

Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums

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Abstract: An ongoing debate on the protection of traditional knowledge was prompted by the United Nations General Assembly declaration of the International Decade of the World's Indigenous Peoples in 1995 and the declaration of the Second International Decade in 2004. These two declarations challenged governments and the international community to address, nationally and internationally, issues that affect indigenous communities. One such issue is the protection of traditional knowledge. The three key international multilateral forums that are debating traditional knowledge issues are the World Intellectual Property Organization, the World Trade Organization, and the Convention on Biological Diversity. Using a political economy framework, this study analyzes the policymaking processes and mandates of the three multilateral forums in order to highlight stakeholders' levels of involvement in these processes. The study found that the multilateral forums' power structures, mandates, and decision-making processes disadvantage indigenous peoples and hinder their full participation in the forums' processes. The study recommends establishing a forum that would take into account indigenous peoples' worldviews; otherwise policy outcomes from these discussions will probably disadvantage indigenous peoples.

INTRODUCTION

The United Nations (UN) General Assembly declared 1995–2004 the International Decade of the World's Indigenous Peoples and 2005–2014 the Second International Decade of the World's Indigenous Peoples, challenging governments and the in-

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ternational community to address, nationally and internationally, issues that affect indigenous communities. The protection of traditional knowledge is one such issue. Discussions on the protection of traditional knowledge have ensued in various multilateral and indigenous peoples' forums worldwide. Three key multilateral forums that are debating traditional knowledge issues are the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), and the Convention on Biological Diversity (CBD).

Various regional, national, and local initiatives to protect traditional knowledge are also in place. These initiatives range from model legislations to national systems tailored to a specific country's traditional knowledge protection circumstances and priorities. Indigenous communities have also recognized the urgent need to protect their knowledge and practices and have, through various declarations, made known their views on international protection of their knowledge. As Blakeney observes, declarations by indigenous people are a result of their realization that the international protection of their knowledge and cultural expressions depends upon their own efforts.¹ Several of the declarations by indigenous peoples are critical of the failure of the existing mechanisms to protect traditional knowledge. Other factors have also led to increased international interest in the protection of traditional knowledge. On the one hand, there has been an increased international recognition of indigenous peoples' activities as creative, innovative, and important contributions to science, research and development, and general human progress.² On the other hand, increased instances of biopiracy have created an urgent need to protect and control the use of traditional knowledge and practices.³

Although the debate about the preservation of traditional knowledge and cultures is not new, my analyses of the ongoing debate shows that stakeholders diverge on the definition and delineation of traditional knowledge, the key issues on its protection, the objectives and methods of protection, and the forum that should be debating these issues. Stakeholders' views are summarized later in Table 1.⁴ Regardless of the underlying rationales and interests, it is definite that traditional knowledge protection is an issue of international significance. However, how and where the debate should proceed remains a contentious issue among the various stakeholders. While there are discussions on what forum would be best to deal with traditional knowledge, there is no research on the power structures and decision-making processes in the forums that are currently debating traditional knowledge.

In this article, I focus on the power structures and decision-making processes in the forums where traditional knowledge protection issues are being debated.⁵ This examination of the forums' organizational and decision-making structures is important for two main reasons. First, it is used to establish how indigenous peoples, as the ones who are most affected by the issues under debate, are involved. Second, this analysis is important in determining how decisions and policies are made in these forums and whose agenda is dominating the debate—and therefore whose worldviews are likely to drive policy outcomes. Thirdly, scrutiny of these forums is also important in order to highlight how power relations and structures

affect policymaking processes and policy outcomes. This examination is prompted by my conviction that the power structures in the forums that are currently debating traditional knowledge issues could explain why the international debate has not had much impact on the traditional knowledge protection status quo.

METHODOLOGY

Using a thematic analysis of policy documents that are emanating from, as well as submitted to, the international forums and declarations made by indigenous peoples, this study identifies the various claims and proposals that stakeholders are making. This study also analyzes the structural organization of these forums in order to establish power relations among stakeholders. Thematic text analysis is used to identify and compare recurring themes and concepts in the analyzed policy documents and interviews. Stone describes thematic text analysis as an analysis that identifies either recurring or changing themes and concepts in texts.⁶ Boyatzis adds that thematic analysis is “a way of seeing” and “a process for encoding qualitative information.”⁷ Thematic analysis allows one to see “something that had not been evident to others, [that is], [t]hey perceive a pattern, or theme, in seemingly random information.”⁸ This “way of seeing” involves first, perceiving a pattern in the data, classifying or encoding the pattern, which involves giving the perceived pattern “a label or definition or description” and finally the analysis, which involves “interpreting the pattern.”⁹

My analysis of policy documents provided stakeholders’ views at the international multilateral forums. In order to include grassroots level views of traditional knowledge holders, I conducted semistructured interviews with 15 elders from a nonproportional sample of First Nations (indigenous peoples) communities in Ontario, Canada.¹⁰ The choice of elders as interviewees was made because, as Elder Vern Harper observes, these are individuals whom members of a community respect due to the great deal of wisdom and experience that they have amassed throughout their lives. They are

respected and cherished individuals who have amassed a great deal of knowledge, wisdom, and experience over [a] period of many, many years. They are individuals who have also set examples, and have contributed something to the good of others. In the process, they usually sacrifice something of themselves, be it time, money or effort.¹¹

According to Kulchyski, McCaskill, and Newhouse, an elder is one “thought of as a very highly respected older person who has the knowledge of the ancient spiritual and cultural ways of her or his people.”¹² The authors note that “among some First Nations, to become an Elder requires elaborate initiation processes involving various degrees of knowledge . . . [but] in other cases, Elders may become recognized as such by their people when they reach a certain age.”¹³ It is worth noting that not all First Nations communities use the term elder and although different

First Nations communities appear to define and identify elders differently, elders irrespective of the community are

exceptionally wise in the ways of their culture and the teachings of the Great Spirit. They are recognized for their wisdom, their stability, and their ability to know what is appropriate in a particular situation. The community looks to them for guidance and sound judgement. They are people who are spiritual leaders, who . . . live the culture, they know the culture, and they have been trained in it.¹⁴

Early into this study, my observations that not all of the elders were conversant with the international debate prompted inclusion of discussants to fill this gap. Six First Nations discussants were interviewed. All discussants were conversant either with traditions of their communities or with the traditional knowledge protection debate at the regional and international levels but were themselves neither elders nor traditional knowledge custodians. Four discussants were community members involved with their communities' traditional knowledge preservation initiatives such as language classes, education curriculum, and cultural centers. The other two discussants were community members who at the time held public service positions that allowed them to attend international meetings in international forums such as the CBD and WIPO.

Participating elders were from a sample drawn using a nonprobability design, which Singleton and Straits describe as a design that does not involve the process of random selection.¹⁵ This nonprobability sampling design is appropriate to this study for three reasons. First, although the various First Nations groups and communities are known, elders in the various communities are not readily known because they are not public figures, which made it impossible to generate a random sample.¹⁶ The unknown number of elders, either in a community or Canada-wide, makes irrelevant the issue of whether or not the sample is big enough and representative. A nonprobability sample design allowed the inclusion of any eligible, community-identified, and cooperative participants.

Second, a nonprobability design was appropriate because the insights that the interviews sought were grounded on the preliminary findings from documentary analysis. These preliminary findings formed the basis for the identification of themes, concepts, and propositions. The interviews were a search for patterns that would help understand some of the findings from documentary analyses. This approach ensured that interviews focused only on providing in-depth understanding of the indigenous peoples' views found in the documentary evidence. This approach could not specify the number of participants because the number of elders was unknown. Data collection continued until a "saturation" point—the point where participants were no longer providing new information. This flexibility in the approach enabled the emergence of new pertinent issues that the study did not, on the onset, seek to explore. The purpose of interviews with First Nations elders was therefore aimed at mapping their views onto those of indigenous peoples' in the international forums, as opposed to soliciting a representative and generalizable voice for indigenous

peoples. Indeed, such a generalizable voice would not suffice because each group and community has unique ways of life. Interviews were aimed at providing in-depth understanding of the findings from analyses of documentary evidence, which provided insights into the voices of other indigenous peoples outside of Canada. The indigenous views that are expressed by indigenous peoples worldwide are complemented by, and further understood through the grassroots views of First Nations people of Canada. As Singleton and Straits posit, when the objective of a study is to gain an in-depth understanding of a problem, a nonprobability sample suffices without concerns for precise statistical generalization.¹⁷

Finally, the major First Nations groups in Ontario have an unequal number of communities. These unequal numbers make probability sampling unsuitable because drawing a sample with probability proportional to size would result in big communities having a higher chance of being included in the sample. Such sampling would have been inefficient as smaller First Nations communities in Ontario would not be as well represented in the sample. A nonprobability sample approach allowed the study of the small groups in their own right and in comparison with the bigger groups.

POLITICAL ECONOMY OF THE DEBATE

I use a political economic framework to analyze the traditional knowledge protection debate. Mosco defines “political economy” as “the study of the social relations, particularly the power relations, that mutually constitute the production, distribution, and consumption of resources”¹⁸ and very generally as “the study of control and survival in social life.”¹⁹ This study does not examine the production and consumption of resources per se. However, it indirectly involves world economies in that information and intellectual property products now play a big role in those economies, which have become more porous with globalization, a phenomenon that has made it challenging to manage the resultant global market. I will note here that globalization has changed the nature and functioning of the international economy. This change poses new challenges to the interactions in a global market.

