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Modern Problems, Colonial Past: Construction of Ethnic Minorities by the Vietnamese State

by Minh Son To | 4843 words

Introduction

> "[...] My weary brother walks no more,
>
> Dropping gun and helmet, he forgets about life!
>
> Afternoon, majestic waterfall roars,
>
> Midnight, *Mường Hịch* tigers mock men.
>
> I remember ***Tây Tiến,*** smokes of cooking rice,
>
> Of *Mai Châu* in season, flagrant with sticky rice.
>
> The camp lit in a festival of torches,
>
> Look – you in your traditional costume since when.
>
> The *khene* singing ethnic melodies, she was coy,
>
> Music came to *Viên Chăn*, poetic feeling enkindled. [...]"

Written in 1948, *Tây Tiến (Marching West)* is a poetic remembrance by Quang Dung on his experience in the army. He recalls the pristine but poetic nature of Northwestern Vietnam and its ethnic people who mingled in fraternity with the troops that braved through jungle diseases. In their military camp, cultural performances were held, ethnic people dressed in traditional costumes, and the troops rejoiced. One ethnic girl reappeared to the author – a Kinh – as coy *(e ấp)* in her cultural wear, dancing in the ethnic tunes of the *khene*. Her perceived exoticism, filtered through Kinh romantic sensibilities, became alluring, almost coquettish.

These moments of aestheticization are part and parcel of the literature common curriculum of Vietnam. They would be subject to endless exercises of 'literary appreciations' (*cảm thụ văn học*) from both students and teachers, often constrained to repeat and praise the romanticism above. (Detractions are unwelcome, penalized by a likely grade decrease.) These 'literary appreciations' have become a trope in Vietnamese education, accepted by its participants as something to be done to fulfill the state-assigned curriculum. This collegiality towards ethnic minorities remains an indelible – refused to be delible by the State – mark of Vietnamese national history, insistent on its unity against foreign invasions.

However, beyond the textbooks are more than just an indifferent audience but conflicting visions of ethnic minorities by the state and the Kinh majority. In line with the above aestheticization, tourism pamphlets and brochures present to domestic and international visitors exotic and natural landscapes of high mountains, picturesque rice terraces, and smiling ethnic women with children on their backs. Where the public has some leeway about their genuine feelings – the Internet – problematic caricatures and jokes of ethnic minorities as simple-minded are found on entertainment YouTube videos and Facebook pages.[1] Beyond inter-ethnic fraternity, more towards hierarchy, the Vietnamese state reproduces an equally popular image of the poor and uncivilized minorities, their perennial predicaments further necessitating aid programs.[2] Non-governmental organizations (NGOs) also support this imagery, albeit more implicit in moralizing intentions via 'impartial' development and graphs of perpetual poverty.[3] More critical – and thus less known – depictions put forward evidences of human rights violations and repression of more radical minorities who claim autonomy,[4] whom the state knows to exist but are veiled as 'sensitive' (*nhạy cảm)* topics not open for outsider discussions or 'complicated' *(phức tạp)* subjects that not everyone can discuss.[5] Common among these conflicting visions is a voiceless minority, whose needs and realities remain unarticulated and must be spoken for by outsiders; a predicament eerily similar to the colonial relations of not long ago.

In an attempt to sort through these visions and identify a genealogy of the construction of the ethnic minority in Vietnam, this essay asks: ***How has the Vietnamese state constructed its ethnic minorities under the perennial agendas of unification and modernization?***

This essay will consist of two sections focusing on the place of ethnicities in the wartime and post-unification periods. Though continuities of policy and ethnological concerns are present across both periods, there are different directions of state agenda. The first section tracks the introduction of ethnicity by French colonists to 'civilize' a precolonial setup of Vietnam, to the re-appropriation of ethnicity by Vietnamese revolutionaries in pursuit of a unified nation-state. The second section tracks a

[1] Thúy Hồng. [Wrong images of ethnic minorities in the media: Needs for strict sanctions.] Đưa Hình ảnh sai lệch về người DTTS trên phương tiện truyền thông: Cần có biện pháp xử lý nghiêm. [Ethnicity & Development] Dân tộc và Phát triển. Accessed at. http://baodantoc.vn/dua-hinh-anh-sai-lech-ve-nguoi-dtts-tren-phuong-tien-truyen-thong-can-co-bien-phap-xu-ly-nghiem-1586272786863.htm

[2] [Parliamentarian Opinion: Promoting comprehensive development of ethnic minority areas.] GÓC NHÌN ĐẠI BIỂU: THÚC ĐẨY PHÁT TRIỂN TOÀN DIỆN VÙNG DÂN TỘC THIỂU SỐ. Website of the Vietnamese Parliament. 27 December 2019. Accessed at http://quochoi.vn/hoatdongdbqh/pages/tin-hoat-dong-dai-bieu.aspx?ItemID=43587

[3] Ethnic minorities and indigenous people. OpenDevelopment Vietnam. 30 March 2013. Accessed at: https://vietnam.opendevelopmentmekong.net/topics/ethnic-minorities-and-indigenous-people/

[4] Violations of the Rights of Ethnic and Religious Minorities In the Socialist Republic of Vietnam. Vietnam Committee on Human Rights. 2012. Accessed at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/VNM/INT_CERD_NGO_VNM_80_10313_E.pdf

[5] [Detailed instructions for special subject of 'the ethnic problem and ethnicity policies'] Hướng dẫn chi tiết chuyên đề "Vấn đề dân tộc và chính sách dân tộc". Central Propaganda Department of the Communist Party of Vietnam. 14 October 2017. Accessed at http://tuyengiao.vn/tu-lieu/huong-dan-chi-dao/huong-dan-chi-tiet-chuyen-de-van-de-dan-toc-va-chinh-sach-dan-toc-105830

re-ethnicization of Vietnam by the new Socialist Republic in consolidating and territorializing its new nation-state, with ethnic minorities gradually reconstructed in the Kinh socialist image. In the socialist-oriented market economy introduced by the 1986 *Đổi Mới* reforms, ethnic incivility is entrenched not just by the state but also by a touristic gaze and new materialistic interests. In both periods, the civilizing discourse, albeit of different forms, nonetheless drastically reconfigures ethnic minorities.

Ethnicity before the Socialist Republic of Vietnam

'Barbarians' in the Frontiers of Precolonial Vietnam

Before ethnic people – the *concept* of ethnicity – came to the shores of Vietnam, there had always been aboriginal or indigenous people living alongside dynastic rulers, occupying the grey areas of frontiers rather than well-defined borders of today's nation-states.[6] As the Vietnamese pushed southward from the 11th to 19th century, it had brought under its rule increasingly diverse people, notably the Cham and Khmer in what is now Central and Southern Vietnam. The final pushes of the Nguyen dynasty gave Vietnam its elongated territory close to today, with a long coast and thin width occupying diverse geographies. Center-periphery relations then were not described in concrete ethnological terms, but rather by geographical associations – the dichotomy of Highlands and Lowlands was more salient then.[7] The people occupying the highland frontiers were viewed by the Vietnamese court as border or upper barbarians (*mọi* or *man*), yet to be civilized.[8]

Despite their status, the court could not fully capture their societies, instead leading a vassal system with locally powerful chiefs, comparable to the larger tributary, Sinocentric system.[9] These chiefs had also acted as important socio-cultural linkages with the Vietnamese court, like the mutual trades with competing lordships of Outer-Inner Vietnam (*Đàng Ngoài, Đàng Trong)*, or through incorporation into the mandarin system of the Nguyen dynasty for military and political purposes.[10] The technological and military limits of the Vietnamese court had permitted certain local autonomies to take stakes in their relationship with the majority or to be simply left alone. Precolonial Vietnam was marked not with a unidirectional, but mutually influencing relationship of center-periphery wherein indigenous autonomy existed and thrived beyond the grasp of the court, unlike contemporary depictions of backward tribal living in national history.[11]

Ethnicization of Vietnam under French Colonization

It was the French colonizers, interested in mapping their colonies for administrative and diplomatic purposes, who redrew the borders of Vietnam and categorized those within and without.[12] This fixing of borders accompanied their ethnology and anthropology, which

[6] Keyes, Charles. "Presidential address: "The Peoples of Asia"—Science and politics in the classification of ethnic groups in Thailand, China, and Vietnam." The Journal of Asian Studies 61.4 (2002): 1163-1203.

