BOOK REVIEWS


On 13 September 2007, after more than two decades of intensive negotiations between States and indigenous peoples’ representatives, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (hereinafter Declaration),¹ an historic document which, albeit non-legally binding, will make an important contribution to delineating the international legal regime governing indigenous rights. Unfortunately, as it was published in May 2007, Alexandra Xanthaki’s *Indigenous Rights and United Nations Standards* could not take account of such a landmark decision. Nevertheless, the study remains fundamentally valid as Xanthaki aptly evaluates the content of the then Draft Declaration (chapter 3) and examines its main provisions within a broader analysis of the existing and emerging indigenous rights regime.

The central question raised by the book is ‘how indigenous claims fit or could fit into current international law’ (p 6). The holistic approach employed to address this question, besides distinguishing the book from recent works written on the subject, serves the author’s purpose of promoting not only indigenous rights but also ‘the further evolution of international law away from its colonial and Eurocentric past’ (p 10). Indeed, rather than narrowing her analysis to a specific theme, the author prefers to engage in a broad discussion of international law standards relevant to indigenous claims based on the underlying idea that international law has a dynamic and evolving character and should therefore constructively respond to the challenges posed by new legitimate claims. Thus the book has the important merit of appreciating a less considered aspect of the debate on this topic, namely the crucial relationship between the emerging indigenous rights regime and progressive conceptions of international law. Within this context, the contentious claim advanced by indigenous peoples for an international human rights system based on the interaction between individual and collective rights undoubtedly represents the first key issue to be analysed. Accordingly, Xanthaki discusses, in chapter 1, the normative foundations of indigenous claims, focusing on the prominence of the collective element in indigenous culture. She embraces the concept of collective rights on the two-fold ground that they are necessary for the protection of indigenous communities and cultures, and that they are compatible with the conceptual foundations of international law.²

However, recognizing indigenous collective rights as a category is only an initial step, since further problems arise when one considers the content of these rights. In chapters 4, 5 and 6, Xanthaki discusses some of the most controversial problems, respectively the right to self-determination, cultural rights and land rights. This is arguably the most interesting part of the book, as the author advances original interpretations of crucial principles and rights and contextually highlights how recent developments within diverse spheres of international law are contributing to create a more favourable regime for indigenous rights. Generally, it is the

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¹ The Declaration on the Rights of Indigenous Peoples (UN Document A/61/L.67) was adopted by a recorded vote of 143 in favour to 4 against (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).


extensive and detailed analysis of self-determination offered in chapter 4 that dominates the thematic analysis. Indeed, at the centre of this part lies the conceptual distinction Xanthaki draws between self-determination as a right, which is restricted to political power and ‘provides its beneficiaries with a specific claim and dictates a specific result’, and self-determination as a principle, which is related to a wider range of claims and ‘does not set out specific legal consequences for non-compliance’ (p 155–60). Accordingly, cultural and land claims, despite being linked with the principle of self-determination, should not be constructed on the basis of the right to self-determination, but on the basis, respectively, of cultural rights and the right to development, especially concerning their economic aspects. However, while the reasoning (which is per se rather intriguing) does not pose significant problems with regard to cultural rights, there exist important complications, as the author herself concedes, with regard to the right to development (p 241).³

Given the fundamental importance of the right to self-determination in indigenous discourses, it is the discussion on the scope of this right, as well as the controversial relationship between its internal and external aspects, which will particularly attract the attention of many readers. In this regard, the author takes a rather common position among advocates of indigenous rights by essentially opposing the idea of limiting indigenous self-determination to its internal aspect, and contextually emphasizing that external self-determination should focus on concepts such as, for example, the autonomous international personality of indigenous peoples (p 172) rather than independence.⁴ This view, which attempts to promote a new understanding rather than a new and limited form of self-determination, has nevertheless encountered the fervent opposition of a number of States throughout the discussions on the text of the Declaration. Indeed it is telling that even States which voted in favour of the Declaration, and thus in favour of the recognition of the right to self-determination to indigenous peoples, endorse a vision of the right essentially restricted to its internal aspect.⁵ This said, the fact the Declaration recognizes to indigenous peoples both the right to autonomy, which is normally equated to internal self-determination, and self-determination proper,⁶ suggests that self-determination transcends the more limited scope of autonomy, or internal self-determination. It follows that discussions on the different implications stemming from autonomous and self-determination regimes become crucial within the context of indigenous peoples’ rights. Xanthaki’s re-evaluation of the meaning of self-determination as a principle and right should, therefore, be welcomed favourably as it explores interesting paths for enhancing indigenous peoples’ rights and contributes to promoting further discussions on this important topic.