In order to counter the challenges that a global market poses, several initiatives have been taken to govern the relations among the multitude of actors in the global market. Such initiatives include establishment of trade organizations such as the WTO, trading blocs such as the North American Free Trade Agreement (NAFTA), and international multilateral agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, the TRIPS). Given the role that intellectual property plays in this global economy, it is no surprise that there are more, and broader, international agreements such as TRIPS and measures to govern relations in the production and consumption of intellectual property. The traditional knowledge protection debate concerns ongoing efforts to either extend the already existing systems or design a new system to govern the relations between knowledge holders (producers) and users (consumers).

Covert and Structural Dimensions of Power

I will use covert and structural dimensions of power to examine power structures in the debate. According to Gill and Law, actor A achieves covert power over actor B through agenda-setting processes.²⁰ Covert power allows an actor to set priorities for policymaking by, as Gill and Law note, excluding some items from consideration. Bachrach and Baratz add that an actor also gains covert power through “non-decision-making,” which is “the practice of limiting the scope of actual decision-making to ‘safe’ issues by manipulating the dominant community values, myths, and political institutions and procedures.”²¹ Consequently, Bachrach and Baratz emphasize the importance of including both decision-making and non-decision-making processes in an examination of power structures.

Structural power is at the center of what are termed North–South relations, in which those in the Southern Hemisphere are presented as lacking skills, technology, and capital and as being systematically disadvantaged by those in the Northern Hemisphere. Structural power involves both material and normative aspects that, according to Gill and Law, create “patterns of incentives and constraints” that then condition the relationship between actor A and actor B.²² The role of intellectual property in the context of development has often been framed as part of the North–South divide.²³ Traditionally, intellectual property rights are a subject of disagreement between North and South. In a nutshell, it is thought that there are suspicions between North and South about the objectives of intellectual property rights. According to the view of the South, intellectual property rights are a reconstituted form of neo-colonialism that undervalues nonscientific forms of knowledge but allows that knowledge’s appropriation.²⁴ The North, however, holds the opinion that intellectual property rights are development-oriented policies that the South should adopt in order to catch up.²⁵

Using the aforementioned political economy framework and dimensions of power to analyze the traditional knowledge debate, the study highlights how economic and social power and control could foster new coalitions and sources of resistance and, consequently, reform existing structures and policies. The study examines how different stakeholders could form coalitions that either foster or oppose power structures and consequently reframe the debate in ways that could promote policy changes.

Situating Indigenous Peoples in the Debate

In this study, I argue that as traditional knowledge owners, indigenous peoples have a right to control how their knowledge is used. Consequently, I emphasize the need to ensure that traditional knowledge protection is consistent with indigenous peoples’ worldviews. Using the aforementioned indigenous peoples’ right as owners of traditional knowledge to control their knowledge and a political economy of intellectual property, I explore the possibility of discordance in the stake-

holders' views and proposals. The political economy framework used in the study situates indigenous peoples' right to control their knowledge within various international instruments, intellectual property included, that address various indigenous issues.

Several international instruments on indigenous peoples' human and cultural rights reinforce traditional knowledge holders' right to control their knowledge.²⁶ Several declarations by indigenous peoples also frame this indigenous peoples' right to their knowledge as an issue of self-determination, which Walker defines as the principle that a people ought to be able to freely determine their own governmental forms and structure without outside interference and influence.²⁷ Self-determination is either external or internal. External self-determination, which many states have achieved, involves the formation of a new state through secession from colonial power. Conversely, internal self-determination allows a people to control their political, economic, social, and cultural development within an existing state. Although internal self-determination has often been tied to, and politicized to, external self-determination, the former type of self-determination is what indigenous peoples are seeking in relation to traditional knowledge. Through internal self-determination, indigenous peoples want the right to control their political and cultural development within the boundaries of already existing territories; that is, they do not seek to be sovereign territories. The term *self-determination* is used in this article in the context of internal self-determination.

The UN Declaration on the Rights of Indigenous Peoples (DRIP) reaffirms universal and fundamental human rights as they apply to indigenous peoples. The DRIP affirms indigenous peoples' right of self-determination through which they should "freely pursue their economic, social and cultural development."²⁸ Regarding traditional knowledge, the DRIP also affirms indigenous peoples' right "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, . . . [and] to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."²⁹ In its Preamble, the DRIP recognizes the need to respect and promote indigenous peoples' inherent rights and characteristics and also notes that "control by Indigenous Peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs."³⁰ According to the DRIP, indigenous peoples' collective right to preserve and develop their cultural identity "derive[s] from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."³¹

According to the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples (hereinafter, the ILO Convention 169), indigenous peoples have the right to

decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.³²

The starting point for recognizing the above right, the ILO Convention 169 posits, would be member states to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”³³ I am convinced of the need to consult knowledge holders and involve them in decisions and policies on issues that would affect the generation and transmission of their knowledge. Indeed, this conviction is demonstrated by my direct involvement of the traditional knowledge holders through interviews with a sample of First Nations elders in Ontario, Canada.

THREE LARGEST MULTINATIONAL INSTITUTIONAL FORUMS

The World Intellectual Property Organization (WIPO)

WIPO was established in 1970 “with a mandate from its Member States to promote the protection of intellectual property throughout the world, through cooperation among states and in collaboration with other international organizations.”³⁴ WIPO’s main objectives are to administer international intellectual property-related treaties, to provide members with assistance in intellectual property laws, and to seek harmonization of national laws in order to promote intellectual property protection internationally.³⁵ WIPO’s involvement in traditional knowledge issues goes back to the 1970s and 1980s when, in conjunction with the United Nations Educational, Scientific and Cultural Organization (UNESCO), it held discussions on the protection of folklore. These discussions resulted in the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore as a template that nations could use as national guidelines for future legislation and to extend the protection of traditional knowledge across national boundaries.

In its exploration of new ways that intellectual property can serve the needs of the world’s diverse population, WIPO identified, as an area for further work, the needs and expectations of groups that the intellectual property systems had not reached. According to WIPO, among such groups are traditional knowledge holders.³⁶ Subsequently, in 1998 and 1999, WIPO carried out fact-finding missions in various parts of the world in order to identify intellectual property protection needs and expectations of traditional knowledge holders.³⁷

The Intergovernmental Committee (IGC)

In WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is the forum that discusses traditional knowledge issues. The IGC was established in 2000 to provide a forum for members to discuss, among other issues, the protection of traditional knowledge and expressions of folklore.³⁸ The IGC has been reviewing legal and policy options for traditional knowledge protection based on international, regional, and national experiences and has developed two sets of draft provisions: one on the protection of traditional cultural expressions (TCEs) or folklore and another on the protection of traditional knowledge against misappropriation and misuse.³⁹ These draft provisions draw upon submissions by, and input from, various stakeholders: member states, industry, indigenous communities, and intergovernmental and nongovernmental organizations.

The draft provisions on protection of traditional knowledge indicate the perspectives and approaches that are guiding the IGC's debate on the protection of traditional knowledge. The IGC's commissioned commenting processes to discuss and redraft the provisions have resulted in a draft document on objectives and principles for the protection of traditional knowledge. Although the IGC has not adopted the draft provisions on traditional knowledge protection and although their development might continue beyond the publication of this article, this study analyzed these draft provisions because as WIPO notes, as they currently stand, they "have no formal status, [but] they illustrate some of the perspectives and approaches that are guiding work in this area... [The draft provisions] could suggest possible frameworks for, ... [and] are being used as points of reference in, a range of national, regional and international policy discussions and standard-setting processes."⁴⁰

The Convention on Biological Diversity (CBD)

The history of the Convention on Biological Diversity (CBD) began with the 1987 Governing Council decision 14/26 of the United Nations Environment Programme (UNEP), which called upon UNEP to convene an Ad Hoc Working Group of Experts on Biological Diversity, which later became the Intergovernmental Negotiating Committee (INC) in 1991.⁴¹ The purpose of this Working Group was to look into harmonizing the existing conventions on biodiversity. The culmination of the work of the Working Group was the adoption of an agreed text of the CBD through the Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity. At the Earth Summit held in Rio de Janeiro in June 1992, the convention opened for signatures and entered into force in December 1993.

The CBD's guiding objectives are contained in the convention's provisions as contained in Articles 6–20. However, Article 1 states CBD's principle objectives as

the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.⁴²

In addition to its provisions, the CBD has also established institutional arrangements “which provide a mechanism for the further development, and for monitoring the implementation, of the Convention through meetings, work programmes, reviews and negotiations.”⁴³ Subsequently, the convention has established the Conference of the Parties (COP) and two other institutions.⁴⁴ The COP, which is the CBD forum that debates traditional knowledge issues, is discussed in the next section.