[7] Salemink, Oscar. (2011). A view from the mountains: a critical history of Lowlander-Highlander relations in Vietnam. Upland Transformations in Vietnam. 27-50.

[8] Id at 7.

[9] Ibid.

[10] Id at 8.

[11] Ibid.

[12] Id at 7.

would replace pre-colonial distinctions of people with an epistemology rooted in the idea of scientific – ethnic – categorization, through markers of culture, linguistics, and races.[13] Underlying their ethnological knowledge was an 'evolutionist and eventually Social-Darwinist' discourse that depicted ethnic minorities as the lower rung of evolution and the French as the higher end.[14]

This knowledge was enacted – and enacted on – differently by different colonial actors. While missionaries and ethnographers depicted ethnic minorities as 'savages' and 'pagans' in line with the French civilizing mission, military explorers and officers paid more attention to their political organization, even if they found them basic.[15] To serve their administrative purposes, they had to keep in contact with these societies and attempted to understand their organizations, territories, and leaders.[16] Ethnological and anthropological knowledge had a practical purpose therein, as colonizers could know, to some extent, who occupied which parts of the territory and how to interact with these people to suit the needs of a burgeoning colonial administration.[17] It was the strategic impetus of colonial administrators and military officers that drove the ethnicization of Vietnam, reifying ethnic boundaries through ethno-linguistic identifiers on identity cards and censuses.[18] Missionaries, more occupied by cultural (religious) reasons, complemented this effort through proselytization. In consequence, they turned some highlanders towards Christianity, to France, and away from anticolonial actors.

Having realized the Vietnamese court's lack of total control over local leaders and its regional heterogeneity, French colonizers instituted a divide-and-rule policy, keeping anticolonial actors away from the ethnic minorities of the highlands.[19] The cases of the feudal leaders Đề Thám (or Hoàng Hoa Thám) and Đèo Văn Trị of the Northern Uplands are illustrative of this, as they carried out independent relations with French colonizers.[20] Despite the Vietnamese national historiography of Đề Thám as an anticolonial hero, he had previously agreed with French colonizers to leave each other alone. The case of Đèo Văn Trị is more illustrative as his allegiance to France was more deliberate, intent on benefiting from trades that flowed from China to Tonkin.[21] In the Central Highlands, French colonizers artificially constructed the Montagnard ethnic identity, composed of different tribes, languages and cultures, bound only by territory.[22] Common cultural rituals and religious conversions were promoted to further bind this artificial ethnic grouping while keeping the Viet (later as Kinh) majority from entering the Montagnard areas.[23] During the U.S.-Vietnam War, American and French officers continued to support this artificial construction, which culminated in ethnonationalism as the *United Front for the Liberation of Oppressed Races* (*Front unifié de lutte des races opprimées* or FULRO).[24] As an inheritance from this colonial

[13] Id at 7.
[14] Salemink, Oscar. The ethnography of Vietnam's Central Highlanders: a historical contextualization, 1850-1990. University of Hawaii Press, 2003.
[15] Id at 15.
[16] Ibid.
[17] Raffin, Anne. "Postcolonial Vietnam: hybrid modernity." Postcolonial Studies 11.3 (2008): 329-344.
[18] Ibid.
[19] Michaud, Jean. "Handling mountain minorities in China, Vietnam and Laos: from history to current concerns." Asian Ethnicity 10.1 (2009): 25-49.
[20] Id at 8.
[21] Ibid.
[22] Id at 18.
[23] Ibid.
[24] Id at 15.

administration, the Montagnard identity lingered until today with political salience, maintaining their line through international organizations and occasional protests (with little success) in Vietnam.

Vision of Instrumental Solidarity between North Vietnamese and Ethnic Minorities

To counter this instrumental ethnicization, North Vietnamese have since the August Revolution conjured and enacted upon a vision of interethnic solidarity. This vision is expressed by three simultaneous currents: A more nuanced but still problematic re-ethnicization of Vietnam by the Democratic Republic of Vietnam (DRV); a seemingly more equal relationship (compared to precedents) with ethnic minorities; and a state-induced discourse of history and culture that emphasized Vietnamese interethnic solidarity and aestheticized its diverse landscapes.

The DRV held a certain ambivalence towards ethnic minorities. It had to reconcile its project of a unified Communist nation-state with the reality of powerful localities that dated back to pre-colonial Vietnam which was further complicated by French colonists. The first constitution of Vietnam in 1946, written and promulgated by Ho Chi Minh, then realized the importance of solidarity. While it insisted on the indivisibility of the Vietnamese territory, it first recognized ethnicity (*dân tộc)* and ethnic minorities (*dân tộc thiểu số)*; guaranteeing them preferential treatment and political representation to bring them to the common level of the nation; and for their education and trials to be in their mother tongues.[25] Albeit more declaratory than practical, this demonstrates a certain willingness by the DRV to negotiate on equal terms with ethnic minorities and diverse political forces in Vietnam in a time when political alliances were critical.[26] Beyond the constitution, the Politburo in 1952 recognized the multiethnic status of the country and acknowledged previous marginalization of ethnic minorities; though mostly blamed this on French exploitation.[27] The ethnological project of the DRV, existing since the 1950s and informed by precedents of French ethnologists, also reflects this political ambivalence. It still had a moralizing attitude: Ethnology must not only describe ethnic minorities, but also prescribe their best traditions and remove their backwardness, strengthening solidarity and national pride, based on revolutionary Kinh sensibilities.[28] While more precise (compared to Montagnard precedent), their ethnic classification had some inconsistencies: There were 64 ethnic groups in 1959, then 59 in 1973, and finally 54 in 1979.[29] On this subject, while officials commented that some ethnicities had been mislabeled by the French and Americans to sow divisions,[30] it is possible that intra-ethnic political differences meant strategic re-classification.[31] As such, the DRV's ethnological project was in a sense more nuanced and collegial to render a different

[25] Constitution of the Democratic Republic of Vietnam, 1946.

[26] See Sidel, M. (2008). Constitutionalism and the emergence of constitutional dialogue in Vietnam. In Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective (Cambridge Studies in Law and Society, pp. 18-49). Cambridge University Press. doi:10.1017/CBO9780511495472.002

[27] Id at 7.

[28] Ibid.

[29] Id at 20.

[30] Statement by Dang Nghiem Van. See: McElwee, Pamela. Becoming socialist or becoming Kinh? Government policies for ethnic minorities in the Socialist Republic of Viet Nam. Cornell University Press, 2004.

[31] Id at 20.

Vietnam, but retained the politics and morality of Kinh Communists.

Policies pursued by the DRV under this ethnology were similarly ambivalent. In 1955 and 1956, the DRV set up respectively the Tây Bắc and Việt Bắc Autonomous Regions (khu tự trị) where most of the ethnic population resided. The Tây Bắc (formerly Thái-Mèo) AR stretched for about 20% of the DRV's territory with more than 500,000 people from up to 25 ethnic groups, while the Việt Bắc AR had over 1,500,000 people from 14 minority ethnic groups.[32] Their respective laws had progressive provisions: People of the ARs were granted freedoms of belief (*tín ngưỡng*, not *'tôn giáo'* or religions) and cultural practices; they were allowed to use their own scripts and languages; should they not possess their own script, the central government will aid them in creating their own; they would be assisted in developing their economy and defending themselves, with fiscal allocations when necessary.[33] Though one could doubt the genuineness of these policies, it was commented that they were pursued rather seriously. Hoàng Minh Giám had opined to an American diplomat that they were to develop ethnic self-confidence and pride, while making it possible for ethnic minorities to participate in national life and culture.[34] There were also a considerable number of officers and administrators of ethnic descent.[35] Nonetheless, the state still had an intervening hand in their developments, especially those outside of these ARs. Outside of the Autonomous Regions, where there was still a significant but dispersed ethnic population, a general observation of 'Vietnamization' can be made; either on a (seemingly) voluntary basis by the Tay ethnic group or imposed upon like the Hoa (Chinese) group.[36] Towards socialist ideals and production, the DRV wanted to reduce the agricultural practices of minorities.[37] In the 1950s and 1960s, there were policies to sedentarize the more nomadic ethnicities for a more effective exploitation of their lands and to homogenize the ethnic minorities, through dissolving traditional communities and merging different groups in fixed locations.[38] The migration of Kinh to 'aid' the minorities further mixed up the composition of highlands and lowlands.[39] This uneven assemblage of policies reveals the DRV's political ambivalence towards their diverse ethnic populations, with an insistence on unity with some capitulations to ethnic autonomy.

