

Preston Hardison

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Access and Benefit Sharing [and Protection from [Cultural] Harms]

ECOLOGY OF ABS - CUSTOMARY LAW, COMMUNITY BIOCULTURAL
PROTOCOLS, PRIOR INFORMED CONSENT AND CULTURAL SURVIVAL



Ecology of IPLC Rights and Interests

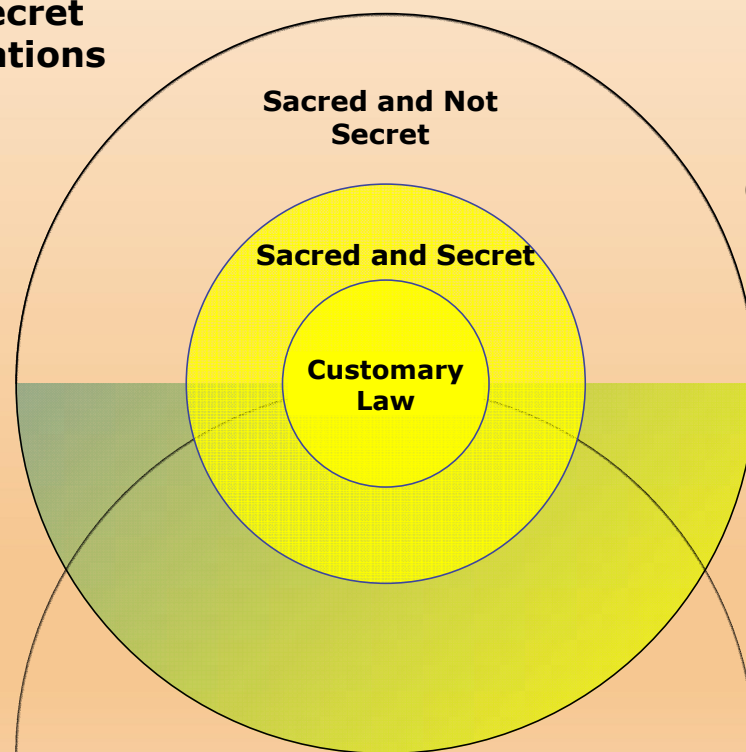
Internal Ecology of R&I

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

Nature of R&I

Inherent
Pre-existing
Inalienable
Cultural Heritage
Self-determination
Universal

Granted
Civil Law
Alienable
Balancing Tests
Local
Special
IPR



External Ecology of R&I

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

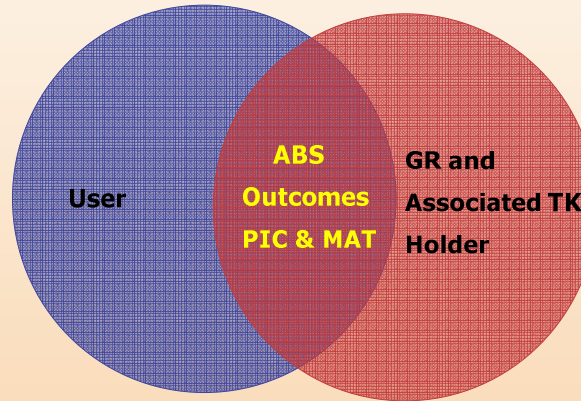
International
Codified International Law
Customary International Law
Agreements
Treaties
Aspirations
UNDRIP
Contracts

