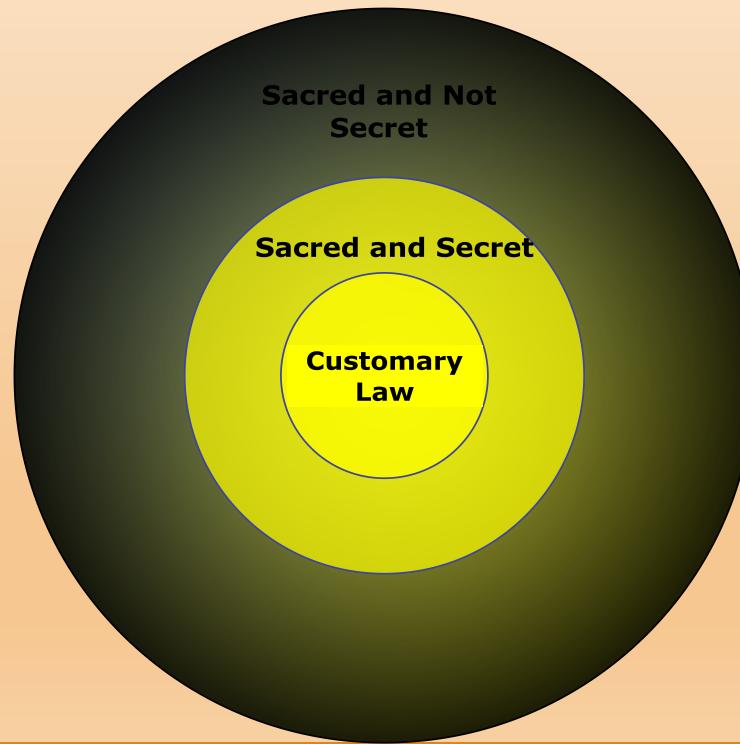


Preston Hardison
Tulalip Tribes
IGC 27 Indigenous Panel

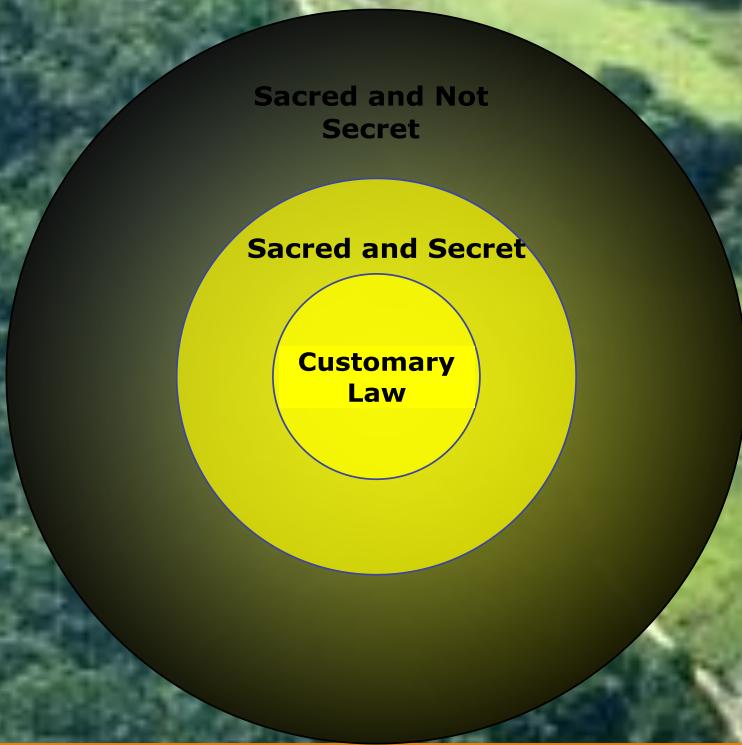
Accounting for the Legal and Social Ecology of TK/TCEs in IP Instrument(s)