Finally, the DRV produced a historical narrative of the Viet nation and a discourse of inter-ethnic fraternity. On the former, postcolonial or revolutionary scholars under the push of nationalism aimed to construct a national narrative of the Viet. This is a twofold process: Involving the previous re-ethnicization of Vietnam and the disengagement from the Sinitic or Chinese

[32] McT, George. "Minorities in the Democratic Republic of Vietnam." Asian Survey (1972): 580-586.
[33] Decree No. 268/SL on the establishment and regulations of the Viet Bac Autonomous Region, 1956, and Decree No. 230/SL on the establishment and regulations of the Tay Bac Autonomous Region, 1955. Accessed at https://vanbanphapluat.co/sac-lenh-268-sl-ban-hanh-ban-quy-dinh-thanh-lap-khu-tu-tri-viet-bac and https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Sac-lenh-230-SL-quy-dinh-thanh-lap-Khu-tu-tri-Thai-Meo/36755/noi-dung.aspx
[34] Id at 33.
[35] Ibid.
[36] Ibid.
[37] Pelley, Patricia. ""Barbarians" and "younger brothers": The remaking of race in postcolonial Vietnam." Journal of Southeast Asian Studies 29.2 (1998): 374-391.
[38] Ibid.
[39] Ibid.

framework of linguistics and history.[40] These scholars represented Vietnam as more than a derivation of China, as part of Southeast Asia rather than East Asia, and with a unique antiquity traced back to the Đồng Sơn bronze drums. Correspondingly in the cultural sphere, writers deployed images of national unity against the colonial depictions of fragmented inter-ethnic relationships in Vietnam.[41] Like the example of *Tây Tiến*, literature of the time aestheticized, domesticated, and rendered nostalgic the geography of Vietnam. Once strange,hostile, and occupied by barbarians, such landscapes now became familiar and beautiful. Pre-colonial barbarians and colonial *sauvages* became brothers and sisters, cultural identities celebrated. Yet there was an implicit hierarchy in this fraternity. The Kinh were the enlightened 'elder brothers' (*anh)* to tutor or civilize the ethnic minorities as the 'younger brothers' (*em)*.[42] Ethnic minorities were not so treasured but tokenized. Vietnam was multiethnic, but in the Kinh's imagination of it. As Patricia Pelly, an author of Vietnam postcolonial history, puts it: *"Revolutionary writers established the evidentiary basis of an inclusive rendition of the past, one that respected the ethnic heterogeneity of Vietnam. And yet the very process of redacting the past in a way that was mindful of difference provided the means to suppress the heterogeneity of the present."*[43]

These currents all share a discourse of cultural relativism in their vision or history of interethnic fraternity. Nonetheless, as Oscar Salemink observed, this discourse was more instrumental rather than practical in the anticolonial struggle by the Vietnamese communists, holding political and strategic importance rather than a genuine or 'thick' approach towards multiethnic nationhood.[44] Ultimately, Vietnamese Communist leaders changed this discourse right after the 1975 unification, discarding the few progressive policies above while retaining the latent hierarchy as part of their socialist nation-building.

Ethnicity during the Socialist Republic of Vietnam

Becoming Socialist, Becoming Kinh: Ethnic minorities in the core socialist period

Having successfully unified Vietnam, it was time for the new Socialist Republic of Vietnam (SRV) to begin the project of national consolidation in a war-torn nation. Whereas in the defunct DRV ethnic minorities had figured ambivalently as the 'younger brother' to the revolutionary Kinh, the SRV's discourse of socialist modernity reconfigured them as falling behind and must be reshaped in the Kinh's visions. Alongside economic, ecological, and cultural concerns, the SRV encountered new security issues. While the literary aestheticization of ethnic landscapes and the historical naturalization of the Viet continued, earlier progressive policies were quickly replaced by more aggressive ones of resettlement, sedentarization, and acculturation to domesticate ethnic minorities.

The SRV implemented a totalizing and homogenizing scheme of resettlement that dissolved historically dispersed communities and promoted large-scale Kinh in-migrations. The direction of resettlement was complex but can be generally understood as going from the lowlands to highlands, urban to rural, and concentrating dispersed communities. The

[40] Ibid.
[41] Id at 38.
[42] Ibid.
[43] Ibid.
[44] Id at 15.

Central Highlands and Southern Vietnam became the most targeted frontiers, as areas with considerable history of foreign influences and ethnic minorities.[45] Tay Nguyen was the imagined center of the Central Highlands with minorities that held insurgent sentiments like the FULRO.[46] Alongside this regional focus was the establishment of New Economic Zones (NEZs) across the country with large concentrations of agricultural laborers from traditionally dispersed communities.[47] These relocations took place with the rationales of returning displaced citizens, securing borders with ethnic tensions, and relieving overpopulated urban areas.[48] From 1976 to 1985, 1,365,000 laborers out of the total 2,760,000 people were relocated; and from 1986 to 1995, 1,123,000 laborers out of 2,254,000 people were relocated, with less inter-provincial movements.[49] It should be noted that these are official statistics under the *khẩu* (*hukou* in Chinese) system that, for technical reasons, could not capture fully the massive population movement back then, as there was large volume of unrecorded voluntary migration that 'broke the plan and disturbed social order' (*phá vỡ quy hoạch và an ninh trật tự*).[50]

Sedentarization of ethnic minorities was integral to the above resettlement. The SRV perceived their Southern lands as uncultivated and underutilized, aiming to domesticate them for national economic needs under both central and provincial authorities.[51] More nomadic ethnic minorities with traditional agricultural practices of swiddening or 'slash-and-burn' were targeted, as these were performed on an improvised basis with low yield.[52] Framing these practices as deforestation and primitive, the ethnic population became gradually sedentarized, with fixed residence and permanent villages that sometimes comprised multiple ethnic groups.[53] 'Cash crops', not necessarily for sustenance, and precious woods were planted in some of these areas.[54] (The contemporary image of *Trung Nguyen* coffee in Central Highlands and Tay Nguyen in Vietnam was a product of this.) To lowland farmers and authorities, ethnic minorities were agriculturally backward and had to be taught how to work their lands.[55] As a consequence of the new economic logic of specialization and altered eating habits, it is the rice grains of lowlands like the Mekong and Red River Deltas near urban and new political centers that today feeds the people of the highlands, who are gradually less able to feed themselves as providers of 'cash crop' like wood, coffee, and spices.[56] Not all NEZs were successful

[45] De Koninck, Rodolphe. "On the geopolitics of land colonization: Order and disorder on the frontiers of Vietnam and Indonesia." Moussons. Recherche en sciences humaines sur l'Asie du Sud-Est 9-10 (2006): 33-59.
[46] Ibid.
[47] McElwee, Pamela. Becoming socialist or becoming Kinh? Government policies for ethnic minorities in the Socialist Republic of Viet Nam. Cornell University Press, 2004.
[48] Evans, Grant. "Internal colonialism in the central highlands of Vietnam." SOJOURN: Journal of Social Issues in Southeast Asia (1992): 274-304.
[49] Anh, Đặng Nguyên. [Resettlement Policies for Constructing the New Economic Zones in Vietnam.] "Chính sách di dân đi xây dựng vùng kinh tế mới ở Việt Nam." [The Sociology Journal.] Tạp chí Xã hội học số 4 (2008): 2008.
[50] Ibid.
[51] Ibid.
[52] Id at 48.
[53] Ibid.
[54] Id at 46.
[55] Ibid.
[56] Overview of the Rice Industry in Viet Nam. Asia Development Bank. Accessed at: https://think-asia.org/bitstream/handle/11540/4363/briefing_no.1_eng_final.pdf?sequence=1

either, as lands were overburdened with agricultural needs from larger populations despite inadequate facilities.[57] Swiddening returned in many highland areas, as lowland agricultural practices and crops were not always suitable in highland climate and soils.[58] There were also tensions between new Kinh migrants and indigenous peoples, with allegations of Kinh overtaking indigenous lands and forests, alongside cultural incompatibilities.[59] These realities, however, did not discontinue but have only somewhat altered the SRV policies since.

