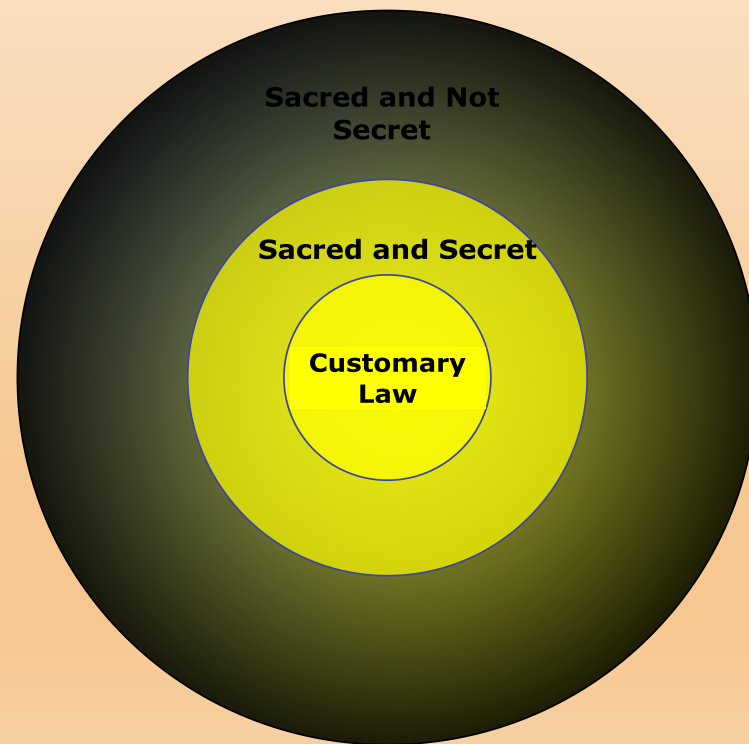


Preston Hardison
Tulalip Tribes
Seminar on Genetic Resources and
Traditional Knowledge

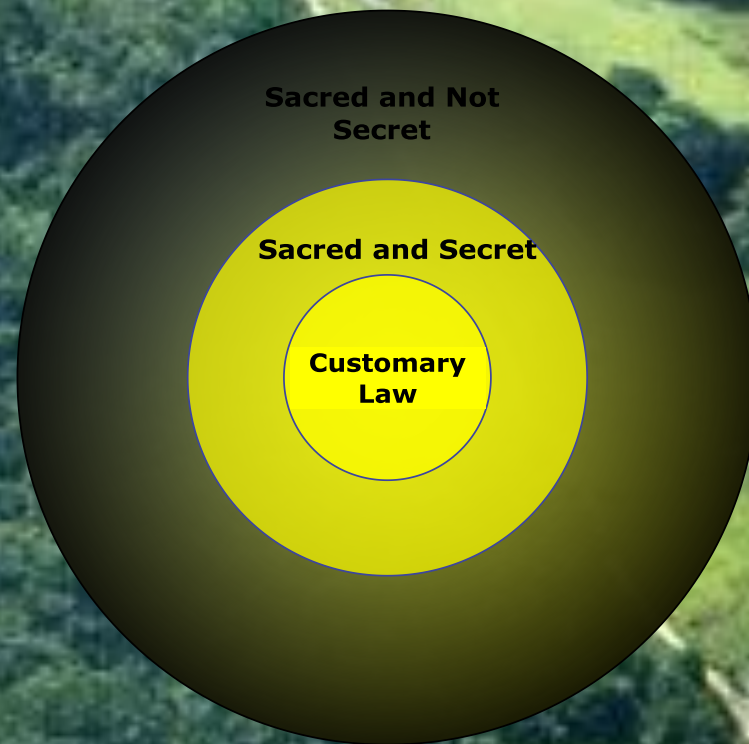
Policy Objectives that Meet Multiple Aspirations

