Preface

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The aim of this book, which is the result of a multi-year research project, is to study how international law could better contribute to promoting trade and development in indigenous cultural heritage (ICH) while, at the same time, respecting indigenous peoples’ traditional values. The cover image of this book captures one of the core ideas that we want to bring across: there are acceptable uses of indigenous cultural heritage, but there is also much misappropriation and inappropriate use, as illustrated by the Cherokee car and the Russian ice skaters wearing inauthentic Aboriginal attire (image source: AP) to qualify for and compete in the 2010 Vancouver Winter Olympics, for example. The image represents the question of how it is that we could best ‘rope in’ the trade of these inappropriate uses.

The book emphasises a comprehensive meaning of the term ICH as frequently used by indigenous peoples themselves by incorporating tangible and intangible aspects as well as moveable and immoveable objects of indigenous peoples’ cultures (including traditional cultural expressions, knowledge, practices and property). The research question inevitably poses difficult problems of legitimacy and method, as Christoph Graber’s chapter demonstrates at the beginning of this book. Reflecting these difficulties, the research process leading to the present book was informed and guided by the precept of participative research, which is a typical feature of a transdisciplinary research methodology. The concept of participation was implemented by bringing together an eclectic group of indigenous and non-indigenous scholars and practitioners from eight different countries and selected fields of expertise. As a milestone of the research project, the group gathered for intense debates in a three-day workshop, organised by i-call, the research centre for communications and art law at the University of Lucerne, in January 2011. During the three days, participants worked intensely together in presenting and discussing the papers that – after having been worked over and reviewed in the months following the workshop – are now assembled as the chapters of this book.

Since we wanted to achieve a high degree of coherence in the output, we invested a great deal of energy into the development of the research structure that has underlain the workshop and the entire project. For this, we discussed some key questions of research – to be addressed from various perspectives of international and national law – with a core group of project partners at an early stage of project development. Later on, further academic experts in law and the social sciences, as well as non-academic stakeholders from international organisations, public administration and civil society, were invited to comment on the planned research structure. Importantly, the structuring process included experts of indigenous origin from the four countries under focus.
Methodologically, this emphasis on expert and stakeholder participation was crucial not only for assuring the transdisciplinary and interdisciplinary character of the project, but also for enhancing the practical use of the expected results. An important outcome of this preparatory work was the decision to draft a reference paper (outlining a procedural approach to resolve some of the pressing problems at the interface of modern law and indigenous culture) and to identify a set of questions to be addressed by the individual participants of the workshop. We felt that this was necessary for complexity reduction management, that is, to assure a coherent thread linking the various chapters of the book and to avoid transdisciplinarity and interdisciplinarity ending up in a cacophony. Luckily, the planned research structure was successful, with participants addressing the questions asked of them and commenting on thoughts contained in the reference paper, while bringing in personal insights and proposals at the same time.

After Graber’s introduction on legitimacy and method, the book starts with a sociological perspective on the research topic, offered by Duane Champagne, a sociologist of Native American descent. His chapter sets the scene by identifying key aspects of indigenous social orders and worldviews that may cause fundamental difficulties when indigenous cultural heritage enters the realm of trade and commerce. The book proceeds with perspectives from the relevant fields of international law, including human and indigenous rights, international trade regulation, intellectual property, cultural property and cultural heritage law. The international focus is complemented by country reports from four countries with important indigenous populations: Australia (Aborigines and Torres Strait Islanders), Canada (First Nations), New Zealand (Māori) and the United States (American Indians). The reports allow the testing of international perspectives against national realities, to provide in-depth analyses of the relationship between international law and national law in the four countries under focus, and to compare top–down with bottom–up approaches. In the epilogue, finally, the editors summarise the insights gained from the individual chapters, identify some potential future directions of research and map out one possible way forward.

The book is unique since it is the first publication to bring together all the relevant viewpoints of international law on the topic of ICH trade and development in one volume. It contributes towards a more comprehensive protection of indigenous peoples’ interests in cultural heritage trade and development, taking account of the rights of cultural self-determination and self-governance as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Thereby, the book seeks to overcome not only high legal, but also high organisational fragmentation. This is necessary because the most relevant fora of law and policy-making in the subject area, such as the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention on Biological Diversity (CBD) and the World Trade Organization (WTO), generally only look at a single aspect of ICH.

For this book, choices not only had to be made in highly fragmented and complex fields of law, but also in a politically, culturally and ethically sensitive environment. The choice of Australia, Canada, New Zealand and the United States as countries of reference was important in order to enhance comparability of the country reports, to avoid additional complexity in national legal systems without Anglo-Saxon roots, and to reduce cultural diversity inherent in the concept of ‘indigenous peoples’ to a justifiable minimum. These countries share a similar historical background of colonisation, wholly or at least partially
under the regime of the British Crown, and thus similar or at least comparable political and legal systems. The indigenous peoples on their territories form separate and distinguishable groups as compared with the immigrant society, not only with regard to culture but also with regard to their legal status within the home country. We are well aware that indigenous peoples in Australia, Canada, New Zealand and the United States are minorities. Consequently, some of the discussed political dynamics and outlined legal options may be absent in countries with an indigenous majority (for example some African or Asian countries). However, this book is not intended to provide final answers for all countries with indigenous populations. It rather serves as pioneering scientific groundwork that methodically, structurally and content-wise sets a standard for further work on ICH trade and development in other parts of the world.

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