Foreword

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In January 2011, I had the privilege of participating in a workshop on 'International Trade in Indigenous Cultural Heritage: Legal and Policy Issues' at the invitation of Christoph B. Graber, the Head of the i-call Research Centre for International Communications and Art Law at the University of Lucerne in Switzerland. The event attracted academic and legal experts from several countries, as well as representatives of some of the most relevant international institutions, such as the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). I am honoured to have been invited by Christoph to write a foreword for the book that continues the scholarly work that was launched at that conference in a beautiful city in the Swiss mountains. In my own academic and professional career I have had to confront many of the issues that now concern the researchers, but in no sense can I profess to be an expert in the particular spheres of study that were addressed at the workshop and that are the subject of analysis in this book. The following observations are therefore offered for what they may be worth.

As the nations of the world move into the twenty-first century, there is evidence that the interests of indigenous peoples are receiving increasing attention and concern from legislators and policy-makers. The contents of this book focus upon the particular interests that are subject to international trade and market concern and regulation. An accompanying development is the emergence of international standards that aim to define minimum standards to be followed by states in their relations with indigenous peoples.

A third and critically important development has been the participation of indigenous peoples' representatives in the process of identifying their particular interests and articulating their significance to governmental and non-governmental bodies both at the state level and at the international level, a development that has contributed significantly to the first two developments.

The reconciliation of the conflicting legitimate interests at stake in these developments, that is the interests of the indigenous peoples on the one hand and the interests of other parties which are mediated by state and international institutions on the other hand, requires the design and creation of processes or institutions that have the capacity to effect a reconciliation that is just, legitimate and workable. The advantages of a transdisciplinary cooperative methodology are applied by the various authors as they address questions the answers to which promise a material contribution to historic developments that engage some of the most arcane aspects of law and international relations and some of the most humanly significant aspects of the life of indigenous peoples.

The central question being addressed by the consortium of scholars is how international law, including trade law, can contribute to allowing indigenous peoples to more actively participate in the trade of their cultural heritage. It is particularly heartening to observe the strong commitment of the participants in the project of which this book is a part, to recognise as a precondition of its work, the autonomous right of an indigenous people to retain control over all aspects of its heritage. As Christoph remarked during the workshop, '[s]uch a precondition poses many difficult questions regarding the interplay of traditional cultures and modern law. These questions are taken seriously by this project and workshop.'

There are indeed a number of challenges to be met, and I suspect that some of the challenges that have attended discussions between indigenous representatives and states' representatives in international fora, such as the drafting of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), will be felt in the project's work.

Indigenous peoples around the world live within the territorial boundaries of states. There they are largely governed by the laws and regulations of these states that now occupy their ancient homelands. A look at history shows that the creation of these states was accomplished by processes that at best marginalised the interests of the indigenous peoples, and at worst tried to eradicate them. This is a hard political and economic legacy to overcome. It is a challenge for states to be persuaded that the interests of indigenous peoples matter. We have many examples of state policies and practices, such as the unilateral legal taking of the lands and natural resources that illustrate a legacy where indigenous peoples themselves did not matter. The logic is that people who do not matter have no interests that matter.

This realisation leads to the next observation, which is the challenge that contemporary state institutions, such as laws and policies and political and administrative institutions, were not generally designed to accommodate and protect the interests of indigenous peoples. As a consequence it is always necessary to question the capacity of state institutions to perform any function that requires respect, recognition and protection of indigenous peoples' interests. Since indigenous peoples generally, with notable exceptions, have relatively little political influence, the task of reforming state institutions, even by parties with the best intentions, is problematic.