BEYOND THE INTELLECTUAL PROPERTY SYSTEM AND ABS

Ecology of IPLC Rights and Interests



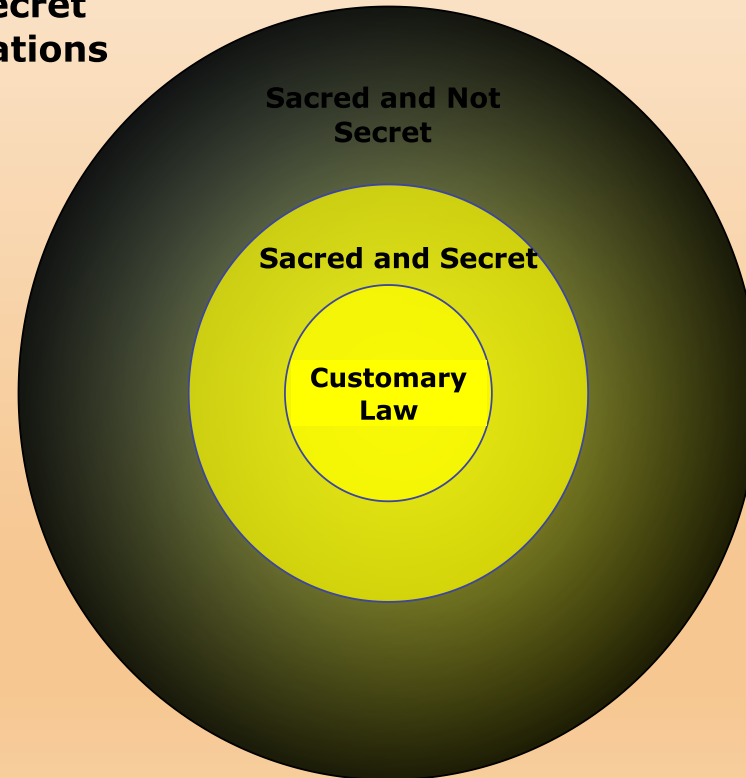
Ecology of IPLC Rights and Interests



Ecology of IPLC Rights and Interests

Internal Ecology of R&I

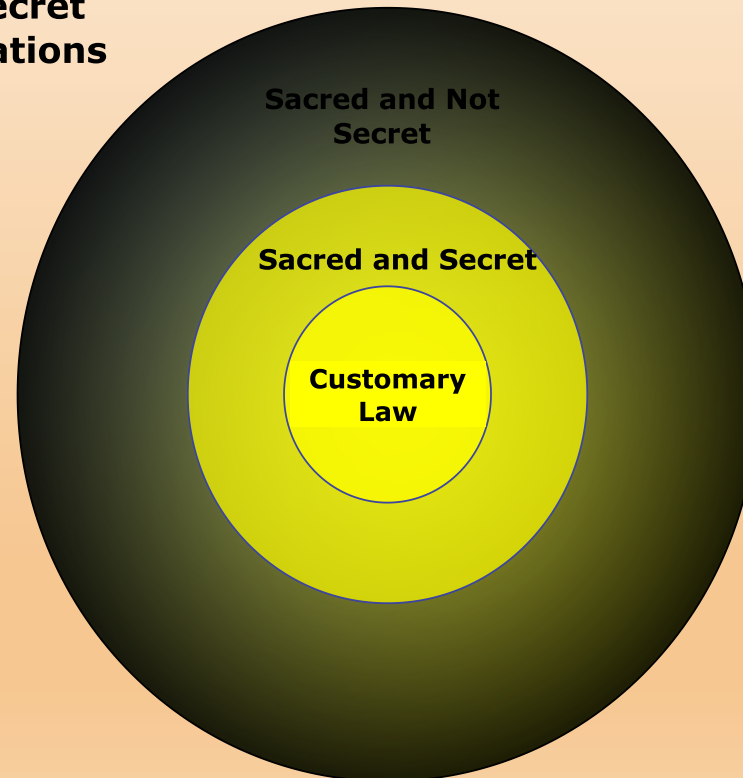
Customary Law
Teachings of the Ancestors
Law of the Creator
Traditional Beliefs, Knowledge
and Practices
Sacred and Secret
Sacred and Not Secret
Stewardship Obligations



