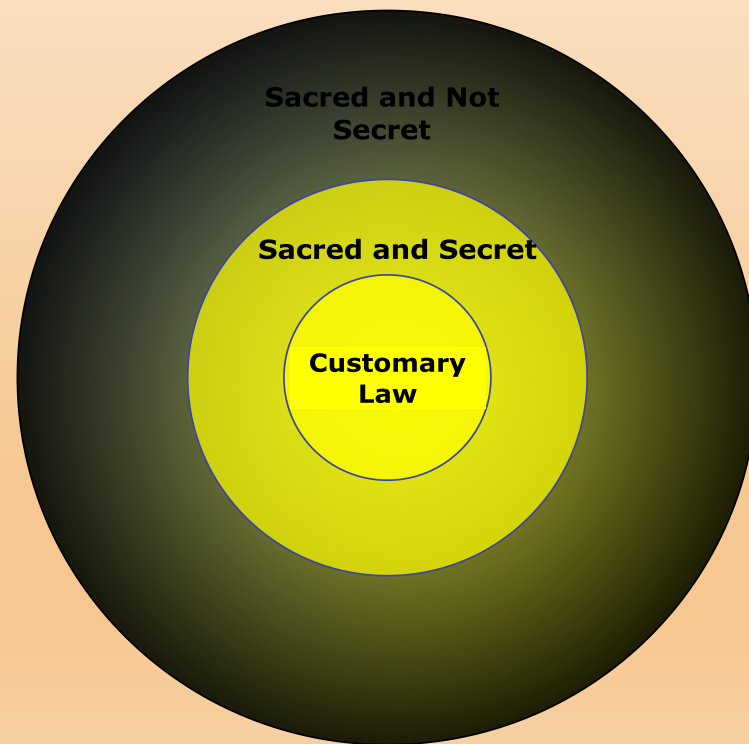


Preston Hardison
Tulalip Tribes
IGC 27 Indigenous Panel

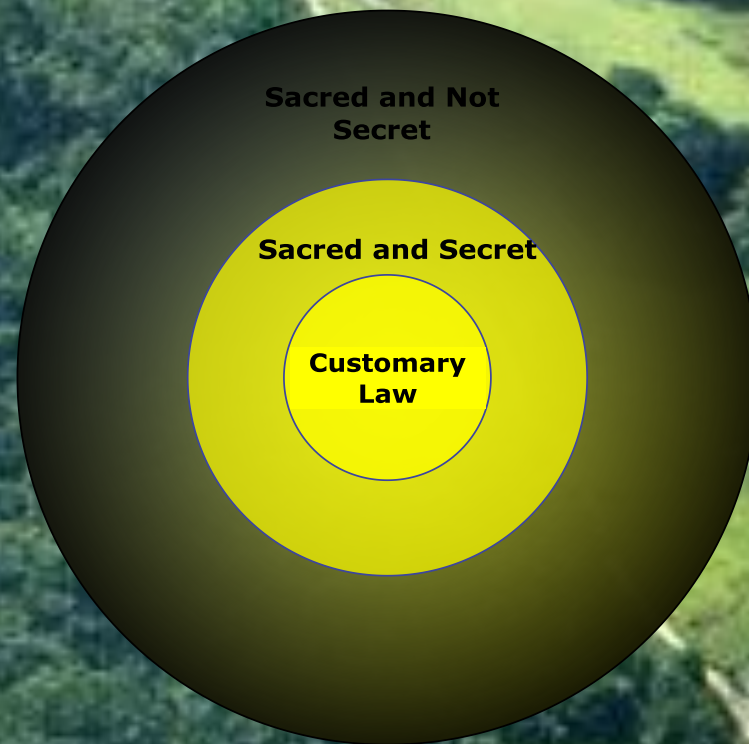
Accounting for the Legal and Social Ecology of TK/TCEs in IP Instrument(s)