The Conference of the Parties (COP)

The COP, established under Article 23 of the CBD, is the convention’s governing body, whose key function is to ensure and review the implementation of the CBD and to steer the convention’s development. The COP keeps under review the implementation of the CBD. Although the COP’s work is interconnected with that of other CBD institutions, it is the main CBD institution that deals with traditional knowledge issues. The COP has initiated work in five thematic areas that elaborate and clarify various aspects of the convention. These five thematic areas address marine and coastal biodiversity, agricultural biodiversity, forest biodiversity, the biodiversity of inland waters, and dry and subhumid lands.⁴⁵ The COP’s agenda also includes other issues that are of relevance to all five thematic areas. One such cross-cutting issue that affects many aspects of biodiversity is traditional knowledge.

To address traditional knowledge issues, the 1994 fourth meeting of the COP established the Working Group on the Implementation of CBD’s Article 8(j) and Related Provisions of the Convention. According to the CBD Article 8(j), each contracting party must

as far as possible and as appropriate subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.⁴⁶

According to the CBD, the Working Group’s program of work entails the implementation of the commitments of this article, the enhancement of the role and involvement of indigenous and local communities. In addition, the program also entails “the development of elements of sui generis systems, developing indicators for the retention of traditional knowledge and methods and measures to address the underlying causes of the loss of such knowledge, the development of an eth-

ical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities.”⁴⁷

The World Trade Organization (WTO)

Before the WTO began its operations in 1995, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the trading system since 1948. The WTO’s involvement in traditional knowledge arose mainly because its “Members’ obligations concerning non-discrimination in international trade interact with the protection of [traditional knowledge].”⁴⁸ Although traditional knowledge was not on the agenda of the Uruguay Round of Multilateral Trade Negotiations (hereinafter, the Uruguay Round of Negotiations), the WTO, under the Council for TRIPS, has been discussing traditional knowledge issues. Article 68 of the TRIPS Agreement outlines the following responsibilities held by the Council for TRIPS: to monitor the operation of the TRIPS Agreement, and in particular ensuring that members comply; to afford members an opportunity to consult on trade-related intellectual property issues; to assist members in dispute settlement; and to carry out any other duties that its members may assign.⁴⁹

The Council for TRIPS is involved in traditional knowledge protection issues following instructions by the Doha Declaration to examine, inter alia, the protection of traditional knowledge and folklore.⁵⁰ In November 2001, the Doha Declaration recognized the need for synchronizing provisions in international agreements, a need that prompted the review of TRIPS Article 27 on patentable and unpatentable inventions. Article 27.3(b) allows signatory governments to exclude some kinds of inventions from patenting. The review of TRIPS Article 27.3(b) began in 1999, and one of the issues under discussion relates to the inclusion of traditional knowledge in the list of unpatentable inventions.⁵¹ Although there is no direct acknowledgment of traditional knowledge in the TRIPS Agreement, a major issue in the discussions on the review of Article 27.3(b) has been to include traditional knowledge in the list of exempted inventions in order to curb its commercial use by those other than either communities or countries where traditional knowledge-based inventions originate. Member submissions to the Council for TRIPS and policy documents regarding Article 27.3(b) of the TRIPS Agreement are analyzed for this study.

FINDINGS

Categories of Stakeholders in the Debate

There are three main categories of stakeholders in the traditional knowledge protection debate: indigenous communities worldwide, member states, and industry. Indigenous communities are stakeholders in the debate by virtue of being the tra-

ditional knowledge holders. At the three analyzed multilateral forums, indigenous stakeholders include both specific communities and local, national, and international organizations that represent indigenous communities in the international forums. Member states stakeholders include countries that are either members of organizations such as the WTO or signatories to an international instrument that deals with traditional knowledge issues. Member states stakeholders are either individual countries or regional blocks such as the African Union or the European Community (EC). Unless noted otherwise, the study interprets submissions by regional blocks to be the views of all the countries in the submitting block.⁵² Industry stakeholders include organizations that have some direct or indirect commercial interests in traditional knowledge and are involved in the debate at the international level.

The three categories of stakeholders express divergent views on the issues under debate. In this article, I focus only on the power relations among these stakeholders and how the structures in the three forums could lead to divergent proposals and thus skewed policy outcomes. My discussion of the power structures starts with an overview of a member states driven discussion about the appropriate forum that should deal with traditional knowledge issues. I then discuss the current forums' decision-making processes and, finally, how indigenous peoples, whose lives are affected by the issues under debate and by its outcome, are positioned in this power structure.

Why (Not) the Three Forums?

Stakeholders in the traditional knowledge debate are not oblivious to the limitations that a forum has when it comes to traditional knowledge issues. It is important to pay attention to the forums that are debating traditional knowledge issues because as Boyle observes, forums advance assumptions and ideologies as well as foreclose various possibilities.⁵³ Analyses of the debate reveal that various stakeholders have divergent views on which forum should address traditional knowledge protection issues. While the debate about an appropriate forum is rife among state stakeholders, the same cannot be said about indigenous stakeholders, probably because they are sure of where the debate either should or should not be taking place. The following discussion illustrates the lack of consensus, even among member states, as to a specific forum that should debate traditional knowledge issues.

Some state stakeholders are convinced that WIPO is the appropriate forum that should deal with traditional knowledge issues. According to the United States and the EC, WIPO is already working on traditional knowledge protection issues and therefore, its continued work would minimize duplication of effort. The United States argues that WIPO is already, through the IGC, far ahead in addressing many of the indigenous peoples' concerns on traditional knowledge protection.⁵⁴ According to the EC, being the specialized UN agency that deals with intellectual

property protection worldwide makes WIPO, from a technical point of view, the most appropriate forum, especially if the purpose of the debate was to create an intellectual-property-like system to protect traditional knowledge.⁵⁵ The EC suggests the WTO as an alternative forum if the purpose of the debate was to create a system that is outside of intellectual property. The EC, however, neither suggests what this system would be nor justifies the WTO as the best suited to debate such a system.

Objections to WIPO handling traditional knowledge issues are based on the argument that these issues are not intellectual property related and therefore should not be discussed at WIPO. Brazil, noting the connection between WIPO's mandate and possible policy outcomes, argues that when WIPO discusses traditional knowledge protection issues, those discussions are bound to be on examining possible positive measures to ensure protection under existing categories of intellectual property.⁵⁶ With WIPO's mandate and objectives such as to administer international intellectual-property-related treaties, to provide members with assistance in intellectual property laws, and to seek harmonization of national laws in order to promote intellectual property protection internationally, any WIPO-associated forum will steer the traditional knowledge protection debate in an intellectual property direction. Indeed, WIPO confirms this by stating that since "its description of the subject matter reflects its intellectual property focus, WIPO's activities are concerned with the possible protection of traditional knowledge that is intellectual property."⁵⁷ This interconnectedness of a forum's mandate with objectives for protection is also noted by Latvia, who observes that intellectual property's objective of protecting economic rights defines discussions at WIPO.⁵⁸

In their objection to WIPO as a forum that should be dealing with traditional knowledge issues, Brazil, India, Australia, and Norway argue that many of the issues under discussion arose from other forums. According to these countries, the Council for TRIPS, for example, would be the best forum to deal with issues about reviewing Article 27.3 of the TRIPS Agreement. Consequently, Brazil, India, Australia, and Norway support the Council for TRIPS to deal with issues of whether or not traditional knowledge protection is patentable subject matter or any other issues on patents and traditional knowledge.⁵⁹ However, these countries' argument overlooks the fact that just as WIPO is pushing an agenda that advances its mandate, so would any other nonindigenous forum such as the proposed WTO's Council for TRIPS, which is likely to push a trade-related agenda.

Suggestions that the WTO should deal with traditional knowledge protection issues are also very divergent. For example, the EC is convinced that if the debate was about creating a system that is outside of intellectual property, then the WTO would be best suited to debate such a system. Japan and Korea also argue that the WTO would be an appropriate forum to take over the issue of traditional knowledge protection, but only after the conceptual issues and possible options had been sufficiently defined and clarified in other forums that are already debating tradi-

tional knowledge issues.⁶⁰ Japan and Korea, however, do not specify what these other forums are and what issues the forums would discuss that would make the WTO an appropriate final forum. Canada and Venezuela make the connection between the forum and the likely agenda that would dominate a debate in a specific forum. Consequently, Canada and Venezuela oppose the WTO as an appropriate forum to address traditional knowledge issues because as Canada argues, these issues are not trade related and therefore have no place in the WTO.⁶¹

Other states such as Brazil, Mauritius (on behalf of the African Group), and Venezuela suggest a coordination of efforts between all the organizations that are involved in traditional knowledge issues.⁶² According to these stakeholders, it is important for forums to follow the traditional knowledge debate going on elsewhere in order to minimize duplication of efforts and a basis for cooperative work among the TRIPS Council, WIPO, and CBD to ensure a systematic solution. The assumption that is made in the proposition, opposition, or coordination of the forums that are currently debating traditional knowledge issues is that the debate will continue in these forums. Consequently, the likelihood of removing the debate from the three multilateral forums does not feature in the debate.

POWER STRUCTURES IN THE MULTILATERAL FORUMS

Power Structures: A North-South Divide?

