⁰³ The then US \$1 billion-plus project in San Dionisio del Mar attracted the attention of many international human rights authorities including the Inter-American Commission of Human Rights, the UN Special Rapporteur on the Rights of Indigenous Peoples, and, most notably, the independent complaint mechanism, or ICIM, of the regional development bank.

According to an internal investigation by the IDB, "[it] did not ensure that the conditions to carry out consultation and good faith negotiation with indigenous communities affected by the project were met."²⁰⁴ Based on these findings, the ICIM recommended that the

juridico/mla/sp/pan/sp_pan-int-text-cp.pdf.

²⁰¹ Interview with Kuna representative (Mar. 2017) (on file with author).

²⁰² See Obaldia, *supra* note 198, at 366-77.

²⁰³ For a summary of recommendations, see generally S. JAMES ANAYA, OBSERVACIONES DEL PROFESOR S. JAMES ANAYA SOBRE LA CONSULTA EN EL CONTEXTO DEL PROYECTO ENERGÍA EÓLICA DEL SUR EN JUCHITÁN DE ZARAGOZA 1 (Feb. 23, 2015), <http://fundar.org.mx/wp-content/uploads/2015/03/Juchitan-observaciones-Anaya.pdf>. For a discussion of the broader context, see S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 U. TORONTO L.J. 435, 439-46 (2017) [hereinafter *Mitigating State Sovereignty*].

²⁰⁴ INTER-AMERICAN DEV. BANK, COMPLIANCE REVIEW REPORT MAREÑA RENOVABLES WIND

project be closed and that it not be carried out in the area and in the manner originally envisaged. It also recommended drawing up a compensation plan for the harm caused to the affected Huave (or Ikojts) community in violation of the IDB's Policy on Indigenous Peoples (OP-765).

Despite this decision, the Mexican government relocated a slightly modified version of the same project twenty miles inland to an area adjacent to the city of Juchitán de Zaragoza. This time, the Mexican government decided to implement a consultation with the Zapotec People (or Ben 'Zaa) for what the authorities called a "new" project in Juchitán, but now without financing from the IDB. The project's background, the presence of well-known foreign investors like Mitsubishi International Corporation, Vestas Wind Systems A/S, and Macquarie Group Limited in the concessionaire, the partnership of these investors with a federal government workers' pension fund, and a history of unresolved land tenure controversies, all made the situation volatile.²⁰⁵ Today, litigation looms before the Mexican Supreme Court and the fate of the project is uncertain. The litigation involves whether the process of consultation with indigenous peoples satisfied the required standards (especially in light of the relocation of a project pre-determined without any input by the Zapotec).²⁰⁶

In short, this example shows the tensions that arise between fostering finance for development projects and safeguarding indigenous peoples. It shows how the interests and incentives of the state are more likely to be aligned with those of MNCs than those of indigenous peoples, and how officials within development banks may sometimes ignore compliance with their own safeguards. More positively, it also shows the potential that such instruments have to impact investment decisions, especially when safeguard protections are well institutionalized and effectively applied. Finally, it shows how the source of funding projects ultimately can impact the well-being of indigenous peoples.

PROJECT 5, http://indianlaw.org/sites/default/files/ME-MICI002-2012_COMPLIANCE_REVIEW_REPORT_FOR_MARE%C3%91A_RENOVABLES_WIND_ENERGY_PROJECT__ENGLISH_WEB__.pdf (last visited Sept. 11, 2018).

²⁰⁵ ANAYA, *supra* note 203.

²⁰⁶ See Jorge Carrasco Araizaga, *La Corte Atrae Amparo Sobre Energía Eólica en Zona Indígena de Oaxaca*, PROCESO (Jan. 10, 2018), <https://www.proceso.com.mx/518021/la-corte-atrae-amparo-sobre-energia-eolica-en-zona-indigena-de-oaxaca>.

3. Trade: The Inuit People

The Inuit People of northern Canada, Greenland, and Alaska have long considered seal hunting a part of their livelihood, culture, and identity. In 2010, however, the European Union adopted a regulation banning the sale of both imported and European seal products.²⁰⁷ In recognition of the degree to which seal hunting contributed to the subsistence of the Inuit, the EU ban included an exception specifically benefiting this group. This exception allowed the Inuit to sell their seal products within the EU so long as the products came from their traditional hunts. Interestingly, the exception only applied to the Inuit and not to other indigenous groups or to other hunters using similar methods.²⁰⁸

As a result, both the ban and the exception were challenged before a panel, and eventually the AB of the WTO, by countries with an interest in the EU's market. In particular, Canada and Norway argued that the ban discriminated against their industries, as it allowed seal products made by hunters in Greenland to more easily enter the EU's market, given the higher percentage of indigenous hunters in Greenland as compared to Canada or Norway.²⁰⁹

The EU defended its regulation as a necessary policy to protect public morals — a general justificatory exception permitted under WTO law.²¹⁰ While Canada conceded that the EU could issue a regulation to protect a widely held moral value, it argued that the EU could only do so after applying equivalent restrictions for indigenous and non-indigenous hunts. In its decision, the AB held that the EU ban failed to meet the requirement that the exception operate in a way that does not amount to arbitrary or unjustifiable discrimination. The AB was concerned about the measure's inconsistent approach, given that the EU did not seek to ameliorate the animal welfare conditions of indigenous hunts and that the exception meant that products from

²⁰⁷ See generally Regulation 1007/2009, of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36 (specially Preamble).

²⁰⁸ See *id.* at 37-38.

²⁰⁹ See Request for the Establishment of a Panel by Norway, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/5 (Mar. 15, 2011); Request for the Establishment of a Panel by Canada, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/4 (Feb. 14, 2011).

²¹⁰ See First Written Submission of the European Union, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, 199, 202, DS400, DS401 (Dec. 21, 2012), http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150190.pdf.

hunts that would otherwise be characterized as commercial could nevertheless slip in under the Inuit's exception. Lastly, the AB felt the EU could have done more to facilitate the access of Canadian Inuit to the exception.²¹¹

Nevertheless, the decision left enough room so that "some modifications that would amount to gestures of good faith" could make the ban WTO-compliant.²¹² In fact, today, Inuit produced seal products can enter the EU market after they are inspected by recognized bodies authorized by the Commission, enjoying privileged access to the common market.²¹³

This case study shows how states can find themselves in legal jeopardy as a consequence of trade obligations when trying to regulate while protecting indigenous groups. While, in many cases, governments retain flexibility under the general exceptions, balancing elements — including proportionality and effectiveness — need to be asserted when governmental actions overly affect a particular class of products or producers. Still, the recognition by international trade authorities that regulating in favor of indigenous peoples is a legitimate regulatory objective is an important step that provides additional tools to protect against challenges based on trade obligations.