CUSTOMARY LAW; “INTANGIBLE” CULTURAL HERITAGE; FREE, PRIOR
INFORMED CONSENT; CULTURAL HARMS AND CULTURAL SURVIVAL

Ecology of IPLC Rights and Interests



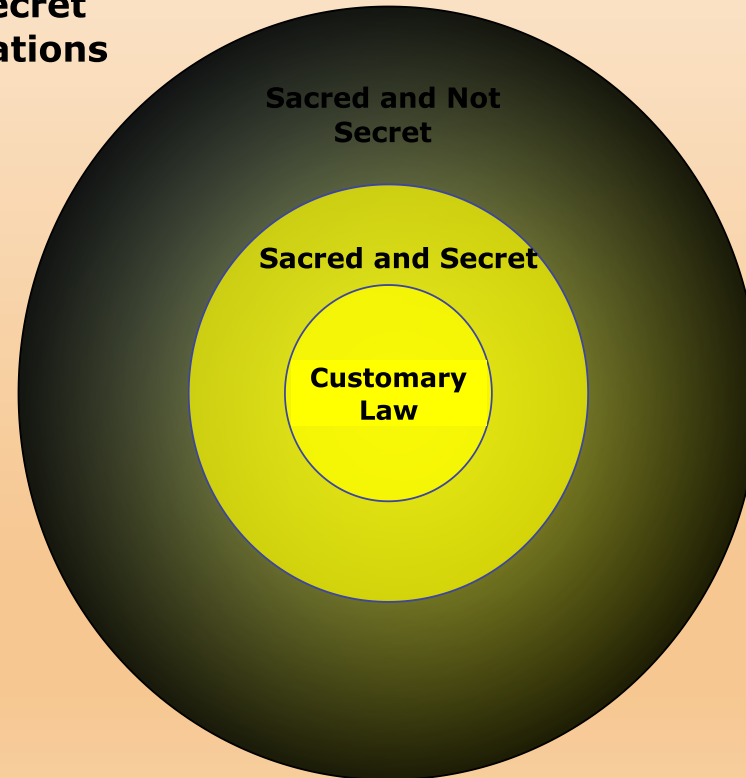
Ecology of IPLC Rights and Interests



Ecology of IPLC Rights and Interests

Internal Ecology of R&I

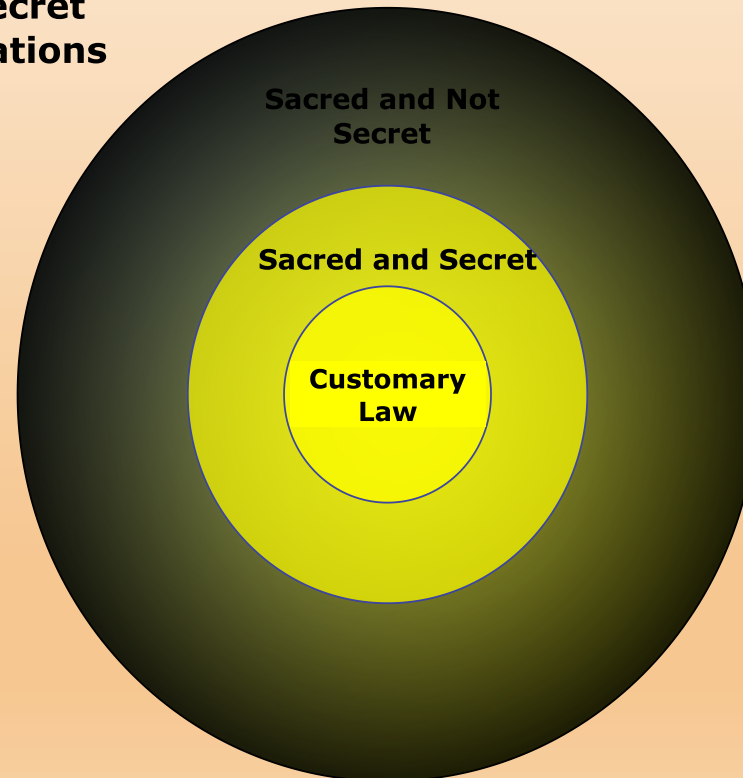
Customary Law
Teachings of the Ancestors
Law of the Creator
**Traditional Beliefs, Knowledge
and Practices**
Sacred and Secret
Sacred and Not Secret
Stewardship Obligations



Ecology of IPLC Rights and Interests

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External Ecology of R&I

Within States
**Treaties, Agreements,
Constructive Arrangements**
Constitutional Law
Statutory Law
Common Law
Contracts

International
Codified International Law
Customary International Law
Agreements
Treaties
Aspirations
UNDRIP
UNDRIP Codified
UNDRIP Non-codified
Contracts

Vienna Convention
Overlapping Subject Matter
Mutually Supportive
Complementary
Conflict of Law
Evolution of Rights