To buttress sweeping resettlement and sedentarization, the SRV imposed acculturation of ethnic minorities, under the impetus of civilization and modernization. The SRV and their statistics provided ecological and economic rationales to frame the agricultural practices of ethnic minorities as primitive and poor, thus justifying intervention.[60] Not only were traditional practices that had an overt economic incentive targeted, but also cultural and immaterial ones. The state viewed the living practices of these ethnic minorities, such as longhouses, as 'unclean' and 'unhealthy'; that their indigenous beliefs in the dead and spirits as 'backward' and 'outdated customs' (*hủ tục*); and subsequently led campaigns to 'modernize' their lifestyles closer to that of the Kinh.[61] Educations had to be taught in the national Vietnamese script – the Quốc Ngữ - under state-sanctioned curricula.[62] Local political organizations of chiefs or village headmen were replaced by state assigned cadres, often Kinh, and administrative regimes.[63] Overall, their policies aimed to acclimate ethnic minorities to the Kinh way of living and governance.

It is here that we begin to see an eerie familiarity with colonial administration. Under a Kinh vision of a socialist and modern Vietnam, the SRV policies reconstructed ethnic minorities as perpetually poor and backward – uncivilized, so must be civilized. The difference might lie in the intentions of these policies: Not to rigidify ethnic differences and co-opt local leaders, thus creating a hierarchy, but to completely assimilate into the national configuration of Vietnam. However, these differences would nonetheless be brought back in modern Vietnam. Not in an interest of genuine multiculturalism, but of a commercialism that commodifies them.

The Specter of Modernity and Ethnic Minorities in post-*Đổi Mới* Vietnam

The 1986 *Đổi Mới* reforms in Vietnam triggered momentous transformations. Accompanying the socialist-oriented market economy in Vietnam is its susceptibility to foreign influences, private interests, a degree of civic society, and a globalist stance. In this contemporary Vietnam, the modernizing drive of past years only intensified with new economic and materialistic needs. While 'socialism' as an ideology of the state has somewhat eroded, it is no longer the only force to articulate ethnic minorities, but also accompanied by international and non-governmental organizations, the domestic and international tourism industries, and a relatively free public sphere owing to Western social media. Though ethnic minorities' voices stand a chance to be heard in this new sociopolitical landscape, they encounter new

[57] Id at 49.
[58] Id at 48.
[59] Id at 49.
[60] Id at 46.
[61] Id at 48.
[62] Ibid.
[63] Ibid.

dependencies and lingering representations from the past.

The Post-*Đổi Mới* Vietnamese state appeared to regain some ambivalence towards ethnic minorities, though retaining most policy rationales of past years. Regarding continuities, the ethnology and construction of the Viet national history have become entrenched - poised to remain unchanged. The official 54 ethnicities do not stand to be reclassified and ambiguities persist in the Vietnamese term for ethnicity, *dân tộc* (which also means people), despite efforts to precise it.[64] Any meaningful changes or precisions would entail administrative costs and political issues, as they could muddle the myth of the Viet nation and overload governance to likely more than 54 ethnicities.[65] In the context of globalization, the state has a further need to present itself coherent; images of the Viet nation are increasingly reiterated, reproduced, and uncontested. Since revolutionary times, scholars have been able to construct a relatively coherent narrative of the Viet[66] which would be proudly presented in official buildings like the Parliament in Hanoi for occasions such as diplomatic visits[67] (which were not open to all citizens.) Ethnic minorities are featured in this historical narrative, but always in a context of defending the nation: They are tokens for a multiethnic but insistently indivisible nation.[68] However, under more critical views from abroad, there is now a cultural relativism in the official discourse, which is more open to the idea of cultural preservation.[69] There is a more egalitarian ethnic perspective, evidenced by the practices of the Museum of Ethnology in Hanoi, with a greater sensitivity towards and reflections on ethnic identities.[70] This occurs alongside a state push for cultural tourism, indicating that some ethnic cultural practices are worthy of preservation, though more for economic and political than cultural incentives.[71] The state does not hold that all practices should be preserved – matters relating to sanitation, medicine, even agriculture must follow state-set standards.[72] The policies of past years are continued,[73] but are reframed as encompassing aid schemes of 'erasing hunger, reducing poverty' (*xóa đói giảm nghèo*) that tie them further to the state.[74] This aligns with the 'development' push on the part of some NGOs who also conceived of ethnic minorities as poor.[75] As such, while there is some cultural relativism, it is decidedly less instrumental than before; but with a sense of top-down benevolence.

The state discourse of before has set a precedent for the popular imagination of ethnic minorities. Kinh people associate ethnic minorities with alcoholism (*uống nhiều rượu*), deforestation (*hay phá rừng*), and outdated customs such as unsanitary or wife-kidnapping practices.[76] Particularly

[64] Koh, Priscilla. "Persistent Ambiguities: Vietnamese Ethnology in the Doi Moi Period (1986-2001)." Explorations in Southeast Asian Studies: A Journal of the Southeast Asian Studies Student Association 5 (2004).
[65] Ibid.
[66] See Pelley, Patricia M. Postcolonial Vietnam: New histories of the national past. Duke University Press, 2002.
[67] Id at 65.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Id at 50.
[74] See Chaudhry, Peter. "Government munificence and the struggle to be poor. Politics, power and the Local State in Vietnam's Northwest Borderlands." (2016).
[75] Id at 4.
[76] Phương, Phạm Quỳnh et al. "['Minority needs to catch up to the majority' – Prejudices in ethnic relations in Vietnam] "'THIỂU SỐ CẦN TIẾN KỊP ĐA

revealing is the perception of 'sexual promiscuousness' (*quan hệ tình dục dễ dãi*), 'parental indifference to children' (*không quan tâm tới con cái*), 'primitive mode of production' (*phương thức sản xuất thô sơ*), and 'lack of business shrewdness' (*không biết làm ăn buôn bán*), which reflect the prevailing Confucian and materialistic sensibilities of the Kinh majority.[77] There are some positive associations – they are more united (*đoàn kết*) and honest (*trung thực)* than, interestingly, the Kinh, who also accepts intermarriage. But these qualities are eclipsed by the more numerous and lasting negative ones.[78] The more consequential view would be that these minorities should be assisted by the government (*cần được nhà nước giúp đỡ*) – i.e. that state intervention is justified – but not necessarily inducted into the government (*cần ưu tiên vào cơ quan nhà nước*). An opportunity for potentially meaningful political representation remains unconsidered.[79] Perpetuating the 'older brother' mindset, the Kinh are perceived to have a moral obligation to 'teach them how to live better' (*dạy cho cuộc sống tốt hơn*), 'help them become civilized' (*giúp họ văn minh hơn*), 'help them move catch up to the Kinh' (*giúp tiến kịp người Kinh*), and 'erase outdated customs' (*xóa bỏ hủ tục*). The printed press, state-owned, generally share the same view.[80] Though they occasionally emphasized cultural preservation in line with official discourse, there are few that feature minority voices.[81] In particular, the press mystify (*huyền bí hóa*) ethnic cultural practices, romanticize (*lãng mạn hóa*) mountainous landscapes and ethnic products, and dramatize *(bi kịch hóa)* the poverty and social ills of ethnic minorities.[82] It seems that the cultural and civilizing discourse of before has taken hold in the public imagination.