4. Investment: Two North-American Tribes

At least two recent proceedings involving the United States have dealt with the intersection between foreign investor and indigenous rights.²¹⁴ The first case demonstrates typical impacts international investment regimes can have on indigenous peoples. Briefly, the case involved the denial of a mining permit by the federal government due, in part, to the project's effect on the Quechan People's natural

²¹¹ See Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, paras. 5.320, 5.326, 5.337, 5.338, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (June 18, 2014) [hereinafter *EC — Seal Products*].

²¹² Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO's Appellate Body Report in EC — Seal Products*, AM. SOC'Y OF INT'L. L. (June 4, 2014), <https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products>.

²¹³ See *id.*

²¹⁴ The "suspended" case brought by TransCanada would have illustrated and tested a more troubling tension between the duty to consult and investment law. See *TransCanada Corp. v. United States*, ICSID Case No. ARB/16/21, Notice of Intent to Submit a Claim to Arbitration (Jan. 6, 2016), <https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207030.pdf>.

resources and cultural heritage. The denial was challenged by a Canadian investor as a measure “tantamount to expropriation of an investment.”²¹⁵ In the end, the investor-state tribunal adjudicating the case found the governmental actions to be consistent with international law, but — as it is common among ISDS tribunal — did not substantively address the points of view expressed by the tribe in its *amicus curiae* submission.²¹⁶

A less typical case is *Grand River v. United States*, another NAFTA arbitration.²¹⁷ This proceeding dealt with a surviving claim from the tobacco Master Settlement Agreement — a settlement between authorities and companies in the United States resulting from deceptive practices in the promotion of tobacco products.²¹⁸ According to the claimants (Canadians, members of the Six Nations of the Iroquois Confederacy or “Haudenosaunee” People and investors in companies in the tobacco distribution sector), these measures affected their sales and constituted an expropriation of a substantial portion of the value of their investment. The tribunal had little sympathy for the claim, finding that the claimants had not been deprived of ownership or control of their business of distributing cigarettes in Native American territories (exempted from the Master Settlement Agreement).²¹⁹

Interestingly, the claimants in *Grand River* also contended that the customary international law standard of equitable treatment incorporates the duty to consult with indigenous peoples. Accordingly, this barred the United States from removing special tobacco-related benefits “without first attempting to ameliorate the resulting impact upon Claimants as [indigenous] investors.”²²⁰ In the decision, the NAFTA tribunal recognized the existence of customary international law norms concerning indigenous peoples, including “the right to be consulted with respect to any project that may affect them.”²²¹ Nevertheless, it held that the norm does not require

²¹⁵ NAFTA Annex II, *supra* note 165, art. 1110.

²¹⁶ See *Glamis Gold, Ltd. v. United States of America*, Award, at 3, 353 (June 8, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>.

²¹⁷ *Grand River Enters. Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL Arb., Award (Jan. 12, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0384.pdf>.

²¹⁸ Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT’L L. J. 383, 394-96 (2016).

²¹⁹ See *Grand River Enters. Six Nations, Ltd.*, Award, paras. 137-45.

²²⁰ See Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 431 (2013).

²²¹ See *Grand River Enters. Six Nations, Ltd.*, Award, para. 210 (quoting ILA

consultations with *individual investors*, but with indigenous peoples through their traditional authorities.²²² This language indicates that the tribunal (with James Anaya as a member) was well aware of a relationship between the duty to consult and international investment law, as well as conscious of the proper scope of application of the duty to consult as a protection against *human rights* violations.²²³

These two cases show some of the potential interactions between the investment regime and indigenous rights. In particular, they show how investment law can empower MNCs to seek compensation when governments act against their interests and in favor of tribes. In some cases, especially when investors deal with less powerful governments, investment frameworks may even over-empower multinational corporations by deterring actions that can give rise to investment claims by foreign investors.²²⁴ At the same time, it could be said that such legal frameworks may affect the capacity of governments to comply with their other obligations, including implementing human rights and engaging in innovative policymaking to address changing social, economic, and environmental conditions that impact indigenous interests. Finally, the cases show how investment tribunals — when sensitive to indigenous rights — can help to contextualize the tension between investor and indigenous rights by reading investment treaties within a larger body of international law. And, in some cases, indigenous foreign investors (or companies owned by indigenous investors) may also use the investment regime to protect their interests — although, admittedly, this is not a common or unchallenging use of the regime.

III. INTERNATIONAL INDIGENOUS ECONOMIC LAW

In this final Part, I undertake three tasks: (a) to set forth the intersection I call international indigenous economic law and describe the defensive and offensive mechanisms for the advancement of

Committee on the Rights of Indigenous Peoples, Interim Report (2010).

²²² See Karamanian, *supra* note 220 (citing Grand River Enters. Six Nations, Ltd., Award).

²²³ See *id.* It is possible that business actors may try to use investment treaties as a basis of state responsibility *vis-à-vis* the investor for consultations (or lack thereof) with indigenous peoples. Such action could result in international responsibility on the part of the state only in very rare cases. Anaya & Puig, *Mitigating State Sovereignty*, *supra* note 203, at 463.

²²⁴ For examples of this imbalance and recommendations, see James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, U.N. Doc. A/HRC/24/41 (July 1, 2013).

indigenous rights that exist within that intersection; (b) to assess the relative merits and limits of the main mechanisms for the institutionalization of indigenous interests within international economic law — namely, a procedural, market-driven approach and a substantive, state-driven approach; and (c) to underscore the crucial role international economic law can play in the protection of vulnerable and marginalized populations and the general lessons to contemporary debates on globalization.

A. Normativity

International law is intersectional; though its specialized fields operate independently, they intersect and connect.²²⁵ To address the most negative effects of globalization, an effort that becomes increasingly urgent as the frustration with interdependence becomes gradually more obvious, a better understanding of these intersections and connections is required. Specifically, it is essential to understand the intersection between international economic law — a field that emphasizes the expansion of transnational finance, trade, and investment volumes and fosters economic activity, development, and growth — and “human-focused” bodies of public international law, particularly human rights law — a field that emphasizes equality before the law, the prevention of social conflicts, and the development of human capabilities.

