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The organizers of the workshop/conference that formed the basis of this book – INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE – should be congratulated for their humanitarian impulses. The conference was held in January 2011 at the University of Lucerne in Switzerland and included both expert and stakeholder participation all working at the interface of nation, international law, and indigenous cultures. Some saw the workshop as a reconciliation of the interests of indigenous peoples and other parties mediated by state and international institutions. While it may be true that the interest of indigenous peoples are receiving the attention of policy makers in conjunction with their participation in speaking instead of being spoken to, the levels of plunder, past and present, are the unspoken contexts for such a workshop for the interface of national and international law and indigenous cultures.

This book is the first integrated publication that brings together international law on the topic of Indigenous Cultural Heritage (ICH) issues, and, although there are dramatic unequal power dimensions, the voices of the indigenous are heard on almost every page – mutual respect is at the center of exchange. That is, indigenous peoples should not only be able to participate in the trade of their cultural heritage, they have the right to retain control over their heritage. Yet, how are their interests to be protected while reconciling Western ideas with non-Western values? For example, will the concept of property as collective reign, or will property as individual remain since both the state and international law are structured to protect individual property? And where does the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) enter into the picture?

The methodology and organization of the book is transdisciplinary, with contributions by indigenous and non-indigenous scholars and practitioners from four different countries: Australia, Canada, the United States, and New Zealand. All four countries share Anglo-Saxon roots and all had been colonized under the British crown, thus enhancing comparability of the issues – Australia has Aboriginals and Torres Straits Islanders, Canada the First Nations Peoples, New Zealand the Maori, and the United States American Indians. The book has four
parts: Methodology and Social Context, International Law Perspectives, Country Reports, and Conclusions.

The book was co-edited by Christoph B. Graber, Karolina Kuprecht, and Jessica C. Lai, all members of the Research Centre for Communication and Art Law at the University of Lucerne, Switzerland. The Foreword, written by Paul Chartrand, a participant in the workshop, notes that as nations move into the twenty-first century there is increasing concern in the interest of indigenous peoples from policy makers, particularly in relation to international trade and regulation, and development of international standards that represent the participation of indigenous peoples’ representatives both at the state and international levels. He refers to an orientation that finally recognizes conflicting interests at stake given that indigenous peoples around the world live within the territorial boundaries of states that govern them, whether by choice or not. He iterates that the most fundamental challenge is to have states willing to accept the proposition that indigenous peoples, and their collective interests do matter on an equal footing with the dominant powers. Indeed the book is unique as a first publication to address all relevant viewpoints of international law on the topic of ICH trade. We have in one volume a comprehensive picture of indigenous peoples’ interests in cultural heritage and development.

There are 21 contributors – two chapters by Graber and Champagne in Part I: Methodology and Social Context, and ten chapters (3 to 12) in Part II: International Law Perspectives, featuring the work of John Scott and Federico Lenzerini, Fiona Macmillan, Susy Frankel, Christoph Antons, Martin Girsberger and Benny Müller, Brigitte Vézina, Rebecca Tsosie, Karolina Kuprecht and Kurt Siehr, Rosemary Coombe and Joseph Turcotte, and, lastly, Francesco Bandarin. Authors of Part II are predominantly professors of law or lawyers working in the field of intellectual property, some connected with UNESCO. Two are indigenous scholars – John Scott, who is Iningai (Australia), and Rebecca Tsosie, who is Yaqui (United States) – and two are in communication and culture studies.

Part III has country representatives: Carole Goldberg on the U.S., Catherine Bell on Canada, Kathy Bowrey on Australia, and Susy Frankel on New Zealand. These representatives ask basic questions only briefly alluded to here: What is indigenous knowledge and cultural heritage in relation to sacred knowledge, or genetic material, or Indian arts and crafts, folklore, and plant remedies? For the U.S. the role of the Native American Graves Protection and Repatriation Act (NAGPRA) is innovative. For Canada the context is different for the Inuit, the Indian, or Métis, meriting different local and national remedies. For Australia the issue is copyright and the question is who are the indigenous, noting that in Australia there is a voluntary code that regulates all issues of indigenous cultural knowledge. For New Zealand, the 1840 Treaty of Waitangi between the Maori and the British Crown provides the Maori with rights to their traditional knowledge. New Zealand’s Free Trade Agreement (FTA) refers to the Treaty of Waitangi and offers the Maori some protection for genetic and biological
resources. However, as Sabine Fenton and Paul Moon\(^1\) show, the treaty is still contentious, as it was written in English and translated into Maori by a missionary in a way that obfuscated the treaty’s main purpose: to cede sovereignty of all Maori land to the British.