Using a structural power dimensions framework, the study examines whether proposals to use existing intellectual property mechanisms to protect traditional knowledge exhibit a North–South division among stakeholders. This examination aims at exploring whether or not power structures in the traditional knowledge debate are similar to those in past negotiations such as the Uruguay Round of Negotiations that exhibited a North–South divide characterized by disagreements between developing and developed countries and by threats of trade sanctions.⁶³ Although it is apparent that intellectual property is the dominant theme in the debate, the North–South views of intellectual property are not monolithic. Instead, as this study found, the North–South divide has closed up in the traditional knowledge debate as countries that would be considered the North have aligned themselves with the South. This closing up of the North–South divide in the traditional knowledge debate can be attributed to two things. First, many of the countries of the North have, within their boundaries, a social, political, and economic “South” where indigenous communities are usually relegated. Consequently, obligations to their indigenous communities make some countries in the North align themselves with the South. Second, there is a lot of pressure on developed countries to recognize and protect other forms of intellectual activities, including traditional knowledge and practices. Although it could be argued that traditional practices and activities are more abundant in the South, there are many countries

in the North that still have indigenous communities that have unique traditions and cultures, a fact that adds to the blurring of the North–South divide in the traditional knowledge debate.

Another explanation for some countries that are considered North taking the South's side on several traditional knowledge protection issues is that these North states have to honor obligations to their indigenous peoples and to international agreements to which they are signatories. However, this study's analysis of the power structures among stakeholders shows that not all states are striking a balance between their interests in indigenous rights and their obligations to their indigenous peoples and to the international community. Evidence has shown that indigenous peoples' voices at the international forums are not gaining traction because many states are not fully engaging their indigenous peoples in the debate.

The potential of intellectual property tools to protect traditional knowledge is the dominant theme in the analyzed multilateral forums. Evidence from documentary analyses and from interviews reveals that indigenous stakeholders are very suspicious of the existing intellectual property mechanisms and oppose these mechanisms' application to traditional knowledge. Although intellectual property rights are traditionally a subject of disagreement between the North and the South, this study could not definitively conclude whether or not stakeholders' views on intellectual property mechanisms' application to traditional knowledge exhibit a North–South divide. It is impossible to definitively draw this conclusion because, as discussed above, documentary evidence indicates that some countries that are considered North take the South's side on several traditional knowledge protection issues.

Stakeholders' Power in the Three Multilateral Forums

My analyses of the international debate have convinced me that the current forums that are debating traditional knowledge issues are inappropriate to deal with such issues because none of these forums is indigenous specific. Furthermore, these forums are member driven, and as observers, indigenous peoples cannot vote on the decisions that are made in these forums; even when these decisions have implications on indigenous cultures and practices. These forums also either advance assumptions that emanate from their mandates, try to fit the issues into these mandates, or politicize these issues in order to either garner opposition or exclude them from the agenda.

Using a covert dimensions framework of power to analyze the three multilateral international forums, the study, not surprisingly, found that stakeholders wield varying levels of power in the debate and decision-making processes. What is surprising is the choice of sides that member states who are the most powerful stakeholders have often taken in this debate. Most countries have neither fully engaged indigenous peoples who live within their boundaries nor solicited their views on the issues under debate. This has resulted in the omission of indigenous views

from these countries' submissions to the international forums. By not involving their indigenous peoples, these countries have forsaken their obligations to these communities and have decided to support the international agreements.

The analyzed forums either administer or are associated with internationally binding agreements, some of which have requirements that ignore and threaten the cultures of indigenous peoples that are constituents of member states. For example, the WTO's TRIPS Agreement requires member states to meet set levels of protection as well as define what is protectable under the agreements. Some of these requirements and standards could be at odds with indigenous and traditional practices. WIPO administers several binding international treaties, and the CBD is also a binding treaty. Some of the requirements for these binding international agreements impose conditions and standards that could impinge on indigenous communities' abilities, as constituents of member states, to preserve their culture and practices. For example, states have to meet standard levels and forms of intellectual goods protection in order to become WTO members. The WTO's TRIPS Agreement could make the traditional knowledge protection situation worse because of the politics and structures of the forum and a possible conflict between member states' obligations to the agreement and to their indigenous peoples.

Insufficient and inauthentic indigenous representation in the international forums means that their voices are not gaining any traction in these forums. These voices would be best represented through state positions that are submitted to the international forums. The absence of indigenous voices in state positions is illustrated by my interviews with Canadian First Nations elders, who are clearly unaware of the international discussions about traditional knowledge protection and are appalled that their communities are not consulted about community concerns and views on issues affecting them. To show the extent of the lack of consultation, out of all the First Nations elders whom I interviewed, only one was aware of the ongoing international debate on protecting traditional knowledge. Furthermore, this elder had neither participated in any international meetings nor had she been consulted about the issues discussed at the international forums. This lack of consultation means that knowledge holders' voices do not reach the international forums because their views are not included in the official statements that member states submit to these forums.

To fill the gap caused by the lack of consultation and therefore elders' lack of knowledge of the ongoing international debate, I also interviewed First Nations discussants who have attended international meetings on traditional knowledge. These discussants' views on the power dynamics in the international meetings are outlined in the next paragraphs. Although these discussants' observations are from a Canadian perspective and may not be generalizable to other countries, they support my findings from analyses of international forums' decision-making procedures and from documents submitted to, and emanating from, these forums.

Two discussants who have attended the CBD and WIPO meetings confirm the above noted First Nations communities' lack of awareness of the international dis-

cussions about traditional knowledge. According to one of the discussants, communities in Canada are, almost all of the time, unaware of the issues raised either at the CBD, WIPO, or WTO. As was also evident from interviewing elders, and as the discussants concur, talking to knowledge holders about the debate sometimes surprises and shocks them. Communities are also appalled that they have not been asked to send their representatives to these meetings. According to one discussant:

People are, and rightly so, annoyed that the government is sending individuals from whatever, the Department of Foreign Affairs or Environment Canada, to go and speak on a topic that they have no knowledge of. Along the line of representation issues, of all the people that I know that have participated in this process, very few, even the Indigenous People[s], would be what you would consider traditional knowledge holders. I have never seen somebody from Canada, like a healer or an elder at these meetings. People who go, and again it is representation based on expertise, tend to be those with expertise on intellectual property rights or biodiversity and it is not to denigrate the individuals that are attending but it is that, in the majority of the cases, nobody formally sent them.⁶⁴

The two discussants indicated that the composition of delegates to these forums does not always include a representative of an indigenous community. According to one discussant, even countries that could afford to send indigenous representatives do not make efforts to ensure authentic representation.⁶⁵ Citing an example of Canada, the discussant observed:

The Canadian government generally tends to provide a space or a few spaces in their delegation for indigenous participation although not generally planned. . . . [However,] this is not an ongoing thing and it is just a point of contention domestically within Canada in that there is no reason as to when or why or how many indigenous participants get to go from Canada. But in Canada we have been very lucky . . . there are a lot of other nations in the world that are having trouble getting their own delegates to the meeting and they are not even considering involving indigenous groups in that process.⁶⁶

As for their presence in some of the international meetings, the two discussants made it clear that their participation in the meetings was not because they were either First Nations representatives or members of a First Nations community. Instead, these two discussants attended these meetings because they held government positions that were somehow relevant to certain traditional knowledge issues at the time.

In the international forums, indigenous peoples' low representation disadvantages them. Furthermore, even in cases where indigenous peoples are part of national delegations, they cannot speak beyond the positions that are formally taken by their countries. As one of the discussants observed:

The people who get [to these meetings] are those who either know how to use the system or whose names have been put forward to attend. It is not a formal or political representation of an individual or specific group . . . [g]enerally what happens is that there is so little indigenous partici-

pation that whoever shows up and happens to be indigenous ends up becoming *de facto* representative.⁶⁷

The debate process, in listening only to member states' official statements, also silences indigenous voices even if they are present in a delegation. As one discussant observes, even if there is an independent voice from an indigenous organization, the process of making interventions on agenda items is that:

all the parties get their chances to speak or make an intervention . . . then after [parties] are the international organizations . . . and then after that will be either the indigenous interventions or the NGOs [nongovernmental organizations]. At the end of the day, even if an issue may have a significant or important impact on indigenous peoples, their intervention is thirty seconds at the end of all other interventions.⁶⁸

Analyses of indigenous peoples' submissions and declarations indicate great emphasis on active indigenous participation in the policymaking processes and the recognition of their right to self-determination, land rights, and customary law as a beginning of the solutions to many of the traditional knowledge issues under debate. However, such complex issues, which are not within the limited mandates of the forums that are debating traditional knowledge issues, could create tensions between the indigenous (including First Nations) and other stakeholders. Two discussants, making a similar observation, note that member states representatives and indigenous peoples do not share the same views and national tensions are sometimes evident at international meetings. In its statement to WIPO's IGC, the American Folklore Society observes the incongruence between traditional knowledge holders' interests and those of powerful voting stakeholders whose power structures even among states, according to one discussant, is evident in coalitions that they form and through the agendas that stakeholders push. This discussant observes that one

can see generally along the lines or the coalitions of the groups that they form. There are the mega diverse countries, the group of the Latin America and the Caribbean. Generally the US, Australia, and New Zealand tend to not necessarily form alliances, but tend to agree and push certain points across in the negotiations. Part of developing the expertise to participate in the process is to learn those intricacies; the positions that will tend to follow out of particular countries and the alliances they form. You can easily pick those out once you get immersed in the process.⁶⁹

This observation leads one to wonder whether the absence of indigenous peoples in the national delegations, at least in the Canadian delegation noted by the discussants, is an intentional move to sustain the coalitions that stakeholders form and an effort not to familiarize indigenous peoples with the intricacies of the power structures—intricacies that would tilt existing power balances. In this article, I suggest that to be the case.