Finally, the advent of cultural tourism should be addressed, having become one major means of living by ethnic minorities. At a first glance, cultural or eco-tourism appears to benefit ethnic minorities as a way to both maintain cultural practices and monetize them. However, to repeat the previous sentiment, not all cultural practices are worthy of preservation. Cultural tourism instead carefully tailors an image of ethnic minorities that is palatable to the new domestic middle class and international tourists. Tourist agencies offer a friendly and exotic landscape of the ethnic, leaving out the more 'distasteful' practices. Tourists engage in a short immersion in ethnic or natural living, while spending most of the time in private and fully furnished lodgings. The result is an aberration of the lived experience of ethnic minorities. The case of Sa Pa, a major travelling destination for such tourism, serves as a telling example: The exoticism of ethnic minorities paired with the imagined 'Love Market' for sexual libertines and ethnic performances, paid to fulfill public and state expectations.[83] This is accompanied by the haphazard constructions of intrusive infrastructures – private hotels, casinos,

SỐ' – Định kiến trong quan hệ tộc người ở Việt Nam." Institute for Studies of. Society, Economy and Environment (iSEE), 2013.

[77] Id at 77.

[78] Ibid.

[79] Ibid.

[80] [Communication about ethnic minorities in printed press]. Thông điệp truyền thông về dân tộc thiểu số trên báo in. Collaboration between Institute for Studies of Society, Economy and Environment and the Academy of Journalism and Communication in Vietnam, 2011.

[81] Ibid.

[82] Ibid.

[83] Michaud, Jean, and Sarah Turner. "Contending visions of a hill-station in Vietnam." Annals of Tourism Research 33.3 (2006): 785-808.

karaoke bars – to accommodate the growing demands of tourists, most of which are owned by the Kinh minority who came from the lowlands or cities.[84] This comes also at a cost of environmental degradation and the disruption of ethnic lives.[85] Nowadays, Sa Pa has become associated more with air pollution from construction sites and ethnic vagrants wandering cement roads, than the temperate paradise wrapped within clouds and mountains advertised in tourist pamphlets.[86] Sa Pa is not the only case, but is exemplary of a general trend. Contemporary Vietnam is marked by a scramble for economic opportunities by powerful private forces,usually corporations under the government's wing,as natural landscapes are domesticated for consumption at the costly expense of the ecosystem and ethnic minorities.[87] It is almost as if Vietnam is trying to make true an old proverb: *'Rừng vàng, biển bạc',* or 'golden forests, silver seas' – all capital for the market.

In Post-*Đổi Mới* Vietnam with only a mirage of socialism, there seems to be no more the specter of communism, but the specter of modernity that haunts its population and ethnic minorities. Teetering between civilization and indigenousness, ethnic people exist in contradictions. They must either relinquish their languages and practices to become civilized, or keep but never change them in order to fulfill the public expectations of the ethnic.

Conclusion

This essay traces the construction of ethnic minorities by the Vietnamese state in two sections.

The first takes up the time before socialist rule: The historical relationships between ethnic minorities and dynastic rulers, then colonial administrators and the DRV. It finds that pre-colonial Vietnam was characterized by strong localities led by ethnic leaders outside the grasp of dynastic rulership. Under French colonists and their civilizing mission, these localities were studied and mapped, becoming ethnicities, propelled by the need for administration. Countering the exploitative nature of the French ethnicization, the DRV rendered its own vision of interethnic solidarity in policy and discourse of culture and history, which nonetheless remained more instrumental than practical.

The second follows ethnic minorities during the socialist rule: The core socialist period with a project of national consolidation and the post-Đổi Mới period under a socialist-oriented market economy. Having unified the country, the new SRV imposed radical and aggressive policies to resettle, sedentarize, and acculturate their ethnic minorities, reshaping them in the Kinh image of socialist ideal, while retaining the previous discourse of interethnic solidarity in a foremost Viet state. Under the new socialist-oriented market economy, the Vietnamese state somewhat softened its attitudes on ethnic minorities; but its civilizational discourse lingered in the public imagination of ethnic minorities, while the

[84] Ibid.
[85] Id 84.
[86] Đậu Dung. [Silent earthquakes in the heart of mountains] Có những cuộc động thổ trong lòng núi nhưng không ai biết. [Women's Magazine] Báo Phụ nữ. 27, Sept. 2019. Accessed at: https://www.phunuonline.com.vn/co-nhung-cuoc-dong-tho-trong-long-nui-nhung-khong-ai-biet-a1391366.html. This is an interview with a prominent activist on environmental degradation caused by major Vietnamese corporations, namely SunGroup and VinGroup.
[87] Ibid.

private force of tourism distorts their representation for consumption.

Ethnic minorities in both periods share a subalternity: *They cannot speak and must be spoken for*. The specter of modernity haunts these ethnic minorities. In both the colonial past and socialist present, a discourse of civilization reconfigured ethnic minorities to suit the needs of administration and capital. Against their possible agency, ethnic minorities in the popular and state construction of Vietnam are rendered timeless, no history nor future of their own making.

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Turkish Foreign Policy towards Iran and Davutoğlu's *Strategic Depth*

by Kryštof Selucký | 7430 words

Abstract

Ahmet Davutoğlu, former Turkish Prime Minister and a professor of International Relations, is the author of the book *Strategic Depth* which portrays Turkey as the potential leader of the "Islamic civilization". The article explores how this doctrine shaped Turkish foreign policy between 2009 (when Davutoğlu became the Minister of Foreign Affairs) and 2016 (when he resigned as Prime Minister) towards Iran. In the context of the history of Turkish-Iranian relations, it concludes that while otherwise influential, *Strategic Depth* did not have a lasting impact on the bilateral relations which continue to be pragmatically-driven.

Introduction

> *"Foreign policy analysis that fails to pass from a static-image analysis to a time-dimensional analysis of dynamic processes may not be accurate or allow for a long-term understanding of the issues. This is because those who make snapshot descriptions and analyse will fail to understand the time-dimensional positioning of the actors or the line of reasoning behind events." (Davutoğlu, 2013b, p.1)*

Ahmet Davutoğlu, former Turkish Prime Minister and a professor of International Relations, is often portrayed as the academic mastermind behind the transformation of Turkish foreign policy in the last two decades. In this essay, I aim to explore how his theoretical doctrine was reflected in Turkish foreign policy towards Iran. Having in mind Davutoğlu's aforementioned warning, I start by tracing Turkish-Iranian relations back to the 16th century to see the historical context of contemporary relations. I conclude that up to 2002's electoral victory of Recep Tayyip Erdoğan's Justice and Development Party (AKP), the relationship was mostly driven by pragmatism and *realpolitik*. I then turn to explore Davutoğlu's *Strategic Depth* doctrine, a theoretical framework that sees Turkey as a country possessing great geographical potential and an important historical legacy and which should strive to become a leader of the "Islamic civilization". Through this optic, I examine the Turkish-Iranian relations under the AKP and more specifically, between 2009 (when Davutoğlu became the Minister of

Foreign Affairs) and 2016 (when he resigned as Prime Minister).

I will argue that while the doctrine of *Strategic Depth* significantly influenced Turkish foreign policy, it did not have much influence on its relations with Iran in the long-term perspective. The only period when it shaped the relationship significantly was after the Arab Spring, but even then Davutoğlu soon realized his predictions had failed and left Turkey abandoned in the Middle East. After Davutoğlu's ouster in 2016, relations with Iran returned to the pragmatic path of previous decades.