The main international institutions whose roles are most relevant to the subject of the book, including WIPO, WTO and UNESCO, are well-established institutions with the mandates and experience to represent the interests of the states that agreed to create them. On the other hand, the hard legacy of state-indigenous peoples' relations means that the very identification of the latter is problematic. Indigenous peoples can be readily identified in some states where they form a substantial part of the population, but how are cultural heritage interests to be respected and protected in a system of worldwide trade without first identifying the legitimate owners of the subject matter of trade? The protection of cultural heritage goes naturally to the core of a people's identity. In the UN process that led to the adoption by the General Assembly of UNDRIP, the indigenous participants would not engage in an attempt to agree on a definition. Yet the very objectives of international trade presuppose a process to identify and involve the legitimate owners of trade-related goods. There is no reason to doubt that the states must have a role in an effective system, but it is

equally important to identify the indigenous parties whose participation is essential to legitimise a state-controlled trade process and system for indigenous cultural goods or services.

Another challenge that is recognised by the members of this project is the imperative, in searching for institutional recognition of indigenous peoples' interests, of reconciling distinct concepts of each side where these concepts are central to the project of protecting and promoting trade in cultural goods or services. This challenge is sometimes described as the task of reconciling 'western' ideas with the ideas of indigenous peoples. Tangentially, I may note that I find the term 'western' to be interesting in this regard, since there are indigenous peoples in western, eastern and indeed in all parts of the world where people live. However, my own limited experience has indicated that there are interesting differences and similarities between indigenous concepts and those of both western and eastern philosophies. What alerts the mind of the observer seems to be the relative importance that is given to particular ideas or values. It would, I speculate, be very difficult to demonstrate empirically that any one particular concept was entirely absent in a large part of the regional population of the world.

With regard to the reconciliation of relevant concepts within the field of study covered in this book, the concept of property has received particular attention. I am aware of at least two aspects of conceptual divergence that are the object of study: the concept of property itself and the collective nature of property in indigenous societies as compared with the common concept of individual property in 'western systems'. The following brief discussion suggests that close scrutiny may help to further a reconciliation of the minds.

If property is viewed as a social institution that regulates the relations between individual persons and tangible or intangible things, then it is apparent that the concept of property, like the Aristotelian concept of law, is a feature of all human societies. This proposition does not deny that some forms of property are held communally and not individually. What need to be reconciled, it seems, are particular contemporary applications of distinct concepts. This requirement need not be based upon the assertion that one concept is alien to the other party's accepted thought. It is often asserted that land is held communally by indigenous peoples while land is held individually in the English real property system. Yet lands were held communally in Roman law and in early English law. Other concepts related to property, such as alienability and inalienability, seem to be found in all societies as well.

There seem to be, nevertheless, some distinctions, the features of which must be carefully observed for their application to the development of international standards and institutions. The concepts of collective rights and individual rights are examples.

This has particular significance for aspects of the subject of study of this book, where existing institutions have been created for the recognition and protection of individual interests and rights and seem, at first blush, to be ill-suited to the recognition and protection of communally held property interests. The particular reference here is to the regulatory regimes that were created for the recognition and protection of intellectual property.

Western societies and legal institutions are familiar with the kinds of interests that, although they are technically held by individuals, are valuable or enjoyable only in community. Examples might include the legal structure of interests held by corporations

and shareholders, and language rights, which are held by individuals but which can only be enjoyed in community.

But these issues need not detain us long. Judicial interpretation is one technique that can effectively transform one concept into another, as has been done in Latin American courts that have read original references to individual rights of ownership as including the collective interests of indigenous peoples in their lands and territories. If the objectives of respect, recognition and protection are firmly asserted by states, then their juridical institutions are capable of reconciling what might seem irreconcilable to the scholarly exegete. As stated earlier, the initial and more fundamental challenge is to get states to accept the proposition that indigenous peoples and, therefore, their collective interests do matter, as do the interests of all peoples.

Towards this fundamental objective, the international community and all states have as a guide the concept of self-determination of all peoples, which UNDRIP proclaims as a fundamental right that applies to indigenous peoples. The Declaration now stands unopposed as a fundamental human right that must guide future indigenous–state relations.

It is with a firm commitment to respect the basic right of self-determination that the participants in the i-call research project and the authors in this book pursue their professional work. They are to be commended for this collective and individual commitment to justice.