This Article has investigated but one of the many intersections of international law — that between international economic law and indigenous rights. I call this narrow intersection *international indigenous economic law*. As illustrated above and explained in more detail below, this body of law has a distinct normativity, which serves not only to reinforce the liberties and protections granted to economic actors, but also to: (1) expose the negative effects of the operations of MNCs on indigenous communities; (2) strengthen the capacity of states and international organizations to protect indigenous rights; (3) condition economic benefits on the support of indigenous

²²⁵ See, e.g., Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, I.C.J. Reports 2012, 324, 391, para. 8 (separate opinion by Greenwood, J.) (“International law is not a series of fragmented specialist and self-contained bodies of law, . . . it is a single, unified system of law.”); Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71 (2003); Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 205 (Thomas Cottier et al. eds., 2005) [hereinafter *Human Rights*] (examining ways in which the WTO accounts for human rights in trade dispute settlement).

interests; and (4) provide policy incentives that promote indigenous products and the practices associated with their production.²²⁶ To more fully explain these functions, I consider this intersection — international indigenous economic law — applied first as a shield for the protection of indigenous rights and then as a sword for their advancement.²²⁷

1. A Shield for Indigenous Rights

Both customary international law and painstakingly negotiated instruments impose on state and non-state actors (including IFIs) a comprehensive set of duties designed to protect indigenous peoples.²²⁸ When these instruments are invoked before international economic institutions, they may operate as a defensive shield for the protection of indigenous rights. But the four main regimes of international economic law incorporate these protections in varying ways, and, in each regime, the goal of advancing indigenous rights meets varying levels of success.

The particular mechanism of indigenous protection under a given economic regime reflects not only its distinct historical context, but also its particular nature and operational structure. For instance, the IP regime, concerned primarily with the unfair exploitation of indigenous cultural and biological resources, establishes special procedures to insulate these resources from the market forces and commoditization that the regime might otherwise unleash.²²⁹ While the regime provides limited enforcement at the international level, it encourages domestic causes of action for the protection of indigenous resources and to improve the collective bargaining position of indigenous peoples.²³⁰ The case of the Kuna People provides a clear

²²⁶ For a description of the potential uses of trade law, see, e.g., Philippe Sands, 'Unilateralism', *Values and International Law*, 11 EUR. J. INT'L L. 291 (2000). For investment law, see, e.g., Charles H. Brower II, *Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179, 209-10 (2011). For finance law, see, e.g., PROTECTING THE INDIVIDUAL FROM INTERNATIONAL AUTHORITY (Monika Heupel & Michael Zürn eds., 2017).

²²⁷ For a discussion of health and human rights as a shield and sword, see Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433, 433-47 (2016).

²²⁸ See generally W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350 (1995); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999).

²²⁹ See *supra* Section II.A.

²³⁰ See, e.g., General Assembly of the States Parties, *Operational Directives for the*

example of the operation of the IP regime as a shield for the protection of indigenous rights.²³¹

International finance, on the other hand, concerns itself with actualizing self-determination, building broad community support prior to the design and implementation of development projects, and enabling the monitoring and accountability of IFI's supported projects.²³² Standards crafted with indigenous representatives become binding safeguards when economic actors — directly or indirectly — obtain financing from development and aid organizations and financial institutions. These safeguards, of course, operate with varying levels of success. At best, and as in the case of the Huave People, financial institutions can ensure that their funded projects uphold the protections these safeguards support.²³³ At worst, governments, international organizations, and MNCs may ignore these safeguards with little threat of legal consequence. Moreover, governments are often unable to constrain borrowers from obtaining financing that is not burdened with these safeguards — leaving their application to other legal regimes or voluntary CSR systems.²³⁴

Finally, the fields of trade and investment rely primarily on exceptions that allow a state to defend actions that might otherwise be characterized as violations of treaty commitments as lawful exercises of regulatory or police authority, when such actions are reasonable efforts to protect indigenous rights or interests.²³⁵ In trade, these exceptions allow states to defend programs that favor indigenous products and the practices associated with their production.²³⁶ The case of the Inuit People exemplifies the use of such an exception, and shows that the flexibility to protect and grant advantages to indigenous peoples, while not unlimited, does exist, and is increasingly recognized by governments and adjudicators in this legal domain.²³⁷ In international investment — a field with relatively few explicit protections — treaty reservations, exceptions and carve-outs focus on the protection of

Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO (June 6, 2014), https://ich.unesco.org/doc/src/ICH-Operational_Directives-5.GA-EN.docx.

²³¹ See *supra* Section II.E.1.

²³² See *supra* Section II.B.

²³³ See *supra* Section II.E.2.

²³⁴ See *supra* Section II.E.2.

²³⁵ See *supra* Sections II.C, II.D.

²³⁶ See *supra* Section II.C.

²³⁷ See *supra* Section II.E.3.

indigenous lands and natural resources.²³⁸ These protections may insulate investment programs designed, or areas preserved for, indigenous autochthonous development. In certain limited instances, like the case brought by the Six Nations in *Grand River*, the rights of indigenous peoples as economic participants in globalization may be enforced — an infrequent use of investment treaties that can complement other remedies and sources of legal authority.²³⁹

These mechanisms prove that in theory, when looked at through its relational capacity, international economic law already enjoys a minimum protective basis. This is achieved mostly through the operation of unilateral reservations, rule exceptions, or policy carve-outs (exemptions) and the consequent application of international legal obligations through *secondary* rules of international law (those concerning and controlling how primary rules ought to be interpreted and applied), to protect indigenous peoples against rights violations resulting from economic policy. Or, in other words, to act as a shield for indigenous rights. To be sure: wielding the shield is difficult and costly for most indigenous groups. Essentially, it requires well-organized and well-informed communities, operating in a transaction-costly environment, to activate economic arrangements to prevent, protect, or (at a minimum) mitigate some of the most negative effects of globalization.

Nevertheless, there is a glimmer of hope that international economic law will be a more effective shield for indigenous rights in the future. For one, states have recognized an undeniable right under international law to protect the public interest through reasonable government action.²⁴⁰ In the particular case of indigenous peoples, governments as well as international organizations *must* do so, as different sources of international law demand effective actions in favor of this specially protected category of people.²⁴¹ 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 may justify broad efforts to protect indigenous peoples — in effect, significantly enlarging

²³⁸ See *supra* Section II.D.

²³⁹ See *supra* Section II.E.4.