History of Turkish-Iranian Relations

Many would be quick to claim that the major fact shaping the relations between Turkey and Iran in the last couple of centuries was the sectarian divide between the *Shi'a* and *Sunni* denominations of Islam. In reality, however, the two nations have treated each other mostly with realist pragmatism. The foundations of their modern relations lie in the 16th century when the founder of the Safavid dynasty in Iran, Shah Ismail, turned Twelver Shi'ism from a mystical sect into a state religion (Armstrong, 2009) and started military expansion to the west. After a series of conflicts with the growing Ottoman Empire, the predecessor of modern Turkey, the two powers concluded the 1639 Treaty of Qasr Shirin which effectively established the modern boundaries between Iraq and Iran (Lapidus, p.253-4). The situation changed after the occupation of the Persian city of Isfahan by the Afghans in 1722. The Ottomans sensed an opportunity and retook some of their old territories (Tucker, 1996, p.20-21). However, after the Shah pushed back against the Ottomans, a series of negotiations ensued between 1736 and 1746 and culminated in the Treaty of Kurdan which confirmed the old borders (Tucker, 1996, p.33). More importantly, however, it transformed the previously "mercurial" relationships between the two countries into a "more stable tie in which the common Muslim identity of Ottomans and Iranians was formally recognized as more important than their sectarian differences" (Tucker, 1996, p.33). For the first time, a system of inter-Muslim relations, that preserved the idea of one Islamic community, *umma*, while also recognizing the autonomy of different Muslim countries, was established (Tucker, 1996, p.37).

A long period of relative peace followed. Even the last serious conflict in the 1820s was quickly resolved by reconfirming the provisions of the 1746 treaty (Tucker, 1996, p.35), and future military confrontations with Iran were limited to occasional tribal border raids (Shaw, 1991, p.313). Facing the growing European economic imperialism, both countries found themselves weak in the emerging international order, and a larger bilateral conflict would go against their respective economic and political interests (Shaw, 1991, p.313). The only significant change that took place was the gradual abandonment of the 18th-century logic of one international *umma*. Instead, the two powers started treating each other in the European manner of "nation-states" (Tucker, 1996, p.17).

Both Iran and Turkey were deeply affected by the First World War. The Ottoman Empire crumbled after fighting alongside the Central Powers, and Mustafa Kemal Atatürk established the modern Republic of Turkey which soon gained international recognition. Iran formally declared neutrality. It soon,

however, became a major battleground of the war, starting with the Ottoman push to the Urmiah region (Abrahamian, 2008, p.59). During the interwar period, Reza Shah, who took power in 1925 and founded the Pahlavi dynasty, and Mustafa Kemal were both occupied by similar projects, such as modernizing their countries and consolidating authority (Calabrese, 1998, p.76), and shared a good personal relationship (Bishku, 1999, p.13). Peaceful relations therefore continued and Iran and Turkey concluded two treatises of friendship and the Saadabad Pact of non-aggression and mutual consultation prior to the start of the Second World War (Bishku, 1999, p.16).

After the Second World War, during which Turkey managed to remain mostly neutral, the two countries furthered their relations through common ideological interests by joining the Western Bloc in the Cold War. This set them in opposition to the majority of Arab states who sided with the USSR. An important milestone in their relations was the formation of the military alliance called the Baghdad Pact (later renamed to Central Treaty Organization, or CENTO) in 1955. CENTO continued to work until 1979, though in the later years it was overshadowed by the Regional Cooperation for Development (RCD) established in 1964 (Bishku, 1999, p.23-24). Despite the regional organisations and their "ideological affinity" (Barkey, 1995, p.152), there was no special friendship or attachment between the two countries. Throughout the 1970s, mutual trade remained negligible (Bishku, 1999, p.24) and the countries actively cooperated only when it served their interests. Nonetheless, from Ankara's point of view, Iran was a friendly, pro-Western regional power (Calabrese, 1998, p.77).

For Ankara, the Iranian Revolution of 1979 was a profound shock. It meant not just a complete turnover of the Iranian regime's character, but it also came at a difficult time for Turkey. In the late 1970s, two sensitive issues started resonating with Turkish society: religious politics and the Kurds (Barkey, 1995, p.151). The former was connected to the emergence of the National Salvation Party (MSP) which was later closed down in the bloody military coup in 1980. The latter issue, which was soon to dominate Turkish foreign policy strategy, became visible with the founding of the Kurdistan Worker's Party (PKK) in 1978, just two months before the Islamic Revolution. Ankara was also conscious that taking too hard of a stance on Iran could "possibly push it into the Soviet sphere of influence" (Hale, 2000, p.172). Therefore, it was cautious with Iran, quickly recognizing the new regime. It also refused to join the US trade embargo in November 1980. This decision, partially motivated by Tehran's promises of extensive economic cooperation (Barkey, 1995, p.152), proved to be very economically advantageous during the Iran-Iraq war.

It could be said, therefore, that Turkey took a two-track policy towards Iran in the 1980s (Aras, 2003, p.182). On one hand, considering the enormous ideological differences between the two regimes, incompatible stances on the Arab-Israeli conflict, and its alliance with the US, Ankara had kept a political distance from Iran. Moreover, security concerns about the Iranian expatriate population and Ankara's suspicions that Tehran might be supporting the Kurdish guerrillas that started an uprising in 1984, only created more political tension. On the other hand, exploiting the Iran-Iraq war which lasted for the greater part of the 1980s,

Turkey was happy to expand its economic relations with Iran. Thanks to the war, Turkish exports to Iran increased from $45 million in 1978 to $1,088 million in 1983 (Barkey, 1995, p.153). Hence, until the end of the Cold War, the two countries continued to have a "correct if often frosty relationship" (Hale, 2000, p.172).

The end of the Cold War together with the Gulf War of 1990 completely reshuffled the international scene and the regional dynamics. While both Iran and Turkey remained relatively unengaged in the Gulf War, the war had shaped their relations by diminishing Iraq's military capabilities and therefore the risk Iraq posed to Iran while also strengthening the US's presence in the region (Calabrese, 1998, p.88). Furthermore, the end of the Cold War opened a new area of potential contention: the newly-emerged states in Central Asia and the Caucasus. While many predicted a clash between the two powers fighting over the influence in these states (Hale, 2000, p.313), the actual unfolding was much calmer. The main arena of competition turned out to be "in the areas of trade and commerce and not in the exporting, or preventing the dissemination of Islam to Central Asia" (Aras, 2003, p.188). This is due to two facts. Firstly, while both Turkey and Iran had strong geographical, linguistic, religious, ethnic, and cultural commonalities with the new republics, they overestimated their own appeal as either economic or political models (Calabrese, 1998, p.93). Secondly, they severely underestimated both the continuing Russian influence in the region and the republics' cautiousness not to submit themselves to a new patron right after being freed from the Soviet Union (Barkey, 1995, p.162). Central Asia's geopolitical influence on Turkish-Iranian relations in the 1990s was not, therefore, as great as many had expected.

Ironically, it was rather Turkish internal issues that significantly influenced relations with Iran. One of the primary movers of Turkish domestic politics since the 1980s[88] has been the conflict with the Kurds and the fight against their secessionism embodied in the PKK party. Even though the main support for PKK undoubtedly came from Syria, Turkish intelligence agencies suspected that Iran was also involved in helping, or at least tolerating the PKK militias on its territory (Hale, 2000, p.312). Iran was, of course, eager to deny it and in September 1994 signed a protocol with Turkey promising mutual cooperation in the "fight against terror" (Barkey, 1995, p.161). But even then, their relations remained tense and distrustful. In 1995, Tansu Çiller, the then-Prime Minister of Turkey, even wanted to launch airstrikes against assumed PKK bases in Iran, before being overruled by the president (Hale, 2000, p.314). The relations worsened further in the second half of the 1990s with the Turkish army stepping in, calling Iran a "terrorist state" and accusing it of sponsoring "anti-Turkish terrorism" (Bozdağlıoğlu, 2003, p.137).

