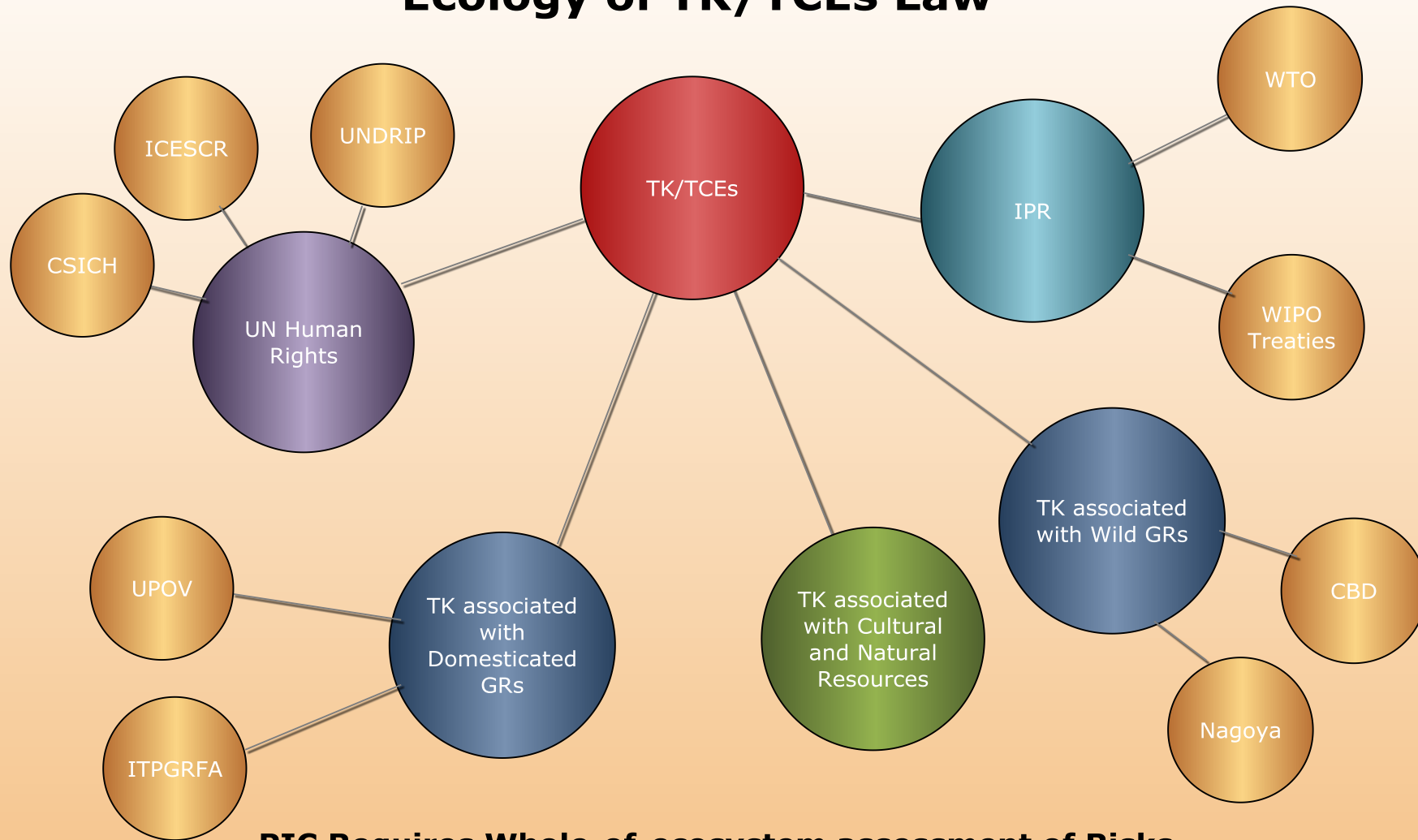


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The Unfocused Gaze

RESOLVING GAPS WILL REQUIRE A MORE CRITICAL EXAMINATION OF
CONCEPTS AND RESPECT FOR MULTIPLE LEGAL DOMAINS APPLYING TO
TRADITIONAL CULTURAL EXPRESSIONS

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

Policy Objectives

- 1. Focus on the mandate: protection**
- 2. If strong protection is achieved based on the rights, interests and obligations of the TCE holders, then the rest (development agenda, commercial use, benefits to others can be achieved).**
- 3. Misappropriation: to take something dishonestly for one's own use; to make unauthorized use of something; to use wrongfully. Misappropriation can make use of moral and other rights.**
- 4. Unlawful appropriation: Risk of lock-in of historical injustice, where the existence or lack of existence of a national law.**

Subject Matter

- 1. Time frame is arbitrary, and would seem to block protections for innovations based on traditional cultural expressions, as the innovations would be too young for protection.**
- 2. If not protected at the point of innovation, how would they ever get to be protected?**
- 3. Are innovations subject to appropriation during the period of non-protection?**