²⁴⁰ See, e.g., Henok Asmelash & Edoardo Stoppioni, *Balancing Between Trade and Public Health Concerns: The Latest Step in the Plain Packaging Saga*, BLOG EUR. J. INT'L L. (Aug. 8, 2018), <https://www.ejiltalk.org/balancing-between-trade-and-public-health-concerns-the-latest-step-in-the-plain-packaging-saga/>. See generally Joel P. Trachtman, *Institutional Linkage: Transcending 'Trade and . . .'*, 96 AM. J. INT'L L. 77, 77-78 (2002).

²⁴¹ See generally *supra* Section III.B.

states' policy and regulatory space, as well as police powers.²⁴² Moreover, bodies like WIPO, WTO Panels, the AB, and ICSID tribunals have offered a more expansive interpretive approach to relevant flexibilities included in treaty texts.²⁴³ Notably, in past WTO cases, the AB had hinted that when “examining WTO claims, other human-focused bodies of public international law can offer a justification that precludes a panel from finding that WTO law has been breached.”²⁴⁴ However, in *EC-Seals*, the WTO drew an actual connection to the concerns of indigenous peoples, effectively reading those concerns as a potentially suitable justification.²⁴⁵ Similarly, in the investment terrain, recent decisions by *ad hoc* tribunals have noted the importance of the intersection of international investment law with other fields of international law and have recognized the duty of governments to protect against human rights violations.²⁴⁶ This recognition expands the capacity to utilize international economic law as a shield for the protection of indigenous rights.

The intersection of international economic law and indigenous rights or international indigenous economic law embraces a distinct normativity — one that above all, emphasizes the *defensive* nature of

²⁴² See generally Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 68 (2014) (concluding “that, under particular circumstances a state or a WTO member has discretion – within limits – to deny the (full) enjoyment of an investment or the importation of a particular product, provided that a justification can be provided”).

²⁴³ For WIPO, see, e.g., World Intell. Prop. Org., *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels*, WIPO Doc. CDIP/5/4 (Mar. 1, 2010.), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=131629. For WTO-Panels see, e.g., Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R, WT/DS401/R (Nov. 25, 2013). For ICSID tribunals see, e.g., Philip Morris Brands, Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, paras. 235-307 (July 8, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>.

²⁴⁴ Koh, *supra* note 227, at 440 (citing Appellate Body Report, *United States — Import Prohibitions of Certain Shrimp and Shrimp Products*, para. 185, WTO Doc. WT/DS58/AB/R (Nov. 6, 1998).

²⁴⁵ Panel Report, *supra* note 243, para. 7.296 (“[T]he interests to be balanced against the objective of the measure at issue are grounded in the importance, recognized broadly in national and international instruments, of the need to preserve Inuit culture and tradition and to sustain their livelihood . . .”).

²⁴⁶ See *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, para. 1200 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (noting that the BIT being applied in that case “has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights”).

international law. The intersection recognizes that the materialization of the rights of indigenous peoples is a legitimate reason to regulate business activities, to deny or suspend financial backing, or to modify the standard operation of the protections offered to IP owners. That is, international indigenous economic law can and should operate as a shield for the protection of indigenous rights.

2. A Sword for Indigenous Rights

International indigenous economic law may also serve as a “sword” for the advancement of indigenous rights. This use of the intersection is only just emerging as part of a “jurisgenerative” moment in indigenous rights advocacy.²⁴⁷ Its effectiveness, however, depends on active, organized, and sustained use by states, international organizations, and civil society groups and the ability of these actors to “foster bridges,” including with international business lawyers.²⁴⁸

Indigenous peoples have traditionally relied on human rights regimes to challenge the laws, policies, and practices of the states in which they reside.²⁴⁹ Underutilized, however, are the *primary* rules of international law (those concerning and controlling a particular subject matter) of economic treaties, which can be relied on to effect those laws and policies *extraterritorially*.²⁵⁰ For instance, clauses in economic agreements may justify the suspension of trade benefits when business actors under the jurisdiction of treaty partners fail to comply with basic human rights.²⁵¹ This possibility has been clarified with recent treaty practice and jurisprudential developments at the WTO.²⁵²

Consider, for instance, a logging concession granted without satisfying the duty to consult with indigenous peoples and that ultimately results in the gross violation of indigenous rights. If the trade agreement contains a human rights exception clause (not uncommon in EU treaty practice), a government could block imports

²⁴⁷ Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 205-33 (2014).

²⁴⁸ For a discussion about the prospects of human rights advocacy, see generally César Rodríguez-Garavito, *Reimagining Human Rights*, 13 J. INT'L L. & INT'L REL. 10 (2017).

²⁴⁹ See S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J.L. & POL'Y 107, 108-09 (2006).

²⁵⁰ See generally H. L. A. HART, *THE CONCEPT OF THE LAW* ch. 5 (1961) (distinguishing between primary and secondary rules).

²⁵¹ See Pauwelyn, *Human Rights*, *supra* note 225, at 206.

²⁵² See, e.g., *EC — Seal Products*, *supra* note 211.

of timber until the exporting state rights the violation.²⁵³ At the WTO, where no such textual basis exists, the barriers may be justified as long as they meet the well-established conditions of the *chapeau*, which I explain below.

Deploying treaties to effect extraterritorial behavior is a step beyond utilizing them to protect residents from, say, tobacco harm, with antismoking legislation based on the Framework Convention on Tobacco Control.²⁵⁴ In effect, this use allows a state to block market access or condition economic benefits on the adoption of certain behavior abroad, essentially forcing values on a community that may not hold them. The WTO-AB has laid the groundwork for a state to defend just this sort of extraterritorial imposition on “public morals” grounds.²⁵⁵ A government may also be concerned in the compliance with human rights obligations that protect the lives, health, and well-being of indigenous peoples abroad. This, I would argue, may grant a legitimate interest in the imposition of restrictions against goods, services or even investments and a reasonable affirmative defense under other general exemptions to justify the extraterritorial effects of a measure.²⁵⁶

But the inquiry does not end there; this unilateral, extraterritorial application must also satisfy at least two additional elements reflected in the introductory paragraph of Article XX of the GATT.²⁵⁷ First, a state acting to enforce indigenous rights extraterritorially with trade measures must do so under the aegis of a widely subscribed international agreement or under customary international law.²⁵⁸ Only such sources of legal authority provide a sufficient basis to justify the act. To be sure, states cannot act unilaterally to protect all values, only those that are basic to the operation and goals of the trading system.

²⁵³ See LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU’S INTERNATIONAL AGREEMENTS ch. 6 (2005).