Ecology of IPLC Rights and Interests

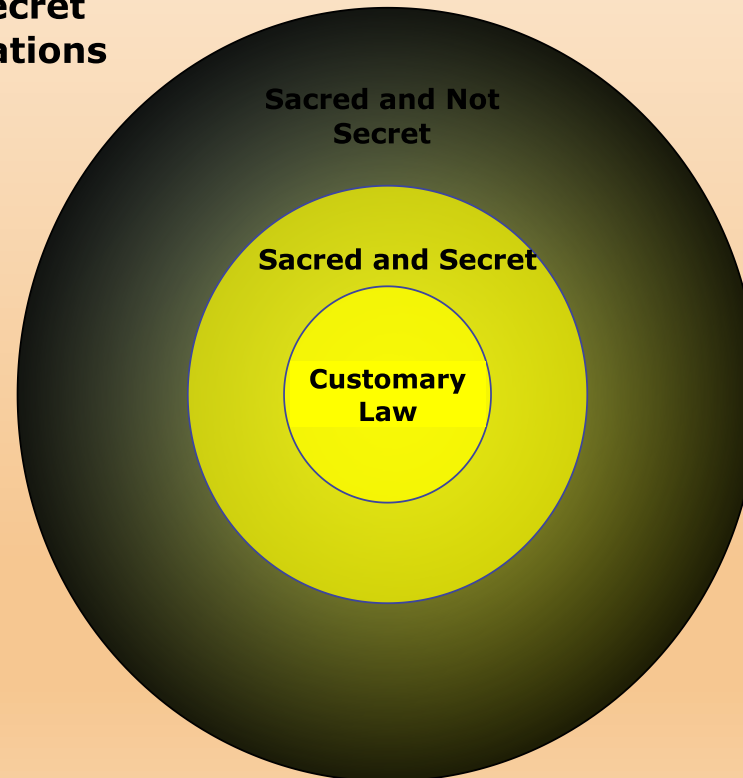
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Nature of R&I

Inherent
Pre-existing
Inalienable
Cultural Heritage
Self-determination
Universal HR

Granted
Civil Law
Alienable
Balancing Tests
Local
Special
IPR



External Ecology of R&I

Within States
**Treaties, Agreements,
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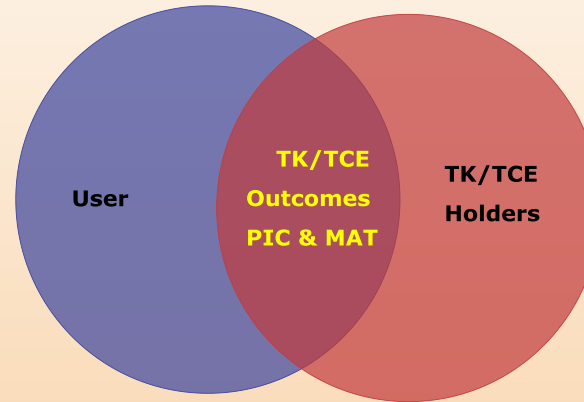
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Ecology of ABS Agreements

Standard TK/TCE Ecosystem

- Decision-focused**
- PIC & MAT in Narrow Context**
- Minimize External Considerations**
 - a. conflicts of law
 - b. risks
- Limited to GRs and Associated TK**
- Limited Time and Spatial Horizon**
 - a. benefit sharing
 - b. risks
 - c. legal issues
- Focus on Benefit Sharing**
- Focus on Legal and Procedural Requirements**