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

Ecology of IPLC Rights and Interests



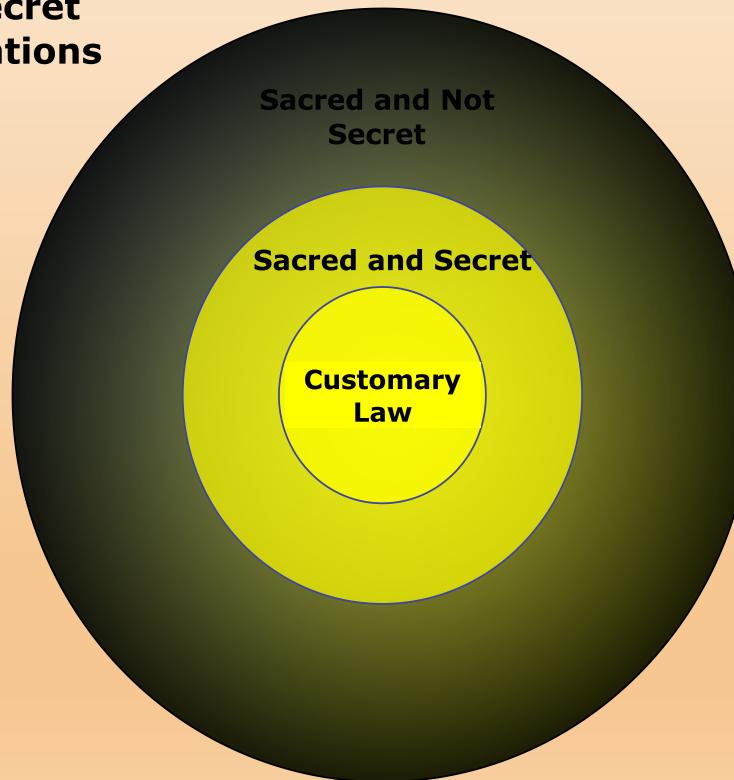
Ecology of IPLC Rights and Interests



Ecology of IPLC Rights and Interests

Internal Ecology of R&I

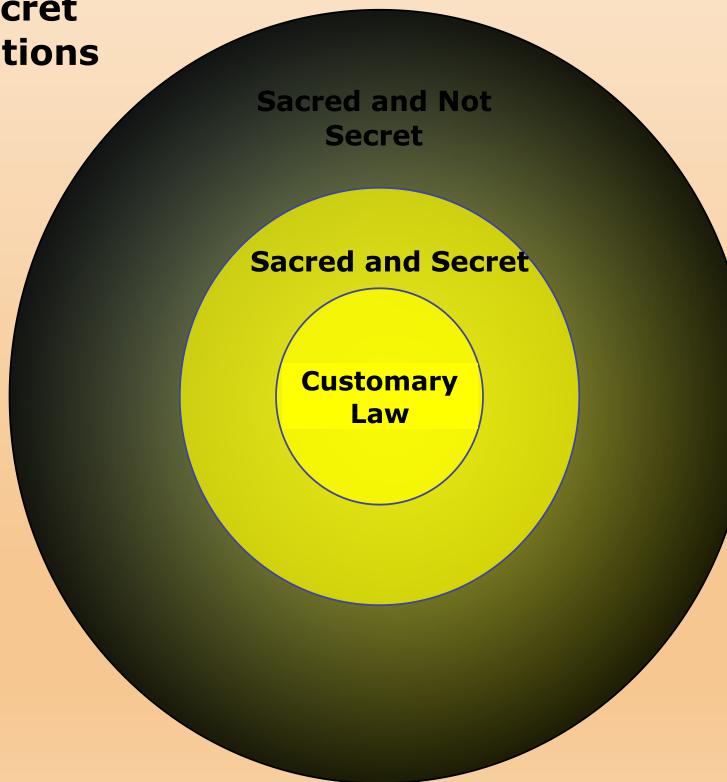
Customary Law
Teachings of the Ancestors
Law of the Creator
**Traditional Beliefs, Knowledge
and Practices**
Sacred and Secret
Sacred and Not Secret
Stewardship Obligations



Ecology of IPLC Rights and Interests

Internal Ecology of R&I

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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
UNDROP
UNDROP Codified
UNDROP Non-codified
Contracts

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

Ecology of IPLC Rights and Interests

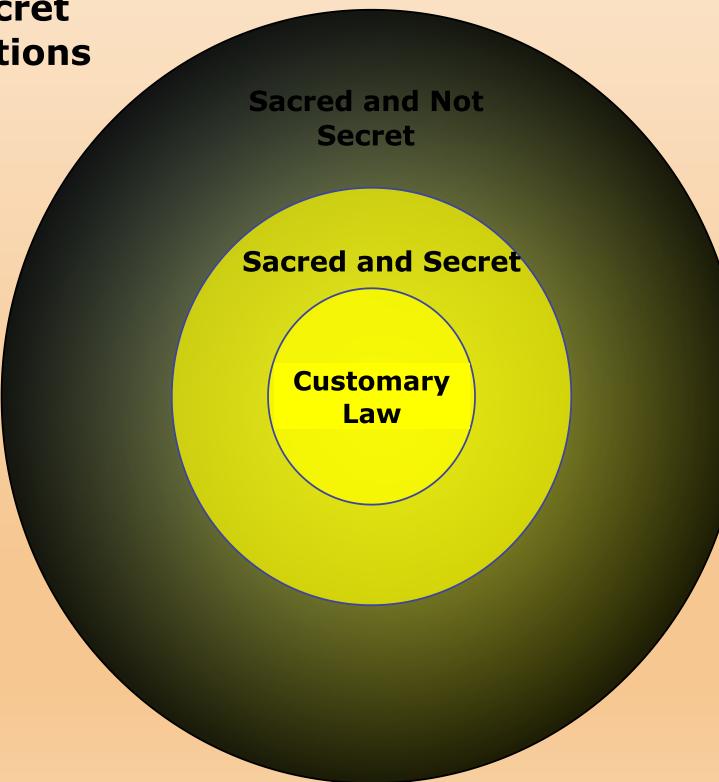
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Nature of R&I