²⁵⁴ WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166.

²⁵⁵ See e.g., *EC — Seal Products*, *supra* note 211, ¶ 2.28.

²⁵⁶ In some instances, the state may even have a duty to act. For discussion, see U.N. Econ. & Soc. Council, Rep. of the U.N. High Commissioner for Human Rights, ¶ 12, U.N. Doc. E/2007/82 (June 25, 2007).

²⁵⁷ General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . .”).

²⁵⁸ See Sands, *supra* note 226, at 299 (discussing this premise in the context of environmental law).

The Preamble of the Agreement establishing the WTO makes reference to two relevant purposes: the fulfillment of sustainable development, and the improvement of living standards, including (or especially, depending on one's view) for marginalized and/or vulnerable populations.²⁵⁹ This reference allows for the consideration of multiple policy goals in the process of interpretation as part of the object-and-purpose analysis of the treaty text.²⁶⁰ Moreover, competing values should be balanced in favor of the enjoyment of human rights (*a pro homine* principle).²⁶¹

Second, a state attempting to act extraterritorially to protect indigenous rights should do so only after first pursuing diplomatic means for the accurate application of relevant rules or standards (for example, standards to implement the duty to consult under ILO 169).²⁶² Adjudicatory bodies — most notably, the WTO-AB in the *Shrimp-Turtle* dispute — have granted states leeway to choose a

²⁵⁹ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (“Recognizing that . . . trade and economic endeavours should be conducted with a view to raising standards of living . . . and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development . . .”); Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 12, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S. Shrimp Report] (noting, in construing Article XX that a “purpose [that] is fundamental to the application of Article XX cannot be ignored [in light of the wording of] the preamble to the Marrakesh Agreement”); Makau Mutua & Robert Howse, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000: THE MILLENNIUM EDITION 51, 62 (Hugo Stokke & Anne Tostensen eds., 2001) (“[T]he actual text of the GATT reflects the recognition of supervening non-trade public values which were meant to prevail in the event of conflict with the free trade rules in the GATT.”).

²⁶⁰ U.S. Shrimp Report, *supra* note 259, ¶ 12 (“An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the [WTO Agreement] . . . acknowledges that the rules of trade should be in accordance with the objective of sustainable development, and should seek to protect and preserve the environment.”); *see also* Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.568, WTO Docs. WT/DS472/R & WT/DS497/R (Aug. 30, 2017) [hereinafter *Brazil Taxation Panel Report*] (“The Panel therefore finds that Brazil has demonstrated that a concern exists in Brazilian society with respect to the need to bridge the digital divide and promote social inclusion, and that such concern is within the scope of ‘public morals’ as defined and applied by Brazil.”).

²⁶¹ See ROBERT KOLB, *INTERPRÉTATION ET CREATION DU DROIT INTERNATIONAL* 54 (Brussels, Bruylant, 2006); Yota Negishi, *The Pro Homine Principle’s Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control*, 28 EUR. J. INT’L L. 457, 459 (2017).

²⁶² ILO *supra* note 6, art. 6.

particular diplomatic action, as long as it fosters multilateral cooperation and is fairly applied.²⁶³

Additional possible offensive uses of international economic law and its institutions for the advancement of indigenous rights exist. Now consider a logging concession granted to a foreign investor complicit in the forcible removal of indigenous peoples from their ancestral lands. If the project is funded by an IFI, “a foreign representative acting as the agent” of adversely affected indigenous peoples like an NGO may force an independent investigation before the compliance system of that body.²⁶⁴ If the financing body’s panel confirms the violation of indigenous rights, it will commence remedial actions or even halt disbursements. Moreover, the foreign investor may be reasonably sanctioned and lose funding sources in its home state, as well as precluded from bringing a successful claim before an *ad hoc* tribunal (perhaps on admissibility grounds) if the operating permit, license, or concession is cancelled by the host state.²⁶⁵ The host state may also bring a claim or counterclaim before an *ad hoc* tribunal for the alleged violation of human rights, if specific language exists in the contract or BIT — an emerging trend in investment instruments.²⁶⁶ In these ways, international economic institutions may sanction foreign investors who fail to comply with legal requirements enshrined in human rights norms.²⁶⁷

²⁶³ Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, ¶ 7.1, WTO Doc. WT/DS58/RW (June 15, 2001).

²⁶⁴ The Inspection Panel for the International Bank for Reconstruction and Development, International Development Association: Operating Procedures, Aug. 19, 1994, 34 I.L.M. 510, 511 (as amended).

²⁶⁵ *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, (Dec. 27, 2016) (ruling that one purpose of the investment system is to promote the rule of law, which precluded offering protection to investor that engaged in unlawful activities) (not public). For information, see, Vladislav Djanic, *In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process Are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims Under Dutch BIT*, IA REPORTER (Jul. 22, 2017), <http://tinyurl.com/ybt2p8pr>.

²⁶⁶ See e.g., TPP *supra* note 14, art. 9.19.2; NEW ZEALAND FOREIGN AFF. & TRADE, INVESTMENT AND ISDS FACT SHEET 4, http://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Investment.pdf (“The Government is expressly permitted to make a counterclaim and obtain damages when the investor is in the wrong under a covered investment agreement.”).

²⁶⁷ See e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, ¶ 1189 (Dec. 8, 2016) (The Urbaser tribunal found: “As far as recourse to the ‘general principles of international law’ is concerned, such reference would be meaningless if the position would be retained that the BIT is to be construed as an isolated set of rules of

Finally, international economic law can be used to develop the social, economic, or cultural activities of indigenous peoples. Consider, for instance, provisions in IP regimes that allow states to condition the recognition of rights on the satisfaction of requirements that forward the cultural protection and economic development of indigenous peoples.²⁶⁸ With some caveats, this possibility is also available 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 by IFIs — opening economic opportunities, one may hope, for indigenous groups.²⁶⁹

To summarize: emerging opportunities exist to use international indigenous economic law as a sword. Despite often being criticized by indigenous advocates, the instruments and institutions of international economic law offer a complementary normativity — one that enables the “offensive” use of international law to strengthen indigenous communities.²⁷⁰ Indigenous advocates in coordination with states, international organizations, MNCs and international economic law practitioners should utilize these tools, even if they come from outside the contours of what is traditionally defined as human rights law.