Ecology of IPLC Rights and Interests

Internal Ecology of R&I

Customary Law
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**Traditional Beliefs, Knowledge
and Practices**
Sacred and Secret
Sacred and Not Secret
Stewardship Obligations



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

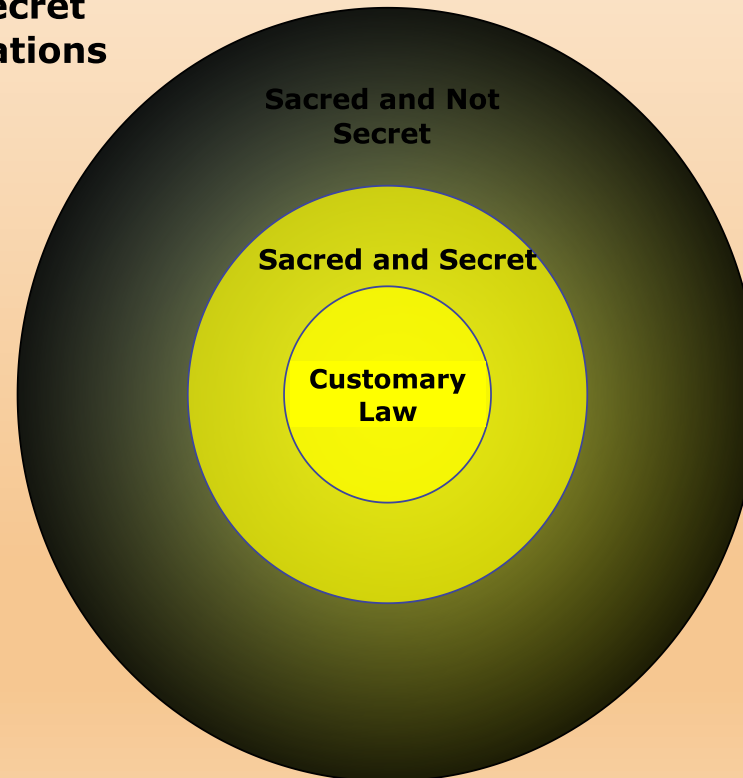
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Sacred and Secret
Sacred and Not Secret
Stewardship Obligations