Using covert dimensions of power, the study found that the current forums' power structures are skewing policy formation processes in traditional knowledge

protection. These power structures allow powerful stakeholders to steer the debate in certain directions by setting the agenda, setting priorities in the policy process, and by excluding various policy options and possibilities from the discussions. The study found that indigenous communities and knowledge holders are disadvantaged in the debate partly because of their inauthentic and insufficient participation and also due to the multilateral forums' power structures that confer voting and final decision making powers to selective stakeholders.

In WIPO, for example, the General Rules of Procedures disadvantage indigenous peoples in that they hinder their full participation by allowing only member states to make final decisions on its activities. Although nonmember stakeholders and interest groups can be accredited to be observers in any of WIPO's meetings, observers cannot vote on issues. Furthermore, the accreditation decisions that are based on subjective information that WIPO requires from applicants can be used to exclude indigenous organizations that WIPO may view as undesirable. Such information includes a description of the organization, its main objectives, and the relationship of the organization with intellectual property matters.⁷⁰ This required information already shuts out organizations that are either against or have no interests in intellectual property. Although WIPO prides itself on the 150 nongovernmental organizations and intergovernmental organizations accredited as observers at its meetings, these observer groups can only participate at the consultation processes about the issue at hand but have no voting powers, which are granted to member states only.⁷¹ As Rule 24 of WIPO's General Rules of Procedures makes clear, although observers "may take part in debates at the invitation of the Chairman, [they] may not submit proposals, amendments or motions."⁷²

As in WIPO, the fact that observers cannot vote on final decisions is not overtly clear in the rhetoric of indigenous participation in the meetings of the COP, which is the CBD forum that discusses traditional knowledge issues. The COP meetings are open to all parties to the CBD, observers from nonparties, and intergovernmental and nongovernmental organizations. The CBD prides itself as the only forum, among the three analyzed multilateral forums, that has mechanisms for the participation of indigenous and local communities in its meetings. The mechanisms developed within the CBD include financial support through a voluntary fund to enable indigenous communities to attend CBD's meetings. Other mechanisms include logistical support and participation in formal and informal groups. Such mechanisms exist in the ad hoc open-ended Working Group on Article 8(j), which is open to both parties and representatives of indigenous peoples. However, there is a caveat to this participation; representatives of indigenous communities participate in the work of the Working Group only as observers. According to rules 6(2) and 7(2) of the CBD's rules of procedure, "observers may, upon invitation of the President, participate *without the right to vote* [emphasis added] in the proceedings of any meeting."⁷³ As in WIPO, participation of observers is not guaranteed and can be refused at any of the three stages of accreditation: the application stage, the evaluation stage where the CBD evaluates the applicants' qualifications

in fields relating to biodiversity, and the final stage where at least a third of the parties present at a specific meeting can object to an observer's participation.

In contrast to the CBD and WIPO, indigenous representatives cannot participate in the WTO meetings. In the WTO, only state and international intergovernmental organizations observers can follow discussions therein on matters of direct interest to them. Observers in the WTO's Council for TRIPS are the Food and Agriculture Organization (FAO), the International Monetary Fund (IMF), the International Union for the Protection of New Varieties of Plants (UPOV), the Organisation for Economic Co-operation and Development (OECD), the UN, the UN Conference on Trade and Development (UNCTAD), the World Bank, the World Customs Organization (WCO), and the WIPO. Again in contrast to the CBD and WIPO, indigenous communities and interest groups cannot participate as observers in the WTO.

Given the above power structures of the three analyzed multilateral forums, the debate is likely to be skewed in ways that advance the power wielding stakeholders' interests. As long as indigenous peoples' organizations participate as nonvoting observers whose views can be quashed at any stage in the debate process, the decisions that are made in these multilateral forums will always disadvantage them. Similarly, the policy outcomes from the debate will not serve indigenous peoples' interests.

Indigenous Peoples' Voices in the Debate

This study establishes that it is consistently unclear how the international forums are seeking and representing indigenous peoples' voices. As Table 1 shows, indigenous peoples views that are expressed through several declarations mainly converge with those expressed by First Nations elders. However, these views in most cases diverge from state and industry stakeholders' concerns, needs, and strategies for protecting traditional knowledge. This finding reinforces the conclusion that indigenous peoples' voices are not being listened to in these self-interested forums and therefore not gaining any traction. As Table 1 shows, state stakeholders' positions are consistently incongruent with those of indigenous (including First Nations) stakeholders.⁷⁴ This incongruence would be avoided if indigenous voices were listened to and incorporated in the debate.

From Table 1, it is evident that several views and proposals that emerge from declarations by indigenous peoples and from interviews with a sample of First Nations elders are absent in the analyzed international forums' agendas and in the policy documents that emanate from these forums. Indigenous stakeholders' views do not get nonindigenous stakeholders' support in the examined multilateral forums, whose power relations, as discussed earlier, disadvantage indigenous peoples. For example, while the use of intellectual property tools is the dominant theme that states and industry advance in the three examined multilateral forums, evidence from First Nations elders and from declarations and submissions by indig-

Table 1
Stakeholders' conceptual concerns and proposed protection strategies.⁷⁵

	<i>First Nations Elders</i>	<i>Indigenous Peoples</i>	<i>States</i>	<i>Industry</i>
Concerns				
Unauthorized use	✓	✓	✓	✓
• Biopiracy	x	✓	✓	x
• Misuse (use out of context)	✓	x	x	x
Granting of intellectual property	✓	✓	✓	x
Negative effects of knowledge sharing	✓	x	x	x
Representation or misrepresentation	✓	x	x	x
Preservation of communities' ways of life	✓	✓	x	x
Loss of land	✓	✓	x	x
Communities' loss of control	✓	✓	x	x
• Access to knowledge and resources	✓	✓	x	x
• Self-determination	✓	x	x	x
Knowledge transmission	✓	✓	x	x
Holders' and owners' rights protection	x	x	✓	✓
Misappropriation for economic gains	x	✓	✓	x
Economic development	x	x	✓	✓
Proposed positive tools				
<i>Intellectual property tools</i>				
• Patents	x	x	✓	✓
• Copyright	x	x	✓	✓
• Trade secrets	x	x	✓	✓
• Geographical indications	x	✓	✓	✓
• Trade-marks/brand names	x	✓	✓	✓
<i>Nonintellectual property tools</i>				
• Sui generis systems	✓	✓	✓	x
• Customary law	✓	✓	x	x
• Model laws	x	x	✓	x
• National laws	x	x	✓	x
• Aboriginal rights and treaties	✓	✓	x	x
• Secrets	✓	x	x	x
Proposed defensive tools⁷⁶				
<i>Intellectual property tools</i>				
	x	x	✓	x
<i>Nonintellectual property practices</i>				
• Documentation	✓	x	x	x
• Customary laws and practices	✓	✓	x	x

enous peoples show that indigenous stakeholders are against the use of these tools to protect their knowledge. Table 1 also shows that indigenous peoples' prevalent concerns on loss of land as the source of traditional knowledge, empowerment, and self-determination to control their knowledge, and on the preservation of traditional knowledge as a way of life are themes that do not feature in proposals that are made by states and industry stakeholders.

By using covert power, which allows actors to set priorities for policymaking, powerful stakeholders are able to either conveniently exclude some items from the agenda or politicize these items in ways that garner opposition. The politicization of indigenous-driven initiatives and other initiatives that could resolve traditional knowledge issues but are considered outside the purview and interests of powerful stakeholders has continued to meet unrelenting opposition from nonindigenous stakeholders who push their own interests. An example of the lack of support of indigenous-specific initiatives is the lack of recognition of Organization of African Unity (OAU) Model Law and Convention on Community Rights and Access to Biological Resources as a useful model that could form a basis for a nonintellectual property protection system and that would ameliorate many of the conventional intellectual property shortcomings. Opposition to the OAU Model Law is well summarized in the observation by Genetic Resources Action International (GRAIN) that intellectual property interests prevailed in a meeting held in Addis Ababa among the OAU, WIPO, and UPOV to comment on the OAU Model Law.⁷⁷ Both WIPO and UPOV resisted the model law although it was meant to help African countries meet the required standards that had been set by the CBD and the TRIPS Agreement.

In their submission at this Addis Ababa meeting, WIPO resisted the OAU Model Law's principle that holds that patenting life is immoral and against the basic values of Africans and should therefore be outlawed.⁷⁸ WIPO was also very critical of the Model Law's scope of community rights. As GRAIN notes, although most African countries were struggling with making community rights work for African countries, instead of helping "to make these [community] rights really work WIPO's solution is to make them fit into global [intellectual property rights] conventions."⁷⁹ GRAIN concludes that "if WIPO's contribution to the "furtherance" of the OAU process was misdirected and counterproductive, UPOV's input consisted of an iron-fisted bash on the whole initiative. UPOV officials even reworked more than 30 articles of the Model Law to suit the standards of their own Convention!"⁸⁰ Such opposition is not unimaginable in the traditional knowledge debate.