B. *Limits*

The institutionalization of indigenous interests within international economic law has yielded mixed results. Positive results include the incorporation of legal protections into legal frameworks, both in the drafting of newer frameworks and in the interpretation of older ones. International IP has incorporated norms that encourage fair distribution of collective benefits, and international finance has made safeguards that encourage autochthonous decision-making routine.²⁷¹ Trade panels — and to some extent investment tribunals — now recognize that the protection of indigenous interests is a legitimate ground to regulate and differentiate between products, services, and

international law for the sole purpose of protecting investments through rights exclusively granted to investors.”); *see also* Charles H. Brower II, *supra* note 226, at 192-93 (discussing the ability of host states to regulate foreign investors).

²⁶⁸ *See supra* Section III.A.1.

²⁶⁹ *See e.g.*, DGM GLOBAL, <http://www.dgmglobal.org> (last visited Nov. 19, 2018) (stating that among other mechanisms, the World Bank supports indigenous peoples through a Dedicated Grant Mechanism (DGM) for Indigenous Peoples).

²⁷⁰ *See* Tauli-Corpus, *supra* note 178, ¶ 65 (discussing the problems associated with international economic law).

²⁷¹ *See supra* Sections III.A.1, III.B.

investments (and the lawful practices associated with them).²⁷² Arguably, years of activism by relatively well-organized indigenous advocates is the primary source of this qualified but important success.

Negative results include the struggle by international economic law to accommodate certain terms of economic and political resistance (e.g., collective property, traditional production practices, self-determination, consultation) advocated by indigenous peoples. Though these concepts fall within the permissible boundaries, terminology, and state-centric operation of international law, they exist in a blind spot, largely unacknowledged by economic policy-makers, international economic law practitioners, and international legal scholars. This blind spot has reinforced the narrow view that indigenous peoples are against globalization, when in fact their demand is for a more balanced and inclusive system that recognizes their distinct values and unique contributions and in which they can successfully participate.²⁷³

That indigenous “terms of resistance” have not been better accommodated reflects the mistaken view that distributional concerns are irrelevant (or, at the very least, an afterthought) to international economic law, matters instead for domestic social policy or human rights law.²⁷⁴ This oversight directly affects the making, the structure, and ultimately the effectiveness of international economic law. It has led to limited direct participation of indigenous groups in treaty-making and dispute settlement processes, resulting in imperfect solutions, all of which only narrowly address indigenous demands.²⁷⁵ For instance, international IP and finance institutionalize indigenous interests utilizing a few concrete standards and procedures, within weaker systems of enforcement — a procedural, market-driven solution. Trade and investment, on the other hand, institutionalize indigenous interests utilizing rule exceptions, policy carve-outs and exemptions, or unilateral reservations, within stronger systems of

²⁷² See *supra* Section III.A.1.

²⁷³ Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 273 (2002) (arguing that globalization has increased the involvement of non-state actors in human rights issues with the resulting paradox that human rights are promoted, yet, at the same time, violated in “unforeseen ways”).

²⁷⁴ Timothy Meyer, Essay, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 996 (2017).

²⁷⁵ Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 260 (2010). For a conceptual analysis of the difference between forms of exceptions, see Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825 (2018).

enforcement (though often weighted in favor of corporate interests) — a substantive, state-driven solution.

The two distinct approaches have different possibilities and limits. The “procedural, market-driven” solution deals primarily with the direct effects of the proposed framework; namely, political legitimacy and economic discrimination.²⁷⁶ For instance, rules within finance require the involvement of indigenous communities in rule- and decision-making, which helps legitimize the work of development banks.²⁷⁷ IP rules protect indigenous culture and empower tribes in negotiations over IP protections, which arguably reduces unfair resources appropriation.²⁷⁸ Both approaches are “market-driven” to the extent that they promote stakeholder engagement, consultation with traditional authorities, and negotiated outcomes between non-state actors.²⁷⁹ They both have the potential to enhance fairness and promote efficiency if existing imbalances in access to information, resources, influence, and capabilities are calibrated. But rules are difficult to enforce, and easy to evade; dominant actors apparently disfavored by rules can avoid them by regime “shifting” or “shopping” — from WIPO to TRIPS, from IFIs to capital markets.²⁸⁰ As critics of globalization have argued, this circumvention shows that when the interests of economic actors and indigenous peoples misalign, international rules may be irrelevant.²⁸¹ Finally, the enforcement of rules is transaction-costly, and requires the development of indigenous community capabilities: independent technical expertise, skilled experience in negotiating business transactions, and developed standardized procedures for community empowerment, decision-making, and monitoring — just to name a few.

The exceptions, carve-outs, and reservations of international trade and investment, on the other hand, provide a “substantive, state-driven” solution. Some have argued that the form of “exceptionalism” may have legal consequences: carve-outs and reservations quarantine

²⁷⁶ See *supra* Section II.C.

²⁷⁷ See *supra* Section II.B.

²⁷⁸ See *supra* Section III.A.1.

²⁷⁹ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 98 (1994).

²⁸⁰ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1, 6 (2004).

²⁸¹ See ROBERT A. WILLIAMS JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 281 (2005); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980) (discussing this relationship in the context of the rights of African-Americans in the U.S.).

specific sectors, industries, or policy areas *ex ante*; exceptions preserve policy space for future exigencies.²⁸² In practice, the distinction is not always clear. What is clear is that trade and investment regimes are able to limit governmental actions and guard against possible exceptions' abuse, but less able to actively enforce mandates to support specific groups such as indigenous peoples.²⁸³ Hence, both regimes struggle to define the limits of state intervention in markets in affirmative terms. One probable consequence of this difficulty is that addressing the indirect yet concrete negative effects of globalization — re-regulation and economic inequality — through lessening market-driven inequalities in income, wealth, and access to goods and services like health care and education is left mostly to domestic policy, not international agreements *per se*.²⁸⁴

Institutionalization by exception is not always undesirable. However, it imposes additional challenges and hardships for, and demands different capabilities from, indigenous peoples. To advance their interests, indigenous peoples must sustain an active role in setting international standards, safeguarding regulatory autonomy, and maintaining constant representation before domestic authorities. In addition, with the judicialization of these two fields, participation in dispute settlement procedures, as well as the initiation of strategic litigation to test the limits of legal obligations, promote a sensible relationship between treaties, and positively expand the flexibilities included in treaties, is much more relevant.²⁸⁵ Access to legal and policy-making expertise is therefore critical in those regimes that incorporate indigenous interests in a substantive, state-driven fashion.²⁸⁶

²⁸² Henckels, *supra* note 275, at 2828.

²⁸³ See KOMESAR, *supra* note 279.