Nature of R&I

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

Granted
Civil Law
Alienable
Balancing Tests
Local
Special
IPR



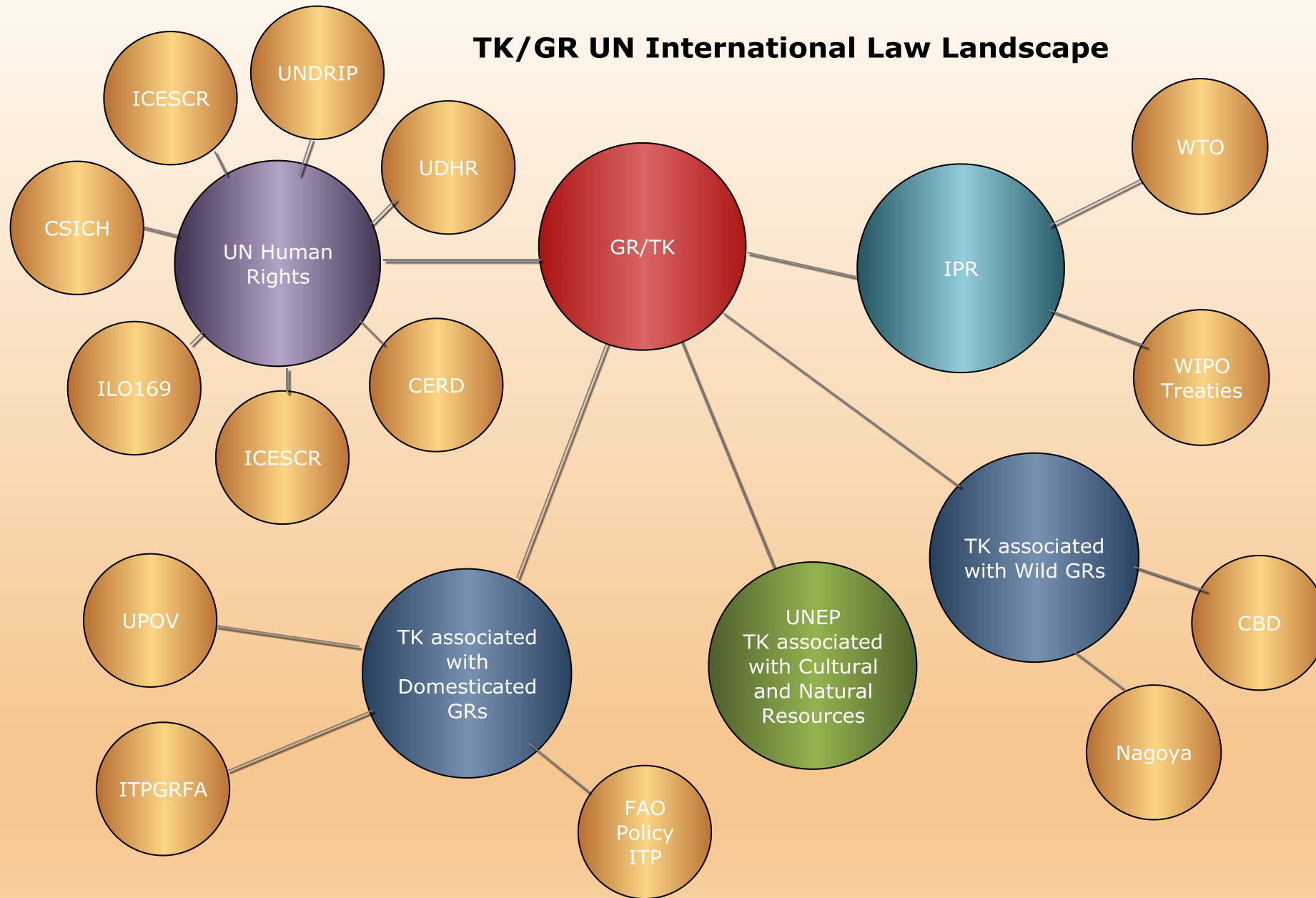