Scope of Protection

- 1. Rights-based and measures based are not mutually exclusive.**
- 2. Objection often made that WIPO is not a competent body to generate human rights.**
- 3. WIPO is a perfectly competent body to ensure its members observe them. Members are bound by the obligations they have made in other fora.**
- 4. Rights extend beyond the moral rights of the copyright system (right of attribution, right to anonymity, right to the integrity of a work).**
- 5. These rights cannot be extinguished by a WIPO instrument (non-derogation)**

Tiered Approach

- 1. TCEs are subject to multiple right-based and other instruments ("constructive arrangements with states") related to its holders**
- 2. Indigenous Peoples are often the subjects of considerable national law (constitutional, treaty, statutory) and the distinct subjects of international law (UNDRIP) in a way that local communities may not be - principally the right of self-determination.**
- 3. Indigenous peoples have rights that are inherent, pre-existing the state, and they are said to be legally recognized and respected, not granted by states. Indigenous peoples have a long history of self-governance and self-identification as peoples. Their expressions are not simply expressions, but bound to governance, identity, dignity and integrity and woven into rituals, practices, spiritual beliefs, stories, practices, and ceremonies.**

Tiered Approach

- 1. Local communities occur under a much wider set of circumstances. In the Convention on Biological Diversity, the legal subject to those "embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."**
- 2. "Balancing rights and interests among stakeholders" of equal standing is not factually true in many cases.**
- 3. Although the tiered approach can solve some problems, the tiers will not be able to be constructed for self-determined peoples without their consent.**

Tiered Approach

- 1. Indigenous peoples may consider all of their traditional cultural expressions to be sacred. Being widely available or distributed does not take away from the spiritual, sacred nature of the TCEs.**
- 2. These also take the view that "once in the public domain, always in the public domain," with little appreciation for the potential for clawback, or transitional measures in which cultural and control rights to already available traditional cultural expressions could be returned over time.**
- 3. If workable at all, tiers would have to be worked out domestically with the free, prior and informed consent of the TCE holders.**

Beneficiaries

- 1. States as beneficiaries creates significant conflict with individual and collective rights to identity, found in the Charter of the United Nations and numerous human rights instruments (UDHR, ICSESCR, ICCPR, UNDRIP).**
- 2. States as beneficiaries would complicate the regime enormously, as it would make the “volume” of intellectual property to be covered by the regime very large (any TCE from the local to national characteristics shared by millions).**
- 3. The IGC has discussed a role for being an administrator of benefits, if so desired by indigenous peoples and local communities.**

Use and Meaning of Certain Concepts

- 1. One definition of misappropriation has cryptic sui generis regime embedded in it.**
- 2. Defining away rights to traditional knowledge from "reading books" would constitute a sweeping sui generis creation of an international public domain in traditional knowledge where none exists now, by essentially defining all published traditional knowledge as being in the public domain.**
- 3. "Receiving from sources outside of intact traditional communities" privileges individual rights against collective rights, and creates a major conflict of law with existing human rights law.**
- 4. "Failure to take reasonable protection measures" imposes substantive trade secret requirements on traditional knowledge.**

Public Domain

- 1. Romantic public domain trope (Anupam Chander and Madhavi Sunder, 2004).**
- 2. Intangible cultural heritage protection seen as a form of censorship or abridgment of rights of freedom of expression.**
- 3. Enclosure of the (local/limited) commons can be just as unjust as enclosure of the commons.**
- 4. Differences in wealth, power, access and ability to exploit.**
- 5. Differences in vulnerability to the exploitation.**
- 6. Implied duty to make TCEs / TK available to the public domain.**

Public Domain

Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain July 09, 2003

The existence of traditional knowledge (and traditional cultural expressions) "in the "public domain" has not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use."

Traditional Knowledge Text Preamble

- 1. (vii) Recognize and protect that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and that this right may not be subject to distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.]**
- 2. Mixes Article 2 and Article 27(a) of the Universal Declaration on Human Rights**
- 3. Equivocates idea of “community” with concept of “one’s own community”**

Traditional Knowledge Text Preamble

- 1. Seems to promote a hierarchy of human rights, with individual rights having supremacy over collective rights.**
- 2. Omits 27(b): Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**
- 3. International Covenant on Civil and Political Rights Article 27 recognizes the rights of ethnic, religious or linguistic minorities to enjoy their own culture. The Human Rights Committee in its General Comment N 23 concerning Article 27 states that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights to which individuals are already entitled under the Covenant.**

Traditional Knowledge Text Preamble

- 1. "Reaffirming further that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis" United Nations General Assembly A/RES/60/251, 3 April 2006, Sixtieth session 60/251, Human Rights Council.**
- 2. Reaffirming that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.**

United Nations Declaration on the Rights of Indigenous Peoples

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

UNDRIP

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

UNDRIP

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8

- 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.**
- 2. States shall provide effective mechanisms for prevention of, and redress for:**
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;**

UNDRIP

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

UNDRIP

Article 11

- 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.**
- 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.**

UNDRIP

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

AAAAA

Article 15

- 1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.**
- 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.**

UNDRIP

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.

UNDRIP

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

UNDRIP

Article 31

1. Indigenous peoples have the 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, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

UNDRIP

Article 33

- 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.**
- 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.**

UNDRIP

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

UNDRIP

Article 37

- 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.**
- 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.**

UNDRIP

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

UNDRIP

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.