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

Ecology of ABS Agreements

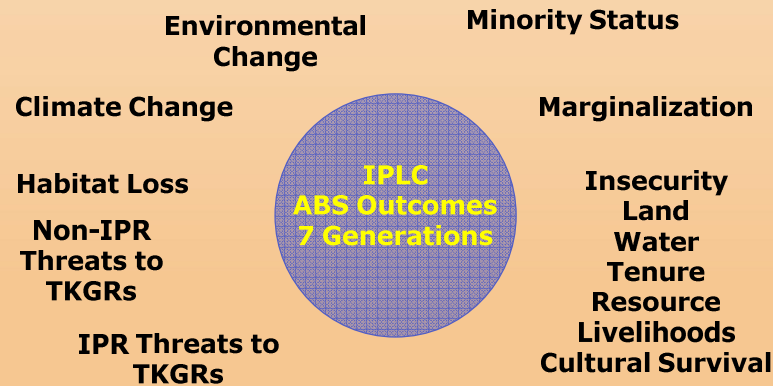
Standard ABS Ecosystem

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

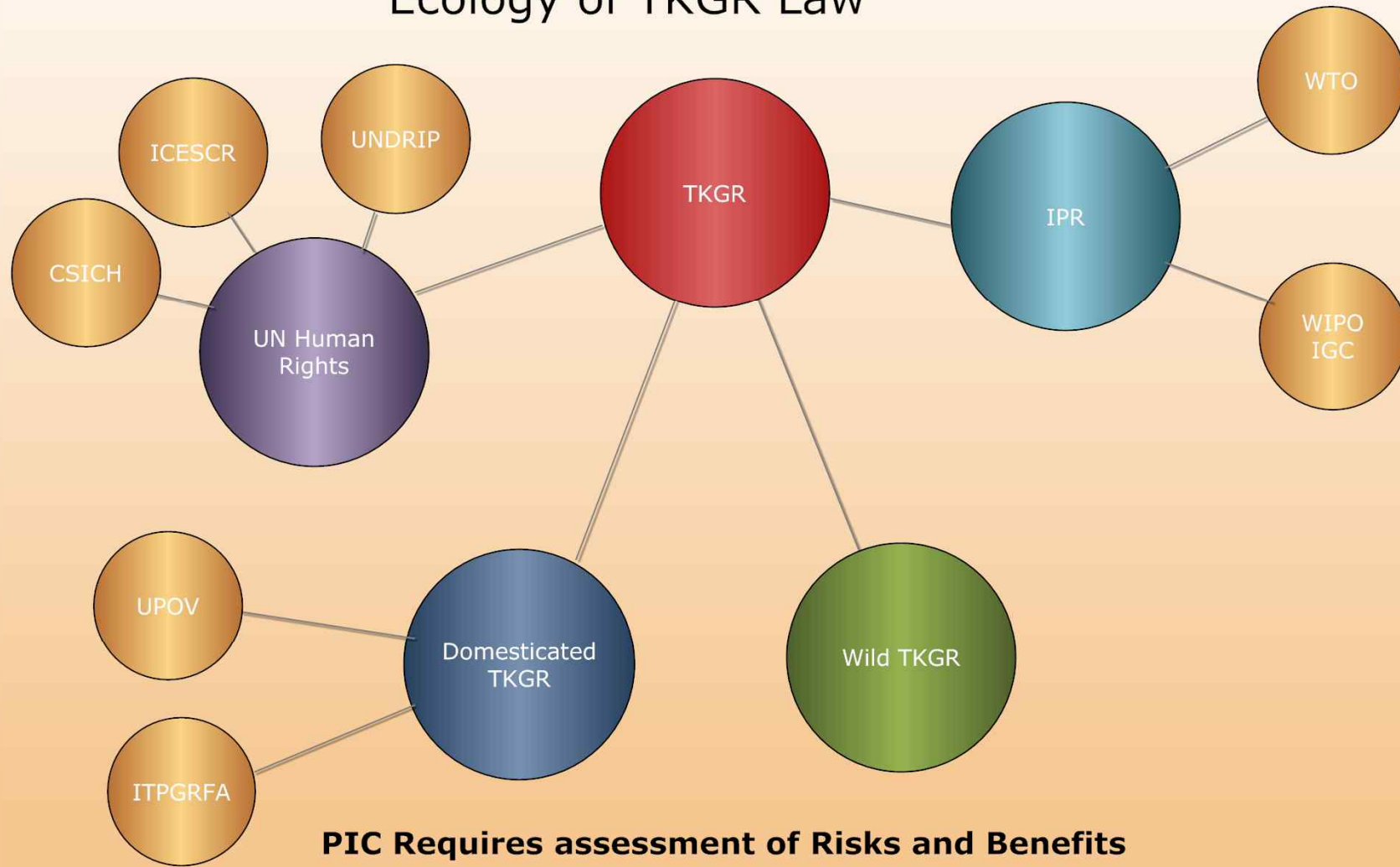


IPLC ABS Ecosystem

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



Ecology of TKGR Law



PIC Requires assessment of Risks and Benefits

Risks and Benefits for ABS Vary by Legal, Management, Compliance, Life-history Contexts

Community Biocultural Protocols

1. How IPLCs wish to be contacted
2. PIC: Procedural Safeguards
3. MAT: Restrictions on uses
customary law, collective ownership
“contracting into custom” – reciprocity, respect, etc.
4. Restrictions on transfers
5. Checkpoints for changes in use
6. Ongoing responsibilities for consultation, negotiation, monitoring, reporting
7. Flexibility to meet different aspirations and contexts

To make these works requires close attention to the legal, policy, management, compliance, cultural ecology of each situation to fully enable the protocols, with a long-time horizon for outcomes. Protocols are covenants, not checklists.



Conclusions

The creation of national ABS is gaining momentum, with recognition of IPLC rights to PIC & MAT

Measures to balance the assessment of risks as well as benefits for implementing prior informed consent

Measures to improve the mutual supportiveness / consistence of ABS with other measures for the protection of TKGRs (Ecology of ABS):

Guiding Principles:

Principle of Non-Maleficence: First, do no harm

Principle of Progressive Realization / Principle of Non-regression (NP Article 4.1)

Principle of Holism

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

Principle of Place- and Resource-based Solutions

Article 4.1:

The provisions of this protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.

Failing to take into full account potential cultural harms and transgressions of customary law is not simply a parallel issue, but can directly harm biological diversity by eroding the ability of its guardians to safeguard it.