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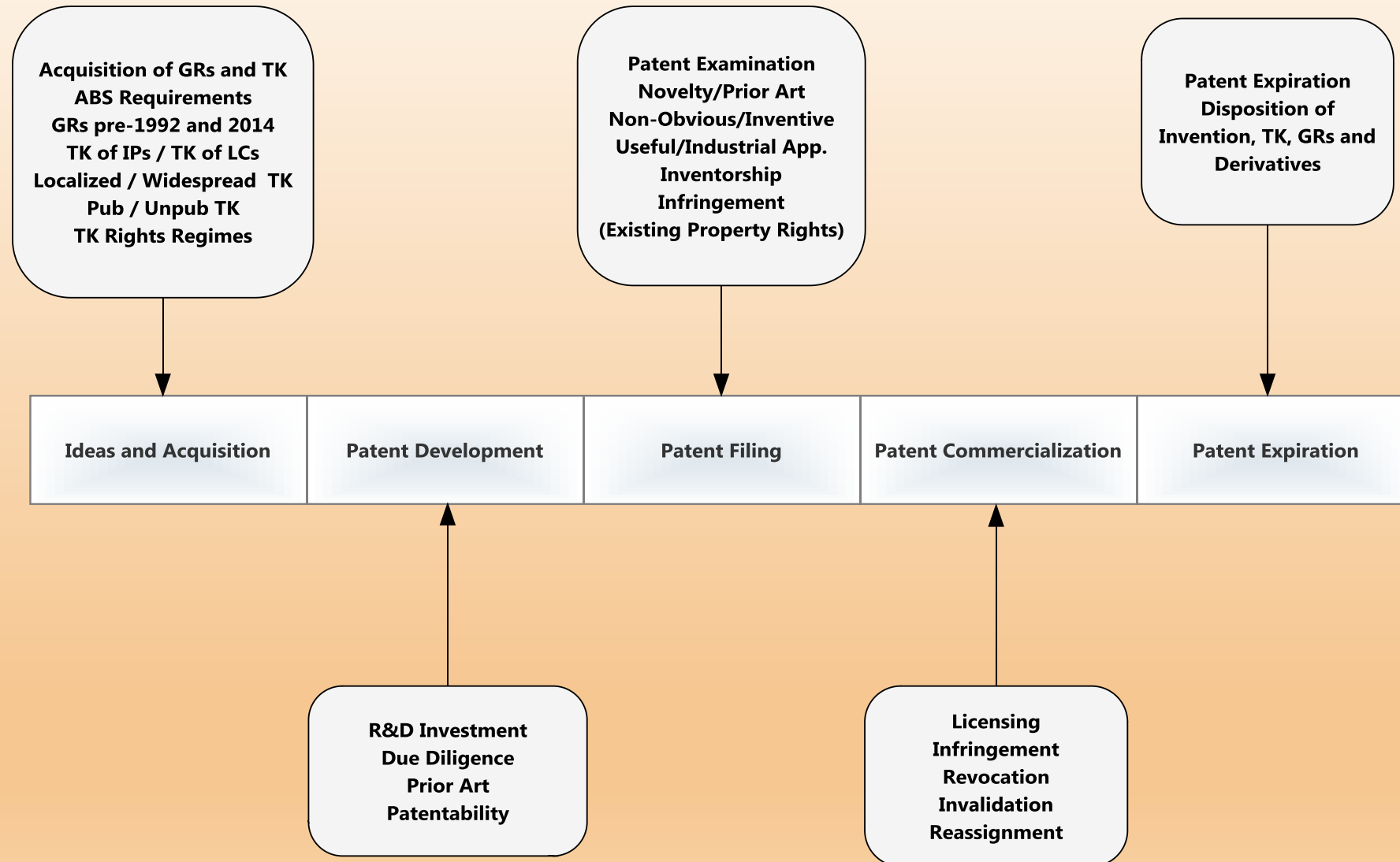
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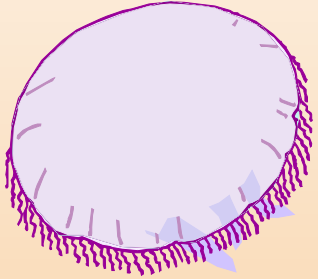
TK/GR UN International Law Landscape