Situational fairness or micro-justice

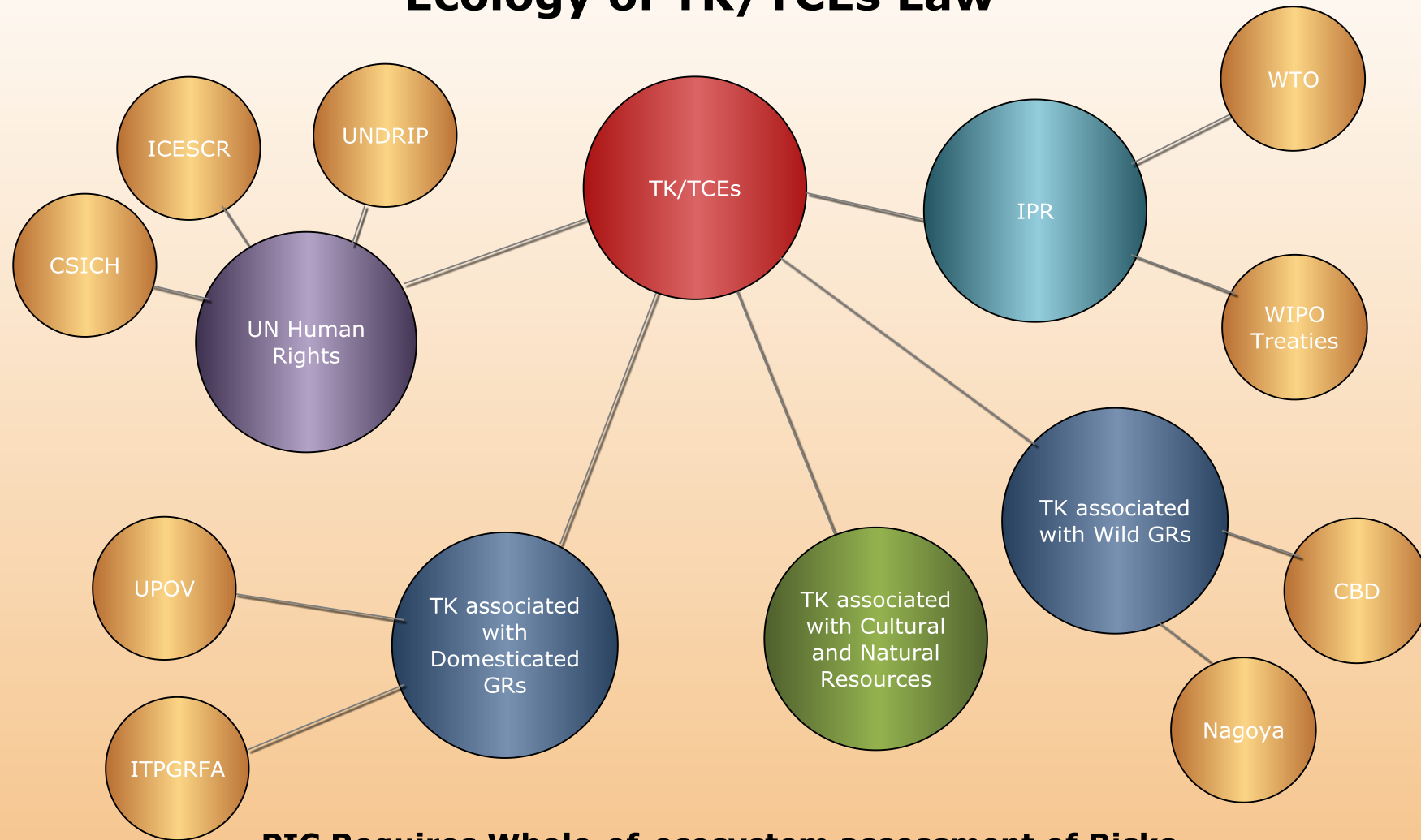
IPLC ABS Ecosystem

- Holistic Solutions to Multiple Problems**
- Long-Term Time and Spatial Horizon**
- Consistency with Customary Law**
- Inalienability, Guardianship, Custodianship**
- ABS Solutions balanced against PIC requirements for Broad Assessment of Risks and Benefits**



Universal fairness or macro-justice

Ecology of TK/TCEs Law



PIC Requires Whole-of-ecosystem assessment of Risks and Benefits

Risks and Benefits vary by Legal, Management, Compliance Contexts and Objectives and for Type of TK/TCEs

Customary Law Principles

- 1. Roles of Indigenous Governments and Knowledge Holders**
 - A. Self-determination / sovereignty**
 - B. Customary law of TK**
 - C. Custodianship/stewardship obligations**

- 2. Worldviews of Indigenous Communities**
 - A. Holistic worldview**
 - B. 7th generation thinking**
 - C. Spirituality**
 - D. Well-being/doing well/living well/vivir bien/sumac kawsay**
 - E. Do no harm**
 - F. Humility, modesty and prudence**