As Table 1 shows, one of the indigenous peoples' concerns that is conspicuously absent from the agenda relates to self-determination. Indigenous stakeholders are convinced that the heart of the solutions to traditional knowledge and other issues is self-determination, which would allow indigenous peoples to preserve their knowledge, control how it is used, and ensure that the communities and their ways of life are authentically represented in the knowledge. Such empowerment of indigenous peoples is only achievable through internal self-determination. However, Table 1 shows that in WIPO, the CBD, and the WTO, member states and industry stakeholders do not address issues of self-determination which are missing in these forums' agendas. From analyses of discussions in the three multilateral forums, one can infer that member states are cautious about discussing self-determination issues. This may be due to the too common past politicization of

self-determination, for example, during the long process that led to the adoption of the DRIP in 2007.⁸¹

As in the forums that are debating traditional knowledge, the unwillingness to discuss self-determination was very evident throughout the DRIP adoption process where countries that voted against the declaration expressed concerns about provisions on self-determination as one of the reasons for opposing the DRIP. Canada's representative, for example, noted that "unfortunately, the provisions in the Declaration on lands, territories and resources were overly broad, unclear, and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have been settled by treaty."⁸² Similarly, Australia's representative said that Australia was dissatisfied with the text's references to self-determination, which "applied to situations of decolonization and the break-up of States into smaller states with clearly defined population groups [and] where a particular group with a defined territory was disenfranchised and was denied political or civil rights."⁸³

If the current forums would listen to the voices of indigenous peoples and consider their concerns and needs, some of which are listed in Table 1, some of the fears that usually lead to politicization of indigenous issues would be allayed. Indigenous stakeholders emphasize the need for their empowerment through fully involving them in the policymaking forums and processes. In the Mataatua Declaration, the Kari-Oca Declaration, and the Voices of the Earth, indigenous peoples note their insufficient participation in policymaking processes, in research, and in all other aspects that involve their knowledge as a major concern that needs redress. In Article 3.1, the Mataatua delegates ask the UN to ensure "the process of participation of Indigenous Peoples in United Nations [forums] is strengthened so their views are fairly represented."⁸⁴ In a call for defensive protection, the Mataatua delegates also urge indigenous peoples to be proactive and develop their own forum that would "preserve and monitor the commercialism or otherwise of indigenous cultural properties in the public domain; generally advise and encourage indigenous peoples to take steps to protect their cultural heritage; [and] allow a mandatory consultative process with respect to any new legislation affecting Indigenous Peoples cultural and intellectual property rights."⁸⁵

Delegates to the Voices of the Earth also urged governments to work toward "facilitating open access and full participation for indigenous peoples in the entire process of debate ... and in all other forums discussing indigenous issues" and recommended the formation of an indigenous peoples' forum that would

develop educational materials on intellectual, cultural, and scientific property rights; develop mechanisms for protection and compensation; advise indigenous and traditional communities on legal and political actions; monitor unethical activities by individuals, institutions, and governments that are misusing intellectual, scientific, and cultural property; develop mechanisms for enforcement of rules, regulations, and laws for protection and compensation, including legal advice and counsel; and establish a network to exchange information about suc-

cessful and unsuccessful attempts by local communities to secure their rights.⁸⁶

Participants at the UNDP-Asia Consultation also recommend the strengthening of

Indigenous Peoples' organizations and communities to be able to collectively address local concerns related to indigenous knowledge and intellectual property rights, [and] raise the awareness of Indigenous Peoples' organizations and communities on the global trends and developments in intellectual property rights systems, especially as they apply to life forms and indigenous knowledge.⁸⁷

Indigenous stakeholders continue to urge states and the international community to support international human rights treaties, conventions, and indigenous forums. In the *Voices of the Earth* and in the *Kari-Oca Declaration*, indigenous peoples call on nation-states to support international initiatives such as the DRIP and the ILO Convention 169 and note that supporting binding agreements "would guarantee an international legal instrument for Indigenous Peoples."⁸⁸ However, the power structures in the various forums, the insufficient and inauthentic representation of Indigenous stakeholders, and the politicization of indigenous proposals have ensured that indigenous initiatives remain as just calls—really faint and distant calls. It is perceptible that indigenous peoples' association of their pursuit of traditional knowledge protection with self-determination and ownership of their cultural heritage and resources emanates from this situation where the status quo is not working and the international efforts being made are misguided and self-interested.

CONCLUSION

The loss of traditional knowledge and the need to protect it are not new issues, and several international efforts have been previously made to address the challenges that current practices pose to the preservation and propagation of traditional knowledge and cultures. However, it is clear that none of the international efforts has had much impact on the status quo. From my analyses of the ongoing debate, it is evident that stakeholders diverge on the key issues on traditional knowledge protection, the objectives and methods of protection, and the forum that should be debating these issues. The underlying motivations for seeking protection of traditional knowledge also vary from forum to forum. Regardless of the underlying rationales and interests, it is definite that traditional knowledge protection is an issue of international significance. I am, however, convinced that the international forums that are currently debating traditional knowledge are not only inappropriate but that the proposals being made in these forums are driven by self interests that are at odds with the needs of indigenous peoples. Analyses of the forums also indicate that international efforts have so far been premised on the

assumption that traditional knowledge holders' needs are intellectual property related. This premise and the politicization of indigenous initiatives and proposals have plagued most international efforts to change the status quo, vis-à-vis loss of traditional knowledge.

In this study, I examined only the forums where the debate is taking place, and therefore it may not be possible to recommend where the conversation should be taking place. However, I have clearly shown that the traditional knowledge protection debate is taking place in forums that disadvantage indigenous peoples, have limited mandates, and ignore indigenous worldviews. It is evident that the multilateral forums that I analyzed do not always reflect indigenous communities' views because these institutional forums are member state driven, and therefore the interests that dominate the debate are those of the member states. The evidence that I gathered for this study shows a problem because there is a clear difference between state and indigenous stakeholders' propositions. These differences prove that states are not balancing their obligations to their indigenous peoples with those to international agreements. I am convinced that a way to strike this balance would be to have sufficient and authentic indigenous representation in national delegations to international meetings.

I have also established that even when the institutional forums have taken initiatives to encourage the participation of indigenous peoples and communities, the bureaucracy and structures in these institutions still keep indigenous participation very low. Even though traditional knowledge holders in the analyzed forums may be encouraged to participate, voting member states make the final decisions. With the current voting structures in these forums, indigenous proposals and participation as observers is futile, because at the end of the day, voting members can decide to quash proposals by indigenous and other nonvoting stakeholders.

While the discussed international forums are essential in setting the norm, there must be a forum that is rooted in, and takes into account, indigenous worldviews and interests. The current forums not only disadvantage indigenous peoples but are at odds with their interests, concerns, and needs. Evidence from interviews with a sample of First Nations elders and discussants has convinced me that the debate should *be* in a wider forum that would take into account the indigenous peoples' worldviews that are wider than the intellectual property-based worldview that is currently dominating the debate. From a practical point of view, I therefore recommend that the debate be removed from the three multilateral forums examined here. Discussions in these three forums should be halted until an appropriate forum that would include indigenous peoples' worldviews is found. Until such a forum is in place, policy outcomes from these discussions will disadvantage indigenous peoples.

The formation of an indigenous peoples specific forum calls for indigenous peoples' internal self-determination that would allow them to freely determine their own ways to deal with the traditional knowledge issues; after all, it is their knowl-

edge. Internal self-determination would allow indigenous peoples to define for themselves their intellectual property; identify their needs for protecting that knowledge; develop their mechanisms that would control how their knowledge is used and represented; sanction its protection, preservation, and revitalization; and establish a new system or adopt a customary system that is based on indigenous worldviews. The formation of an indigenous forum must be left to indigenous peoples so that the forum's structure and decision-making processes take into account indigenous worldviews, practices, and cultures.

Unfortunately, an indigenous forum is unlikely to come to fruition when states intentionally politicize self-determination issues and frame them as secession issues. With such politicization, there is likely to be opposition to an indigenous specific forum that would empower and enable indigenous peoples to control their own cultural development. If an indigenous forum is slow to come by and the debate must continue in the current forums, which is more likely than not, the study has established that there is room for including, and procedures to include, indigenous voices in states' official positions that are submitted to these forums. I recommend state consultations with indigenous peoples as the most effective avenue to get indigenous voices to national official positions and, thus, to the international processes.⁸⁹ In order to bring local initiatives to an international process, there is a need to directly elicit the views of indigenous peoples. As it is now, a lot of policy options are not included in national positions on protecting traditional knowledge because knowledge holders are not consulted. It is absolutely necessary to solicit knowledge holders' views and, if they so wish, make sure that their extensive knowledge is made available to policymakers for inclusion in official positions that will be submitted to the international forums. This would not only ensure that indigenous stakeholders' views are reaching the international forums, but also that national positions are in concordance with those of their indigenous peoples. As long as there is no such consultation, there will always be too many voices, most of which are not authentic indigenous voices, that will only clog the debate, steer it away from indigenous peoples' concerns, and make it harder for stakeholders to reach a consensus.