²⁸⁴ Karen Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 494-95 (2000). For a similar argument outside of international economic law, see Michael Howlett & Jeremy Rayner, *Globalization and Governance Capacity: Explaining Divergence in National Forest Programs as Instances of "Next-Generation" Regulation in Canada and Europe*, 19 GOVERNANCE 251, 252-53 (2006).

²⁸⁵ On trade judicialization, see generally, Gregory Shaffer, *What's New in EU Trade Dispute Settlement? Judicialization, Public — Private Networks and the WTO Legal Order*, 13 J. EUR. PUBLIC POL'Y 67(2006). For a similar argument, see Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945, 952-53 (2008).

²⁸⁶ Errol E. Meidinger, *Accord: Look Who's Making the Rules: International Environmental Standard Setting by Non-Governmental Organizations*, 4 HUMAN ECOLOGY REV. 52 (1997).

C. Lessons

The international law intersection — international indigenous economic law — explored in this Article is paradigmatic of the ways in which globalization accommodates issues of social and economic justice. This intersection provides insight into the fate of the marginalized under international law, a key litmus test for the very legitimacy of international economic law itself. The intersection also provides partial guidance in addressing the current wave of discontent with globalization's negative effects.

By underlining this intersection, this work points out the overarching vision that still permeates across international economic law: a vision of hermetically sealed regimes.²⁸⁷ This silo approach impedes the observation that, though international economic law is potentially efficient in a practical way (Kaldor-Hicks),²⁸⁸ it nonetheless transfers relative influence and power from the disenfranchised and underrepresented — labor, areas with modest or poor infrastructure — to the empowered actors that benefit from interconnected markets — MNCs, financiers, economic capitals.²⁸⁹ Moreover, this compartmentalized and oft-overspecialized understanding of the field promotes a vision of economic interdependence that is reciprocal and consensual and that lacks relationships with and links to other fields of international law — from indigenous rights to health regulation, from anticorruption to tax evasion. This vision is reflected in most economic treaties, which generally fail to directly address human-focused areas of international law.²⁹⁰

A narrow and hermetic version of international economic law may facilitate complex negotiations, but its result, often ignored by some strands of legal scholarship,²⁹¹ is the weakening of the tools available within international law to advocate against the unequal distribution of resources. It is not value neutral; instead, it allocates responsibility

²⁸⁷ See Giorgio Sacerdoti, *WTO Law and the "Fragmentation" of International Law: Specificity, Integration, Conflicts*, in *WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 595, 596 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008).

²⁸⁸ See generally J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 700 (1939). For the trade application, see Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy* 1 *J. INT'L ECON. L.* 49, 57-64 (1998).

²⁸⁹ Shaffer, *supra* note 76, at 16.

²⁹⁰ For a discussion in the context of international trade law, see Koh, *supra* note 171, at 437-38.

²⁹¹ See, e.g., Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT'L ORG.* 1 (1986) (providing a narrow discussion of international law).

to address the political-economy (and resulting transfers of influence and power) created by international economic law to domestic social policy, and enables international economic agreements to refrain from prescribing certain types of policies.

In other words, the limited inclusion of indigenous peoples' interests (or, for that matter, of other marginalized groups) from international economic instruments is defensible only to a point. The underlying assumption is that domestic law and/or other international instruments will address the imbalances created by globalization adequately. However, in a fragmented context, where this is rarely the case, the exclusion of indigenous interests from economic arrangements looks less like a matter of simplification or epistemic quality and more like strategic design — a system created by the “globalized elites” to exploit the vulnerable. The singular focus on efficiency begins to suggest that upwards redistribution of utility is in fact the goal rather than an unfortunate byproduct. It is not surprising, therefore, that groups claiming to represent post-industrial communities affected by globalization are joining forces with nationalist currents that reject “globalism,” promote slogans such as “buy American, hire American,” and defend a renewed version of economic protectionism with a xenophobic undertone.²⁹² Correctly or not, these groups see in interdependence a massive economic transfer — from wealthy (U.S.) to emerging powers (China); from Athens to Brussels; from the poor (ninety-nine percent) to the rich (one percent) — but none see in its current architecture a plausible avenue to resist the imbalances exacerbated by it. Hence, both suggest that nations should “protect . . . against supposedly vicious competition from others,” instead of investing in a better functioning and fairer international economic order.²⁹³

But international indigenous economic law and the relative success of indigenous peoples in their long continuous struggle teach that “economic nationalism” is not the way forward. They teach the importance of “resistance from *within*” — the importation of a particular language enshrined in human rights discourse, norms, legal concepts, and strategies into the frameworks of economic interdependence.²⁹⁴ Despite this clear lesson, it is especially alarming

²⁹² Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

²⁹³ Robert Howse, *Senate Democrats Prepare a Trade War Beyond Trump's Wildest Fantasies*, INT'L ECON. L. & POLY BLOG (Aug. 3, 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/08/-senate-democrats-prepare-a-trade-war-beyond-trumps-wildest-fantasies-.html>.

²⁹⁴ See Maria Camila Bustos, *U.N. Climate Negotiations: Indigenous Resistance from*

that in debating globalization's future, scholars and policy-makers have not only advocated against treaty frameworks that support globalization (e.g., NAFTA, EU, TPP), but also against human rights law and enforcement, citing potential "costs to the friendly relations of states and even interstate peace."²⁹⁵ In effect, both camps are in partial agreement that international law is the problem — a viewpoint that poses a challenge to interstate cooperation not seen in recent history.

This viewpoint is of limited purchase and ignores the link between giving effect to human rights values and equalizing the vast disparities in material resources between and within countries — a goal also reflected in frameworks like the WTO Agreements.²⁹⁶ The position effectively renounces the common values espoused and supported by international law. Briefly, three reasons reflected in this work should make the case against this retrenched position. Combined, these reasons suggest that an increased focus on human rights in international economic law is a preferable alternative to the dominant positions currently taken: the practically impossible and economically costly one that demands an immediate retrenchment of globalization, and the politically obsolete and unsustainable one that allocates responsibility to address the negative effects of globalization exclusively to domestic policy.²⁹⁷

First, this work has shown that, to some degree, human rights norms are enforceable in the frameworks of international economic law. The IP model illustrates the ability to actualize the principles and values of human rights law in the domestic enforcement of economic law.²⁹⁸ Moreover, not all models of law enforcement require inter-state conflicts that can lead to diplomatic instability. For example, international finance influences corporate behavior with no need for interstate confrontations and their associated politicization.²⁹⁹

Second, the enforcement of human rights does not necessarily entail the expansion of existing legal obligations. The effects of iterative engagement within international economic institutions can be

Within, NACLA (Jan. 11, 2014), <https://nacla.org/news/2014/1/11/un-climate-negotiations-indigenous-resistance-within>.