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, Constructive Arrangements
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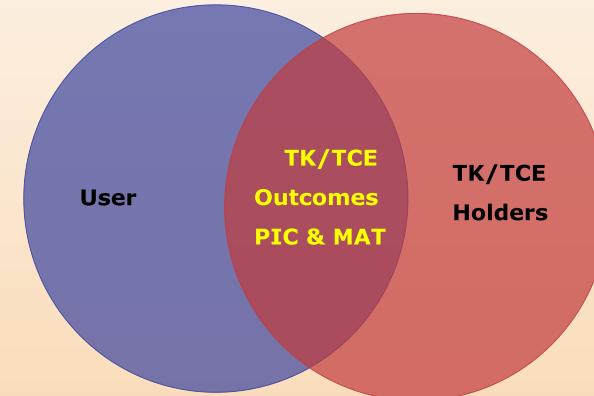
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Ecology of ABS Agreements

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

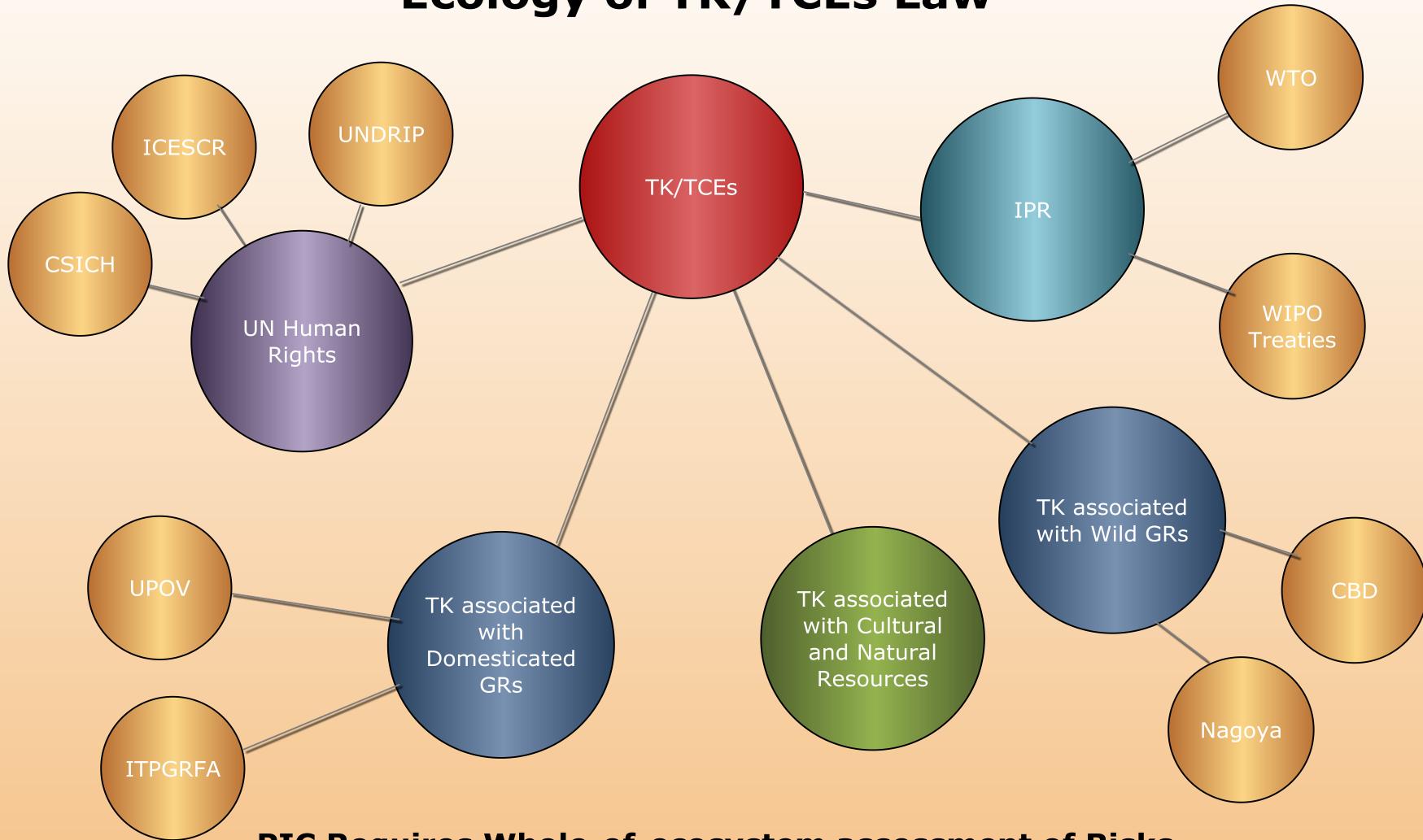
IPLC ABS Ecosystem

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 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