There was, however, a second domestic trend in Turkey that interested Iran: the rise of Islamist parties. The MSP was banned in 1980 after the military coup but only three years later it had re-emerged as the Welfare Party (RP). In the late 1980s and early 1990s, the Islamization of Turkish politics increased dramatically, as demonstrated by RP's electoral successes in the 1994 local and 1995 parliamentary elections. Once RP managed to

[88] It is important to note, however, that the Kurdish question was already implicitly present in the Saadabad and Baghdad pacts (Bishku, 1999, p.20).

form a coalition government in 1996 and Necmettin Erbakan took the premier's seat, Turkey's foreign policy took an abrupt turn. While the secularist deputy PM, Tansu Çiller, was going around Europe, trying to convince European leaders of Turkish pro-European stance and identity, Erbakan visited Iran and signed a major trade deal in Tehran (Bozdağlıoğlu, 2003, p.134). At the same time, ignoring the policies of Turkey's NATO allies, he spoke of a "growing trend of cooperation" with Iran (Bozdağlıoğlu, 2003, p.134) and even tried to negotiate a mutual defence cooperation agreement (Hale, 2000, p.315). The trend of the Islamization of Turkish politics was stopped by the 1997 "postmodern" army coup which forced Erbakan's resignation and the 1998 legal ban of the Welfare Party. Erbakan was not careful enough in dealing with the army which had always considered itself a guardian of the secular order.

Despite several small crises in the late 1990s, such as the alleged bombing of two Iranian villages in 1999 (Hale, 2000, p.315), Turkish-Iranian relations remained stable during the 1990s and early 2000s. Since the emergence of the Kurdish question, Turkish foreign policy was largely shaped by security considerations, especially due to Iran's alleged support for PKK (Barkey, 1995, p.155). Meanwhile, rational economic cooperation continued, especially through the Economic Cooperation Organization (ECO) which in 1985 filled the place emptied by the dissolution of RCD in 1979 (Aras, 2003, p.190). Economic and security-oriented pragmatism, rather than any sectarian or ideological differences, remained the main ruling force.

The Davutoğlu Doctrine

Ahmet Davutoğlu started his career in the 1990s as a professor of International Relations but soon became a member of the rising AK Party. By 2005, he managed to become an influential advisor to the Minister of Foreign Affairs. His career rocketed from there: In 2009, he was appointed the Minister of Foreign Affairs; in 2014, he became the Prime Minister, a position which he occupied until 2016 when he was ousted due to internal disagreements with President Erdoğan (Financial Times, 2016). During his academic career, Davutoğlu developed a complex and original understanding of the world order and international relations. Especially in light of Davutoğlu's actual policies, academics disagree about the formal classification of his worldview. I will not try to arbitrate as to whether it should be labelled neo-Ottoman, pan-Islamist, neo-imperialist (Cagaptay, 2020, p.45), geocultural (Erşen, 2014, p.98), or civilizational constructivist (Cohen, 2016). Instead, I will call it simply the *Davutoğlu Doctrine* and try to identify the main influences reflected in it.

His views are firmly rooted in classical geopolitical realism. He uses concepts such as "balance of power" or "heartland" and "hinterland" (Erşen, 2014, p.98), and deterministically gives great importance to geography and historical legacy as the only constants in international relations (Davutoğlu, 2013a, interview p.94). He also claims that the Middle East is a key region for both land (heartland) and maritime (rimland) geopolitics (Erşen, 2014, p.92). Furthermore, while criticizing Huntington's thesis about the necessary clash of civilizations, he subscribes to the civilizational view of the world (Davutoğlu, 1994). Davutoğlu argues for a "comprehensive civilizational dialogue" which would assure a "globally legitimate

international political order", stating that the clash only starts when the "civilizational difference is being utilized for a strategic objective" (1994, p.124-125). Therefore, apart from geography, culture, religion, and civilization are also determinants of international politics (Cohen, 2016, p.533). The inter-civilizational dialogue, however, should not lead to uniformity. Civilizations should accept that they have different values and not impose them on each other, as the West tried to do through its strive for "unicultural monopolism" (Davutoğlu, 1994, p.127). This also means that Western theories of politics cannot work in Muslim nations that have different socio-political culture (Cohen, 2016, p.535). Instead, political legitimacy must stem from Islam. Internationally speaking, a set of values should be formulated which is "shared by all nations of the globe despite their different cultures and civilizations" (Davutoğlu, 1994, p.126).

Through this great emphasis on values, Davutoğlu's theory takes a lot from constructivism. He particularly underscores the role of values, norms, and international institutions in the intra-civilizational order (Cohen, 2016, p.528). Each civilization has a central power possessing historical and strategic depth which it should utilize to wield soft power and bring the civilization together. Unsurprisingly, Davutoğlu considers Turkey the central power of the Islamic civilization. It has both a strategic geopolitical position and the historical legacy of the Ottoman Empire. As such, Turkey should strive to achieve not only leading roles in several regions, but also a global strategic significance (Grigoriadis, 2010, p.4).

From this endeavour to bring the civilization together originates the famous "zero problems with neighbours" doctrine – for Davutoğlu this is the way to bring his doctrine into practical foreign policy (Davutoğlu, 2013a, p.95). To achieve the "zero problems" policy and "overcome tensions with neighbours, relations with those countries must be emancipated from institutional and regime rivalries, and instead based on a broader basis in which economic and cultural factors prevail" (Davutoğlu, 2001). Turkey needs to pursue a multi-dimensional foreign policy which reflects the fact that it is geographically a part of many different regions. Davutoğlu says that Turkey is a European, Balkan, African, Caucasian, Middle Eastern, Mediterranean, Caspian, Central Asian, Red Sea, and Gulf country (Davutoğlu, 2013a, p.94-95). Therefore, Turkey should reorganize its relations with central powers, pursue multiaxial global diplomacy, and create a "hinterland founded on historically consolidated cultural, economic, and political relationships" (Davutoğlu, 2001).

This regional hinterland will, in Davutoğlu's vision of the future, slowly make the Western-imposed, artificial borders in the Middle East meaningless. Through the use of constructivist concepts such as economic interdependence, cultural exchange, political dialogue, and more generally, soft power, a "modern framework for a new regional order" (Davutoğlu, 2013a, p.97) will be established and Islamic unity accomplished (Ozkan, 2014, p.121). Once Turkey accepts its Ottoman legacy and Muslim identity and pursues a multifaceted foreign policy, it will become the "emerging power of [this] century" (Davutoğlu, 2001). However, this long-term plan, no matter whether achievable or not, could not be accepted by the Iranian government. Davutoğlu was conscious of that. While trying to position Turkey as a country

that would stand above the Sunni-Shia divide (Davutoğlu, 2008, p.81-82), Davutoğlu could not deny that Turkey was a Sunni-majority country and was seen as such by its neighbours, including Iran. If Turkey pursued its ambition to become a regional hegemon, a confrontation with the Iranian revolutionary regime that was trying to attain a similar position for itself, would become inevitable.

Turkish Foreign Policy Towards Iran in the 21st Century

I will now turn to the contemporary history of Turkish-Iranian relations since 2002 and examine to what extent is the *Davutoğlu Doctrine* reflected in them. Two distinct eras need to be examined separately – before and after the start of the Syrian Civil War in 2011.

Bilateral Relations before the Syrian War (2002-2011)

The 2002 massive electoral victory of the Justice and Development Party, which identified itself as "conservative democrat" and pursued democratization reforms despite its Islamist roots (Şen, 2010, p.59), meant a dramatic change in Turkish foreign policy towards the Middle East. Even though it remains unclear how much power Davutoğlu had as a foreign policy advisor, it is undeniable that the doctrine of "zero problems with the neighbours" and a re-orientation of foreign policy focus towards the Middle East had already begun to be implemented during the first years of AKP's rule (Dalay and Friedman, 2013, p.130). When AKP came to power, there were three main foreign policy issues: the Cyprus issue, Turkey's accession to the EU, and the American invasion of Iraq (Özcan, 2017, p.10). Consequently, during the first years of AKP's rule, Turkish foreign policy was mostly concerned with issues of domestic significance such as the EU accession or the Kurdish question (Dalay and Friedman, 2013, p.127). However, the main topic of Turkish-Iranian interactions during the first years of AKP rule was the war in Iraq which brought the two countries closer by creating shared threats and concerns.