The Patent Life Cycle



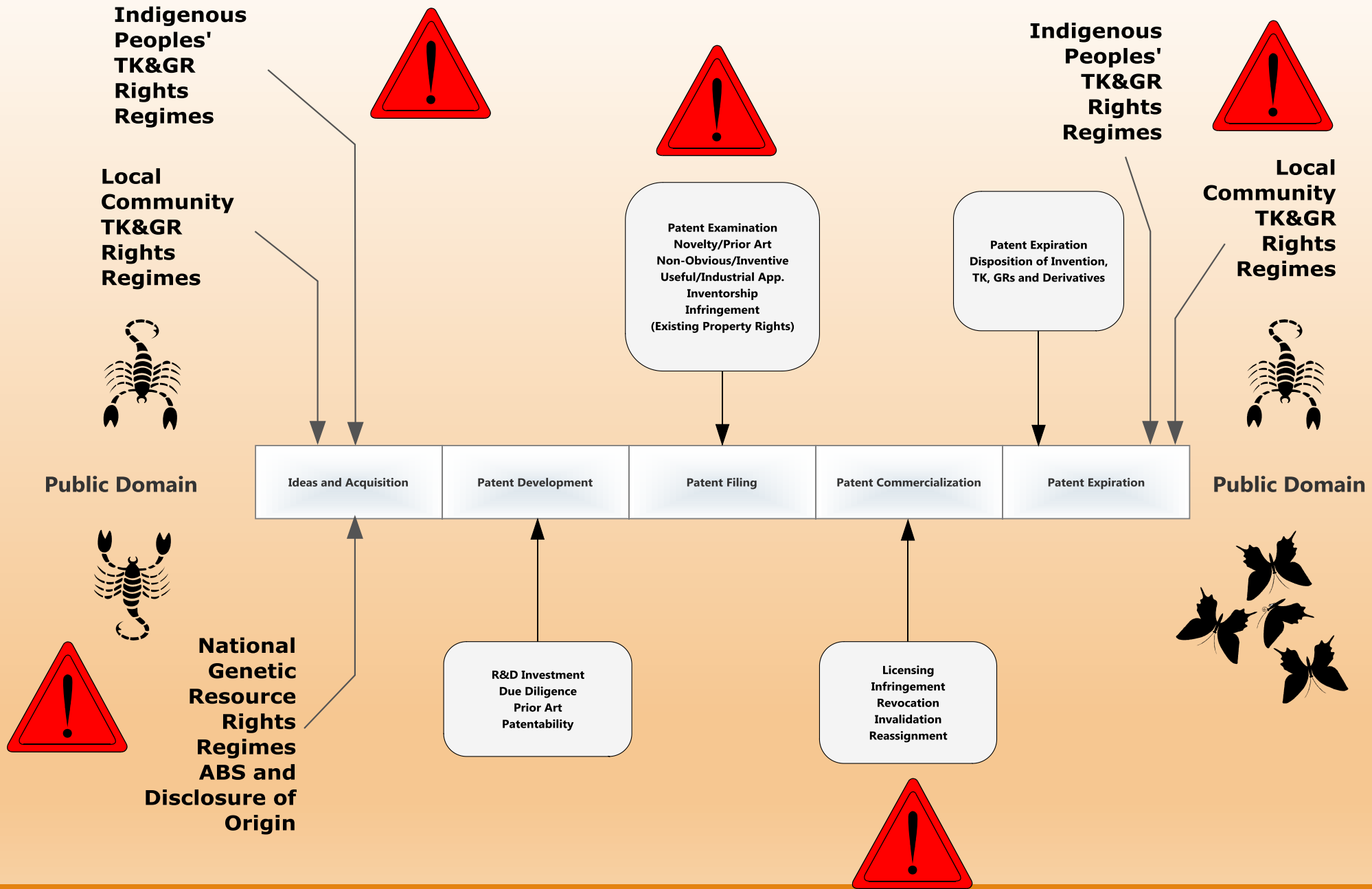
The Halcyon Days of IP



Public Domain



Public Domain



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 as cultural heritage and human rights
 - b. Public domain, similarly, constitutes the exhaustion of rights

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. Access and benefit sharing has some significant limitations**
 - a. Front loaded – looks mostly at procedural justice for contracts
 - b. Market-based does not capture a range of expressed aspirations
 - c. Leads to outcomes where benefits are exhausted and control is lost
 - d. IPR-based ABS may not serve benefits for larger societies, or benefit many IPLCs over the long term
 - e. Benefits from knowledge sharing v practices
 - f. Underestimates potential harms to IPLCs: Lack of protection against non-IP, non-monopolistic misuses and misappropriation of the cultural resources or heritage associated with traditional knowledge

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. **Limitations of Access and benefit sharing**

6. **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. **Limitations of Access and benefit sharing**
6. **Dispossession/crowding out by expansion of scope**

7. **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 v. Local Communities**
- 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**
- d. Right to say no, and to provide benefits through practice**

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?**

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. Care must be taken in applying the public domain, or referring to claims that larger majorities may make against the cultural heritage of minorities**
- 9. In regards to Indigenous Peoples: UNDRIP and ILO169 should be used as minimum standards.**

Conclusions

Policy Objective 3, as currently developed, is inadequate:

c. [Ensuring] [promoting] [facilitating] [complementarity] [mutual supportiveness] with international agreements relating to the protection of genetic resources [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources] [and those relating to IP].

The policy must also:

Ensure that measures undertaken for patent review respect international agreements and constructive arrangements within states for the protection of the rights and interests of indigenous peoples and local communities, including, inter alia, human rights, cultural rights, collective rights and other issues that make a contribution to human dignity