ENDNOTES

1. Blakeney, "Intellectual Property in the Dreamtime."

2. Alikhan and Mashelkar, in *Intellectual Property and Competitive Strategy*, discuss the place of traditional knowledge in modern science. According to Alikhan and Mashelkar, traditional knowledge is being recognized in various ways such as its important role in environmental impact assessment, and environmental and biodiversity conservation and sustainability. For further discussion of traditional knowledge in modern science, see also Bicker, Sillitoe, and Pottier, *Development and Local Knowledge*; and Bowie, "Traditional Knowledge and Environmental Assessment."

The important role of traditional knowledge in natural resources management has also been discussed by Failing, Gregory, and Harstone, who examine ways of integrating local and scientific knowledge into environmental decision making in "Integrating Science." Several successful projects in Canada have incorporated traditional knowledge. Parlee and colleagues show that common property arrange-

ments governing berry harvesting in the Teet'it Gwich'in region of the Northwest Territories have resulted in sustainable use of resources ("Indigenous Knowledge of Ecological Variability," 515).

In an examination of wildlife management in northern Canada, Kendrick and Manseau note that incorporating traditional knowledge into wildlife management provides an opportunity for resource managers to understand how the local people manage their natural resources ("Representing Traditional Knowledge," 404). Similarly, in their examination of ways to address environmental problems, Ransom and Ettenger emphasize that incorporating traditional concepts into policymaking allows for respect of cultural identity, values, and knowledge while creating good relationships between communities and outside agencies and researchers ("Polishing the Kaswentha," 219). In an evaluative study of Northwest Atlantic cod fishery, Milich demonstrates the detrimental effects that excluding traditional knowledge from resources management can have on resource sustainability ("Resource Mismanagement," 625).

3. The term *biopiracy* (bioprospecting) is used in this article to refer to the appropriation of the knowledge and genetic resources of farming and indigenous communities by either individuals or institution seeking exclusive monopolistic control over these resources and knowledge.

4. For a detailed discussion on which issues stakeholders either converge or diverge, see Maina, "The Traditional Knowledge Protection Debate."

5. For a detailed discussion of stakeholders' definition and characterization of traditional knowledge, concerns and proposals, protection objectives and needs, and whether or not stakeholders converge or diverge on the issues under debate, see Maina, "The Traditional Knowledge Protection Debate."

6. Boyatzis defines a theme as "a pattern found in the information that at minimum describes and organizes the possible observations and at maximum interprets aspects of the phenomenon" (*Transforming Qualitative Information*, 4).

7. Boyatzis, *Transforming Qualitative Information*, 4.

8. Boyatzis, *Transforming Qualitative Information*, 3.

9. Boyatzis, *Transforming Qualitative Information*, 4–5.

10. In this study, I use the term *First Nations* to refer to the aboriginal (indigenous) peoples in Canada. First Nations has come to be generally used for the indigenous peoples of Canada, excluding the Arctic-situated Inuit, and Métis who are peoples of mixed European–First Nations ancestry. In the literature, there are other terms such as native peoples, indigenous peoples, natives, and aboriginal peoples that are used to refer to the aboriginal peoples in Canada.

11. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, 109.

12. Kulchyski, McCaskill, and Newhouse, *In the Words*, xix. Indeed, the extensive knowledge that elders hold on various topics is illustrated by the wide range of studies that have been done in different disciplines using interviews with First Nations elders to collect data. As in my study, several researchers from different disciplines have interviewed elders because they are considered the knowledgeable community members. See, for example, Hjartarson, "Epistemological Foundations," writing in the discipline of education. Hjartarson interviewed elders to get an understanding of traditional Native education from a First Nations' perspective. In environmental science, forestry, botany, geography, and cultural anthropology, Kenny ("Ojibway Plant Taxonomy"), M'Lot ("Ka Isinakwak Askii"), and Wall ("Porcupines") collected their data through interviews with First Nations elders.

Writing from the discipline of sociology, Keewatin ("An Indigenous Perspective"), Hart-Wasekeesikaw ("First Nations Peoples"), and Brass ("Empowerment and Wellness") also interviewed First Nations elders to gather their data. See also Ross-Leitenberger ("Aboriginal Midwifery") who, writing from a women's studies perspective, also interviewed First Nations elders in her exploration of whether traditional midwifery and birthing practices are applicable to contemporary birthing.

13. Kulchyski, McCaskill, and Newhouse, *In the Words*, xix.

14. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, 110.

15. Singleton and Straits, *Approaches to Social Research*, 132.

16. First Nations communities confer elder status to their respected members. Elder status is not political, and therefore only community members know who their elders are. Furthermore, many of these elders will not identify themselves as thus, a point that is succinctly made by Ojibway Elder AC

when asked to describe his role as an elder. According to Ojibway Elder AC, “You do not brag about this. You do not stand up and say; here, I am over here to people. They would have to come on their own. I do not go advertising. Even the Indian People have to understand the protocol” (Personal interview with Ojibway Elder AC, 21 December 2006). Many other elders in concurring with the Ojibway elder emphasized that it is the community members who recognize their knowledge and identify them as elders. Kulchyski, McCaskill, and Newhouse concur with the above elder in their observation that “few Elders call themselves Elders, and there is no institutional process that recognizes or validates them as such. The Aboriginal community to which an individual belongs is likely the only genuine source of recognition of that individual’s status as an Elder” (Kulchyski, McCaskill, and Newhouse, *In the Words*, xix).

17. Singleton and Straits, *Approaches to Social Research*, 132–33.

18. Mosco, *The Political Economy*, 25.

19. Mosco defines control as “the internal organization of individual and group members, while survival [economic] takes up the means by which they produce what is needed to reproduce themselves” (*The Political Economy*, 26).

20. Gill and Law, *The Global Political Economy*, 74

21. Bachrach and Baratz, “Decisions and Nondecisions,” 632.

22. Gill and Law, *The Global Political Economy*, 74.

23. For a discussion of the role that intellectual property plays in development, see Maskus in *The Role and Intellectual Property Rights*; Naghavi in “Strategic Intellectual Property”; Braga, Fink, and Sepulveda in *Intellectual Property Rights*; and Gould and Gruben in “The Role of Intellectual Property.”

However, Shiva, in *Protect or Plunder* posits that intellectual property systems’ justifications that they promote investment research and technology transfer, stimulate creativity, and allow knowledge generation are nothing but myths.

24. See Shiva, in *Biopiracy: The Plunder*, who classifies patents’ historical use as a way to conquer territories with their modern use to conquer economies. Similarly, delegates at the *Coordinator of the Indigenous Organizations of the Amazon Basin (COICA)/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity* (hereinafter, the *COICA/UNDP Meeting*) characterize the prevailing intellectual property system as one that reflects a conception and practice that is colonialist.

25. In “Strategic Intellectual Property,” Naghavi argues that in order for the South to catch up, stringent intellectual property is always optimal because it would trigger technology transfer. However, Maina in “What Patents Tell” argues that the social cost of expanding intellectual property protection could outweigh the benefits in intellectual property importing economies, which are generally developing countries. As Scotchmer notes in “The Political Economy,” there is interplay between power forms and intellectual property protection in that the more innovative economies are the keener they are on expanding intellectual property protection. These power structures have led developed countries to pressure developing countries, sometimes under threats such as trade sanctions, to meet intellectual property protection standards. Conversely, the benefits are positive for intellectual property exporting economies, which tend to be developed countries. Lai and Qiu (“The Northern Intellectual”) also support such justifications by noting that both the North and the South would gain if the South harmonized its intellectual property standards with those of the North. But Shiva, in *Protect or Plunder*, characterizes as myth intellectual property justifications that it promotes investment research, technology transfer, and stimulates creativity and thus development.