Generally, the author provides a rather encouraging answer to the central question of the book. In particular, by highlighting the emergence of specific international law standards relevant to indigenous claims, notably a product of the combined effort of international, regional and national bodies, she convincingly identifies viable paths towards the accommodation of indigenous rights, enhancing, contextually, a vision of international law as a dynamic tool. The book succeeds in capturing the substantial dimension of indigenous claims and related challenges to traditional

³ Indeed even though one accepts the fundamental premise, namely that the right to self-determination does not encompass economic claims as such, to accommodate land rights through the right to development, which thus far has been recognized solely in soft-law documents, including the Declaration, and whose content and beneficiaries are still object of debates, could prove even more problematic.

⁴ Yet it is important to stress that this interpretation would not rule out the right to remedial secession.

⁵ The case of the UK is instructive. After the adoption of the Declaration, the UK representative stated at the General Assembly that ‘the United Kingdom understood article 3 of the Declaration as promoting the development of a new and distinct right of self-determination, specific to indigenous peoples ... separate and different from the existing right of all peoples to self-determination in international law’. In particular, she stressed that ‘subsequent articles of the Declaration sought to set out the content of that new “right” which was to be exercised, where it applied, within the territory of a State and was not intended to impact in any way on the political unity or territorial integrity of existing States’. Available on the website of the United Nations Department of Public Information, News and Media Division, New York, <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (accessed on 24 September 2007).

⁶ Respectively Article 4 and 3 of the Declaration.
international law, offering an important contribution to the growing international literature on indigenous rights. It suits both a reader without specialist knowledge of the subject, who can benefit from the general analysis of the current, and emerging, indigenous rights regime, and a more expert reader who can delve into interesting discussions on some of the most controversial issues arising within the indigenous debate in the international arena.

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This new volume is the first book in a new series from Oxford University Press on International Arbitration, edited by Professor Loukas Mistelis of Queen Mary University of London. This new series is dedicated to specific issues in international arbitration and practice, following the example of the well-known Oceana series. The aim of this first volume is to cover the main instruments under which investment disputes arise; the legal basis of treaty arbitration; dispute resolution; and parallel proceedings. In the nine chapters, a definition of a foreign investor and an investment is offered, including nationality issues and foreign control, and a full treatment of investors’ substantive rights, including fair and equitable treatment. The last three chapters deal with the substantive rights of the investors, in particular their treatment, expropriation, compensation and remedies. Arbitration of overseas investment disputes is one of the fastest-growing areas of international dispute resolution. Over 2000 Bilateral Investment Treaties (BITs) were signed in the last decades between foreign States, in addition to many multilateral treaties (MITs) and other forms of investment agreements (NAFTA, ASEAN, etc). The first BIT was between former West Germany and Pakistan (1959); disputes that have arisen from that day are often resolved through the forum of international arbitration, and typically involve claims by an investor company for compensation when an investment has been illegally expropriated or adversely affected by the State’s activities. This is one of the main differences between international commercial arbitration and international investment arbitration: the awards are kept private and confidential in the first case (if the two parties don’t allow the publication). In the second case they are published because there is a clear public interest in knowing about the award, the dissenting opinion(s), the ruling that could be discussed or taken as a precedent. In Vivendi v Argentina (2005) for the first time the ‘particular public interest’ push the tribunal to set out three criteria for determining to admit non-disputing party submissions (perhaps in a future award some tribunal could admit also amicus curiae submissions!). In interpreting a BIT, the authors emphasize, it is necessary to remember that the substantive law applied in a treaty arbitration is the treaty itself. There are numerous issues relating to the role and application of principles of international law and of decisions by international tribunals, including those of previous investment arbitrations.

The legal principles that have developed in this area are subject to intense debate, and many scholars are involved in the process of trying to organize them. Many of the principles have only been developed recently in the context of investment treaty arbitrations, and tribunals are often guided more by the approaches taken by other tribunals than by pre-existing doctrines of public international law. However, the volume of law created, applied and analysed by tribunals is such that it is now possible to think about a process of codification. This book provides the first detailed analytical survey of the developing substantive principles of international law which are being applied to disputes by international investment tribunals. It considers the key questions that arise, and provides a description of the present state of the law as reflected in tribunal practice. The three authors, Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, are leading

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