The Conclusions section is most helpful in pulling together the sum total of all of the conference findings, noting the benefits of recognizing the socioeconomic context in each country as well as pointing to previous shortcomings of top-down versus bottom-up approaches. The “Lessons learned” section is an excellent summary of the contributors’ explanations. The strong focus on the international level reflects the fact that most indigenous peoples have, since the beginning, had difficulties with their states in relation to property laws, customs, and all that befell them with their conquest by European invaders. Thus the argument that perhaps international attention to indigenous rights will force states to recognize these rights. Yet the authors also recognize that it would be unrealistic to place all bets for solutions on international law. In the United States, NAGPRA – a federal cultural property law – was meant to protect old and tangible, movable Native American property, whereas in Canada the failure of the state to self-act might encourage strategies to involve the international sector to at least politically influence national law in a certain direction in favor if Inuit, Métis, and Indian.

Recognition of the fact that the indigenous communities in these four common-law states are not homogenous in languages, customary laws, and knowledge systems leads in different directions, to policies that address local issues rather than standardized solutions, while also recognizing common concepts and indigenous realities everywhere. Tribal legal initiatives may complement national policies, or in some cases re-interpret existing legal norms to better take into account the interests of indigenous peoples, as for example interpreting the intellectual property public domain in conjunction with customary laws of indigenous peoples. The respect for a bottom-up approach is the central most important initiative underscored in this volume, replacing the usual top-down perspective of states. In so doing, representatives of indigenous peoples’ rights need to actually represent their entire group, whether the appointed representative is indigenous or not.

The direction of having international trade law consistent with public international law is even more challenging since it involves international customary law. Here we get into more complexities with the WTO, GATT, and TRIPS agreements, but as the editors note, the devil is in the details, and of course there were differences of opinion. The editors’ policy recommendations then focused on two specific examples: the kava ban and the European seal ban, both providing insights into the problems of actually representing indigenous interests in international trade regulations in specific disputes. The editors note that, in fact, trade regulations are not capable of helping indigenous peoples participate more actively in international trade. The discussion then moves into certification marks, as in Fairtrade labeling and consumer laws.
On the very last page of this last chapter, the editors provide a summary of steps forward in which they succinctly note all the major points developed in this volume. Not a bad place to begin the reading of this amazing effort to make sense of all the interconnected issues relevant to international trade in indigenous cultural heritage. The editors can be congratulated on producing an amazingly rich volume that could not have been accomplished without the breadth of knowledge of all the conference attendees. This is legal research at the cutting edge, and for once not so Euro-American centric.

Nevertheless, I am left with a question. The word power is not in the index. We are reading about peoples who have been plundered through decades of the misuse of the rule of law, and they are still being plundered – not only of indigenous cultural heritage, but also of land, water, and resources. Yet the book is about empowering indigenous peoples to more actively participate in the trade of their cultural heritage. Is doing so possible without renouncing their traditional values? Perhaps we should turn the picture around and ask when enough is enough. Western commercialism is environmentally choking the planet. There ought to be a law!

It is all well and good that Christoph Graber reminds the reader in his first chapter that the debate should “shift from a defensive attitude to proactive strategy” (p. 3) but on the ground reality doesn’t square with the idea that development provides freedom for indigenous peoples. Indeed, in the longue durée, development will most likely not provide freedom for any peoples. Perhaps we are all indigenous, at the mercy of the notion that progress means more technology and more trade with all their development consequences.

ENDNOTES


3 Ikechi Mgbeoji, GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE (Cornell University Press, 2006).

4 Harold Crooks and Mathieu Roy, SURVIVING PROGRESS [film] (National Film Board of Canada, 2011).

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