26. Examples on international treaties and conventions that are relevant to cultural rights include the 1950 Florence Agreement on the Importation of Educational, Scientific and Cultural Materials; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

27. Walker, *Oxford Companion*, 1128.

28. United Nations, “United Nations Declaration,” Article 3.

29. United Nations, “United Nations Declaration,” Article 31.

30. United Nations, “United Nations Declaration,” para. 11.

31. United Nations, “United Nations Declaration,” para. 8.

32. International Labour Organization, “C169 Convention,” Article 7.1.

33. International Labour Organization, "C169 Convention," Article 6.1.
34. WIPO, "The Protection of Traditional Knowledge," WIPO/GRTKF/IC/11/5a Annex: 4.
35. WIPO, "The Protection of Traditional Knowledge," WIPO/GRTKF/IC/11/5/a.
36. WIPO, "Intellectual Property Needs."
37. According to WIPO, the missions to 28 countries were carried out "in order to identify intellectual property needs and expectations of traditional knowledge holders" ("Intellectual Property Needs," 16). These missions were in various regions. In the South Pacific region, WIPO carried out fact-finding missions in Australia, New Zealand, Fiji, and Papua New Guinea. In South Asia, WIPO visited Bangladesh, India, and Sri Lanka while in Southern and Eastern Africa, WIPO carried out missions in Uganda, United Republic of Tanzania, Namibia, and South Africa. Other regions that WIPO visited are North America (United States of America and Canada), West Africa (Nigeria, Ghana, Mali, and Senegal), the Arab countries (Oman, Qatar, Egypt, and Tunisia), South America (Peru and Bolivia), Central America (Guatemala and Panama), and the Caribbean (Trinidad and Tobago, Guyana, and Jamaica). In consultation with UNESCO, WIPO also held four regional consultations on the protection of expressions of folklore. A consultation for African countries was held in Pretoria (March 1999); for countries in Asia and the Pacific region in Hanoi (April 1999); for Arab countries in Tunis (May 1999); and for Latin America and the Caribbean in Quito (June 1999).
38. WIPO, "Matters Concerning Intellectual Property."
39. WIPO, "Draft Provisions."
40. WIPO, "Draft Provisions."
41. Convention on Biological Diversity, *Handbook of the Convention*, xvii.
42. Convention on Biological Diversity, *Handbook of the Convention*, 5.
43. Convention on Biological Diversity, *Handbook of the Convention*, 5–6.
44. The other two CBD institutions are the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), and the Secretariat. Established under Article 25 of the CBD, the SBSTTA provides the COP with advice relating to the Convention's implementation. Article 24 of the CBD also establishes the Secretariat as the institution responsible for the preparation and servicing of all the meetings held under the Convention, including meetings of the COP (Convention on Biological Diversity, *Handbook of the Convention*, 16–17).
45. Convention on Biological Diversity, *Handbook of the Convention*, xxiii.
46. Convention on Biological Diversity, "Multilateral Convention."
47. *Convention on Biological Diversity: Working Group*, para. 4.
48. WIPO, *Intellectual Property Needs*, 55.
49. WTO, *Final Act*.
50. See UPOV, "Doha WTO Ministerial 2001," WT/MIN(01)/DEC/1 par. 19. The Doha WTO Ministerial Declaration was adopted on November, 14, 2001.
51. WTO, *Final Act*.
52. Voting procedures of the analyzed forums attest to this interpretation. In rule 39 of its procedure, the CBD, for example, considers a regional block's vote as equal to the total number of votes of the block's member states which are parties to the convention. According to the CBD's rule 39 of procedure, only parties to the Convention can vote (one vote per party). Rule 39(2) of the CBD adds, "regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member states which are Parties. Such organizations shall not exercise their right to vote if their members exercise theirs, and vice versa" (*Handbook of the Convention*, 62).
- Decision-making within WIPO and the WTO is different. Both WIPO and the WTO reach their decisions not by voting but by consensus. In cases where consensus cannot be reached, voting is possible with a vote being won with a majority and on a "one country, one vote" basis.
53. Boyle, *Shamans*, 12.
54. World Trade Organization (WTO) Council for Trade-Related Aspects of Intellectual Property Rights, "Minutes of Meeting 5–7 March 2002," IP/C/M/35 paras. 241–242.
55. WTO, "Minutes of Meeting 5–7 March 2002," IP/C/M/35 para. 239.
56. WIPO, "The Protection of Traditional Knowledge," WIPO/GRTKF/IC/11/5(a), Annex.

57. WIPO, *Intellectual Property Needs*, 24.

58. WIPO Intergovernmental Committee, "The Protection of Traditional Knowledge," WIPO/GRTKF/IC/11/5(a), Annex.

59. For Brazil's views, see WTO "Minutes of Meeting 21–22 Sept. 2000," IP/C/M/28 para. 168. See paras. 167 and 151 for India and Australia respectively. For Norway's views, see WTO, "Minutes of Meeting 26–29 June 2000," IP/C/M/27 para. 133.

60. For proposals by the EC, see WIPO, "Minutes of Meeting 5–7 March 2002," IP/C/M/35 paras. 238–239 and WTO, "Communication from the EC," IP/C/W/254. For Japan's views, see WTO, "Minutes of Meeting 20–21 Oct. 1999," IP/C/M/25 para. 93 and WTO, "Minutes of Meeting 21–22 Sept. 2000," IP/C/M/28 para. 164 for Korea's views.

61. For Canada's position, see WTO, "Minutes of Meeting 20–21 Oct. 1999," IP/C/M/25 para. 91). Canada has not made clear what an appropriate forum would be. For Venezuela, see WTO, "Minutes of Meeting," IP/C/M/26 para. 73.

62. For Brazil, see WTO, "Minutes of Meeting 21 Mar. 2000," IP/C/M/26. For views by Mauritius, see WTO, "Communication from Mauritius," IP/C/W/206 paras. 62 and 64. For Venezuela's views, see WTO, "Minutes of Meeting 21 Mar. 2000," IP/C/M/26 par. 28.

63. For a more detailed examination of power structures in the *Uruguay Round of Negotiations*, see Drahos and Braithwaite (*Information Feudalism*), Matthews (*Globalising Intellectual Property Rights*), and Shiva (*Protect or Plunder*).

64. Personal interview, 13 October 2006.

65. This is the discussant's observation about Canada. It would be impossible for the discussant to tell whether delegations from other countries had authentic representation of Indigenous Peoples. Therefore, I cannot make conclusions on the composition of delegates from other countries based on this discussant's observation.

66. Personal interview, 13 October 2006.

67. Personal interview, 13 October 2006.

68. Personal interview, 13 October 2006.

69. Personal interview, 13 October 2006.

70. WIPO, "Intergovernmental Committee."

71. For a more detailed account of the various decision-making bodies and processes, for the criteria for admission as an observer, and a list of current observers, see WIPO, "Members and Observers."

72. WIPO, "General Rules of Procedures."

73. CBD, *Handbook of the Convention*, 54.

74. The three categories of stakeholders' incongruent concerns, needs, and protection strategies are further discussed in Maina, *The Traditional Knowledge Protection Debate*.

75. In Table 1, a checkmark (✓) indicates that a great preponderance of the evidence indicates the views of the stakeholders in a column. Conversely, an X indicates that a given category of stakeholders, on this evidence, rarely or never expressed this view. These marks are drawn from the more detailed analysis in Maina, *The Traditional Knowledge Protection Debate*. The table is used here only as a graphical summary of the evidence presented in the text. The table is used here to summarize the divergences and convergences among the three categories of stakeholders in the debate.

76. The term *defensive protection* "refers to measures aimed at preventing the acquisition of intellectual property rights over [traditional knowledge] or genetic resources by parties other than the customary custodians of the knowledge" (WIPO, "Defensive Protection Measures," WIPO/GRTKF/IC/6/8). Defensive protection does not entail acquisition of rights but only prevents others from gaining intellectual property rights. Positive protection refers to protection through the recognition and exercise of rights such as intellectual property rights.

77. GRAIN is an international nonprofit organization that supports small farmers and social movements and in their efforts and initiatives that are aimed at ensuring community-controlled and biodiversity-based food systems.

78. In its argument against the *OAU Model Law*, WIPO cites *TRIPS Agreement* Article 27.3(b) which allows patenting of at least micro-organisms. WIPO argued that the *OAU Model Law* prohibition of patenting of life forms is against the *TRIPS Agreement*. This opposition by a powerful

stakeholder is clearly based on, and is meant to serve self-interests that are at odds both with indigenous interests and the general conservation of biodiversity.

79. GRAIN, "IPR Agents," para. 10

80. GRAIN, "IPR Agents," para. 11.

81. The UN Commission on Human Rights received the Draft Declaration of the Rights of Indigenous Peoples in 1995. The commission assigned a working group to review the declaration. In 2006, the group submitted a final document to the Human Rights Council and on September 13, 2007, the General Assembly Resolution 61/295 adopted the Declaration on the Rights of Indigenous Peoples (DRIP). Member states adopted the DRIP but four countries namely Australia, Canada, New Zealand, and the United States voted against the declaration. These countries cited, as reasons for opposing the declaration, provisions on self-determination, land and resources rights and provisions that gave Indigenous Peoples a right of veto over national legislation. The following 11 countries abstained from voting: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine. Although the DRIP is not legally binding and would therefore be difficult to enforce, its drafting and adoption process demonstrates the lack of international support for Indigenous Peoples' initiatives and forums. It is because of lack of support that it took about 12 years for member states to adopt the DRIP although the UN Commission on Human Rights received the DRIP in 1995 and assigned a working group to review it.

82. United Nations General Assembly, "General Assembly," para. 9.

83. United Nations General Assembly, "General Assembly," para. 11.

84. Anonymous, "The Mataatua Declaration," 208.

85. Anonymous, "The Mataatua Declaration," 206.

86. Anonymous, "Recommendations from the Voices," 212.

87. Anonymous, "UNDP Consultation," 221.

88. Anonymous, "Kari-Oca Declaration," 190.

89. Indeed, the ILO Convention 169 acknowledges that the starting point for any considerations to legislative or administrative measures that may affect indigenous peoples should be consultations with "the peoples concerned, through appropriate procedures and in particular through their representative institutions" (International Labour Organization. "C169 Convention," Article 6.1).

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