Customary Law Principles

2. Worldviews of Indigenous Communities (Cont)

G. Balance / equilibrium / complementarity

H. Respect

I. Recognition

J. Reciprocity

K. Duality

3. Cultural Norms For Sharing and Protecting TKs

A. Secret/sacred/cultural privacy/individual privacy

B. Confidentiality

D. Fairness and Equity: Situational (micro F&E) and Universal (macro F&E)

E. Empowerment / capacity building

Protections: Knowledge-based

- 1. Loss/Extinction**
- 2. Exclusion**
- 3. Exploitation**
- 4. Erroneously granted property rights**
- 5. Any commercial use**
- 6. Specific commercial uses**
- 7. Commercial use without FPIC**
- 8. Any non-commercial use**
- 9. Specific non-commercial uses**
- 10. Non-commercial use without FPIC**
- 11. Inappropriate / defamatory / disrespectful use (in perpetuity)**
- 12. Spiritually or materially harmful use**
- 13. Co-protection and holistic protection**

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
 - a. Protection by existing or sui generis IP law
 - b. Protection from adverse IP consequences of traditional practices

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
2. **Avoidance of lock-out:** preemption, prejudicial use of copyright terms that limit protections under other instruments (human rights, cultural heritage)

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
2. **Avoidance of lock-out**
3. **Avoidance of lock-in:** freezing past injustices through binding outcomes to past agreements that don't recognize sui generis or evolving human rights regimes (non-retrospectivity)

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
2. **Avoidance of lock-out**
3. **Avoidance of lock-in**
4. **Dispossession/crowding out by definition:** e.g. moral rights, public domain
 - a. Moral rights as a copyright concept does not capture all of the rights associated with TK/TCEs as cultural heritage and human rights
 - b. Public domain, similarly, constitutes the exhaustion of rights
 1. Leads to paradox of exhaustion of economic rights with continuation of non-economic rights. Do not know what this means.

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
2. **Avoidance of lock-out**
3. **Avoidance of lock-in**
4. **Dispossession/crowding out by definition**
5. **Dispossession/crowding out by expansion of scope:** unqualified use of terms (e.g. public domain, common heritage of human kind, broader interests of society, inappropriate balancing tests)

Protections: International Law

1. **Recognition of harms and recognition of benefits compatible with customary law**
2. **Avoidance of lock-out**
3. **Avoidance of lock-in**
4. **Dispossession/crowding out by definition**
5. **Dispossession/crowding out by expansion of scope**
6. **Non-regression and progressive realization of human rights and existing rights and interests:** recognition of indigenous peoples and the progressive realization of the rights and interests of indigenous peoples

Cross-cutting Issues

- 1. Indigenous Peoples**
- 2. Definition of traditional: Characteristics approach**
 - a. In UNDRIP there is no definition of indigenous peoples**
 - b. Despite 25 years of work, no complete description available**
 - c. Many fundamental concepts in IP law undefined or partially defined (e.g. fair use)**
- 3. Beneficiaries: Indigenous peoples and local communities in terms of control, FPIC and MAT**

Cross-cutting Issues

4. Nature of the rights: Beyond right to say no and right to compensation

- a. Right to control the decision over sharing**
- b. Right to control for of benefit sharing**
- c. Right to control future uses of the shared knowledge**

5. Public availability / widely diffused

- a. Attributable**
- b. Non attributable**
- c. IP balancing tests versus inherent rights, comity, courtesy, legal reciprocity and mutual accommodation**
- d. Balancing tests versus proportionality**
- e. Public domain**
 - 1. No International law of the public domain**
 - 2. Why is it in the public domain? Past injustices, negotiated solutions**

Cross-cutting Issues

- 6. Protection must be holistic and complementary**
- 7. Protection must be responsive to status: Granted rights, inherent and inalienable rights, inherent and alienable rights.**
- 8. In regards to Indigenous Peoples: UNDRIP and ILO169 should be used as minimum standards.**

Conclusions

1. Use of UNDRIP and ILO169 and a set of minimum standards for the construction of a sui generis regime
2. Promote recognition of IPLC customary laws and rights to FPIC & MAT
3. Measures to balance the assessment of risks as well as benefits for implementing prior informed consent
4. Measures to improve the mutual supportiveness / consistence of ABS with other measures for the protection of TK/TCEs. Some Guiding Principles:

Principle of Non-Maleficence: First, do no harm

Principle of Progressive Realization / Principle of Non-regression

Principle of Holism

Principle of Proportionality

Principle of Resolution of Conflicts of Law / Principle of Most Beneficial Interpretation

Principle of Place- and Resource-based Solutions

Principle of Mutual Accommodation

Principle of Comity

Principle of Mutual Supportiveness between Competing Regimes