²⁹⁵ See Wuerth, *supra* note 17, at 348; Tillerson, *supra* note 17.

²⁹⁶ The Preamble reads: "[r]ecogniz[e] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living." See *Brazil Taxation Panel Report*, *supra* note 260, ¶ 7.56.

²⁹⁷ On retrenchment, see Richard Tuck, *The Left Case for Brexit*, DISSENT MAG. (June 6, 2016), https://www.dissentmagazine.org/online_articles/left-case-brexit. On response, see, e.g., Sykes, *supra* note 288, at 67.

²⁹⁸ See *supra* Section III.A.1.

²⁹⁹ Sarfaty, *supra* note 158, at 1792.

leveraged without creating an enforcement process for each human rights commitment. International economic institutions can delineate targets and policies for supporting human rights, including the policy that protecting human rights may justify the limiting or conditioning of rights or benefits under international economic arrangements to economic actors. For example, in fields like investment, along with clearer indigenous rights exceptions an explicit “human rights jurisdictional veto” could be adopted. This veto would direct tribunals to summarily dismiss arbitral proceedings from investors implicated in violations of human rights.³⁰⁰

Third, the argument that human rights enforcement can impair peace and security fails to recognize that growing inequality itself impairs peace and security. Abdicating the enforcement of human rights forgets that such rights are a moral imperative, essential for peace and security, and good for business (in that order). The international trade system has recognized the importance of human rights and adapted to accommodate indigenous interests.³⁰¹ This accommodation evidences how human rights battles are not only about the recognition of abstract values, but the defense of concrete forms of economic participation and subsistence.³⁰²

Finally, the relative success of indigenous rights shows a “path of resistance” that works within the margins of international law without advocating for nativism and isolationism.³⁰³ Instead, the struggle has been based on the defense of unique capabilities, respect for distinct beliefs and economic organization, communal self-determination and the recognition of special challenges — a justified but constrained exceptionalism. While the argument is based on human rights law, it shares with international economic law the principles and values of community empowerment, personal freedom, non-discrimination, entrepreneurship, and sustainable development.

The study of international indigenous economic law reveals the systemic challenges posed by global economic interdependence to

³⁰⁰ The idea of a “veto” as a special jurisdictional issue is not new. For instance, under Article 1110 of NAFTA, a tax veto applies to fiscal measures in claims of improper expropriation. NAFTA does not suggest that tax matters cannot be arbitrated. Rather, the treaty says that fiscal authorities in host and investor states together may block the arbitral proceedings. *See generally* William W. Park, *Arbitration and the Fisc: NAFTA’s “Tax Veto,”* 2 CHI. J. INT’L. L. 231, 231-32 (2001).

³⁰¹ *See supra* Section III.A.1.

³⁰² *See* Paola Conconi & Tania Voon, *EC – Seal Products: The Tension between Public Morals and International Trade Agreements*, 15 WORLD TRADE REV. 211, 213 (2016).

³⁰³ *See* PATRICK MACKLEM, *THE SOVEREIGNTY OF HUMAN RIGHTS* 162 (2015).

indigenous peoples, and the relative success indigenous peoples have had in confronting those challenges. The specific nature of these challenges and successes derive from the distinct context of indigenous rights and the unique status and struggles of indigenous peoples. Yet, in understanding them, it is also possible to draw generalizable lessons for international economic law, and glean global strategies for all marginalized groups, not just indigenous peoples. Taken together, these lessons and strategies suggest a version of international economic law more concerned with the vulnerable and marginalized. Below, I offer a non-exclusive list of broad pathways to make that vision a reality.

- To enhance the legitimacy of international economic law, governing structures must, to the extent possible, include representatives of marginalized groups in the upstream and downstream law production processes. With some caveats, the participation of indigenous peoples in the development of safeguards within financial organizations, enhanced with procedural tools to bring complaints and arguments before enforcement and compliance mechanisms, serves as a model for this expansion.
- To limit the use of international economic agreements to defend practices that exacerbate exploitation and disparity, governing structures must clarify the “policy-space” available to enact governmental measures that support vulnerable populations. Specifically, international economic rules should not interfere, nor be interpreted to interfere, with respect for basic human rights, economic rights in particular. Chapters in economic agreements that balance human rights with economic rules should make this clear; the model recently secured by Canada with respect to measures necessary to protect indigenous rights under USMCA serves as a starting point. Admittedly, these efforts may be insufficient without a more active focus on domestic policies like tax, health care, access to education, and infrastructure. Nevertheless, the explicit recognition of a broader latitude in this domain may grant symbolic value to the support of international economic law.
- To address the effects of economic discrimination, international economic agreements must reduce the burden of certain provisions, like performance requirements’ prohibitions, by demanding specific measures against

commercial policies that adversely affect vulnerable populations. The Maori policy “carve-out” in the TPP serves as the beginnings of a model. Such carve-outs should include specific obligations of impact assessment of trade, investment, and IP policies on marginalized groups, as well as impact mitigation, and mechanisms for monitoring outcomes.

- To reduce inequality, mechanisms for improving bargaining power over the material resources of vulnerable or marginalized groups should be included via provisions that condition economic benefits on the implementation of processes for fair compensation and direct sharing of benefits. The inclusion in IP regimes of provisions of this nature for the benefit of indigenous groups serves as a preliminary exemplar. States should complement this with mechanisms to enhance a symbiotic relationship between public and private actors in global governance.

CONCLUSION

Legal scholarship that addresses the links between international business and human rights law has grown exponentially over the last two decades. Yet the specific ways in which globalization accommodates those who are negatively affected by economic interdependence receive scant attention. The intersection between indigenous rights and international economic law — international indigenous economic law — serves as an instructive lens to observe the complex interactions between human and economic-focused areas of international law. Specifically, it uncovers how fields with distinct goals, rules, and structures are simultaneously implicated in the current fight against the retrenchment of international law. In this sense, to address current demands to improve globalization, international economic law must incorporate the struggle for social inclusion espoused by human rights. At the same time, human rights advocates should utilize legal instruments that promote economic interdependence to create or renew strategies that allow for the materialization of human rights. This strategy has been at the core of indigenous rights advocacy, whose example and success provides some hope for the future of international law.