Even though Turkey, as a NATO member, officially supported the invasion, it did not join the war nor allow the US to open a front at its borders, and the Turkish public largely opposed the war (Cagaptay, 2020, p.89-91). Iran felt threatened by the US's increased presence in the region. With the outbreak of sectarian violence in Iraq in 2006, both countries were worried that it might spread throughout the region and hence supported the establishment of a strong national government in Baghdad to contain it (Sinkaya, 2012, p.143). Consequently, Turkey tried to develop stronger ties with the Iraqi Shi'a Prime Minister Nouri al-Maliki. In 2008, Davutoğlu underlined that Maliki visited Turkey twice and had several phone conversations with Erdoğan establishing a relationship of "full-fledged confidence" (Davutoğlu, 2008, p.87). Even more significant was, however, the Iranian rapprochement with the Iraqi government. In 2008, Mahmoud Ahmadinejad engaged in the first official visit of an Iranian president to Iraq since the Iran-Iraq war. Maliki later commented that the talks with the Iranian president were "friendly, positive and full of trust" (BBC News, 2008). Turkish and Iranian interests diverged during the 2010 Iraqi Parliamentary elections in which Turkey supported the non-sectarian al-Iraqiya bloc while Iran continued its support for the Shi'ite Dawa party headed by Maliki (Stein and Bleek, 2012, p.142). When Maliki won the elections, Turkey lost much of its political influence in Iraq. Even though Ankara tried to

highlight its non-sectarian approach and better the relations once again, through Erdoğan's 2011 meeting with Iraqi Shi'ite clerics (Ahram, 2011), the relations remained tense. By 2012, Erdoğan seemingly gave up on Maliki, publicly accusing him of being "self-centred" and for promoting sectarian conflict, and started dealing directly with the Kurdish Regional Government (KRG) in Northern Iraq to retain at least some influence in the country (Cagaptay, 2020, p.200-201).

These developments confirm that the main motivation for both Turkey's and Iran's interest in Iraq was to contain the Kurdish question. They both feared the breaking of Iraqi territorial integrity which would increase Kurdish autonomy and potentially lead to the establishment of an independent Kurdish state in Northern Iraq (Karacasulu and Karakır, 2011, p.1403). While for Turkey, the PKK had presented a security issue for decades, for Iran, the situation changed dramatically after the emergence of the Kurdistan Free Life Party (PJAK), an Iranian equivalent of the PKK, in 2004. Later, both groups utilized Iraqi territory as a safe haven against their respective enemies (Sinkaya, 2012, p.143). As a consequence, the security cooperation trend intensified and, in 2008, Iran and Turkey signed an agreement on intelligence sharing and cooperation against terrorism (Sinkaya, 2012, p.143). It is interesting to note that despite the increased cooperation, neither country wished for the other to achieve peace with the Kurds because that would effectively allow the guerrilla fighters to eliminate one front and focus entirely on the other (Cagaptay, 2020, p.163).

Another important issue was the ongoing tension between Iran and the US over the Iranian nuclear programme. Turkish foreign policy here too remained largely consistent with the pre-AKP stance, refusing to support sanctions against Iran. Critically, in June 2010, Turkey and Brazil voted against the UN Security Council resolution (UN, 2010) to impose additional sanctions on Iran which was followed up by harsh rhetoric from Ankara suggesting that it did "not see the Iran's nuclear growth to be as worrisome as Israel's nuclear arsenal" (Cagaptay, 2020, p.103). This approach arguably followed up on Turkish policy not to join the US trade embargo on Iran in 1980. However, this time it was also supported by Davutoğlu's proactive foreign policy and great focus on mediation. The biggest success of the mediation efforts with regards to Iran was the uranium swap agreement which Turkey negotiated together with Brazil in 2010 (Davutoğlu, 2010). This proactive and anti-US foreign policy together with the rhetoric of Turkish highest representatives who vigorously defended Iran's right to a peaceful nuclear programme (Guardian, 2008) significantly contributed to the Turkish-Iranian rapprochement in the 2000s.

Finally, a great motivator for this rapprochement as well as its main product were the flourishing economic relations. In the decade after 2001, bilateral trade expanded from $1.2 billion to $16 billion and the number of Iranian tourists increased from 330,000 to almost 1.9 million (Kirişci, 2019). An overwhelming part of Iranian exports to Turkey were hydrocarbon resources. Turkey wanted to diversify its energy sources so as to reduce its dependence on Russia, and trade with Iran was a good opportunity to do so. Already in 2008, Turkey's energetic dependency on Iran was 20% compared to 65% from Russia (Karacasulu and Karakır, 2011, p.1404).

Overall, while the regional Turkish foreign policy changed dramatically in the 2000s, be it its engagement with Africa (Cagaptay, 2020, p.66-67) or the transformation of relations with Syria from open enmity into what Davutoğlu called "full harmony" (Dinc and Yetim, 2012, p.79), its policy towards Iran did not change much. It remained on the same line of pragmatism it had followed for decades before the new millennium. Thanks to the convergence of interests in Iraq, the continuing opposition to US sanctions, and Iran's positive view of AKP as a non-secularist party, the relationship between the two countries had further developed. A clear manifestation of the rapprochement was Turkey's immediate recognition of Ahmadinejad's contested presidential victory in 2009 (Cagaptay, 2020, p.159). However, due to their regional power struggle and continuing suspicions towards each other, their relationship could not be transformed into a strategic partnership.

In the previous part of this essay, I have concluded that to achieve Davutoğlu's vision of Turkey as a leader of the Islamic civilization, confrontation with the Iranian regime would be inevitable. Even though that might seem contradictory to the actual developments in the 2000s, it is not. Davutoğlu's strategy during those years was to achieve better relations with all neighbours and build Turkish soft power. A major part of that was presenting Turkey as a country that deeply cared about the region and its people. By mediating in regional conflicts, promoting Turkey's international image as the "protector of Muslims, from the Philippines and Somalia to Myanmar and Bosnia" (Cagaptay, 2020, p.56), increasingly standing on the Palestinian side in the conflict with Israel, and spreading Turkish cultural influence through popular soap operas such as the *Magnificent Century*, Davutoğlu tried to improve the public opinion of Turkey throughout the Middle East. And he was quite successful. In 2012, the Turkish Economic and Social Studies Foundation, a think tank, reported that Turkey was perceived as the region's foremost political power across the Middle East (Akgün and Gündoğar, 2012, p.11). Furthermore, Davutoğlu was also popular in the West: In 2010, the Foreign Policy magazine put him as number seven in its list of Top 100 Global Thinkers (Foreign Policy, 2010).

Since the mid-1990s, Davutoğlu expected that the Arab regimes which are not based on popular support cannot last and will eventually be dissolved (Ozkan, 2014, p.130). When that happened, he believed, Turkey would have "a historic opportunity for leadership in the Middle East," (Ozkan, 2014, p.130). In 2012, he wrote that "one strength of [Turkish] foreign policy, thus, is the ongoing process of reconnecting with the people in our region with whom we shared a common history and are poised to have a common destiny," (Davutoğlu, 2012, p.2). Good relations with Iran were a practical way forward for the time being because they were economically advantageous and also promoted the desired image of Turkey as a country that stands above the Sunni-Shia divide.

Bilateral Relations during the Syrian Civil War (2011-2016)

In 2011, Davutoğlu was convinced that the moment of the great turn had come and the secular Arab dictatorships would be overthrown. He wrote that the uprisings were "natural and inevitable processes" (Davutoğlu, 2012, p.1) and Turkey positioned itself "on the right side of the history and decided to make

[its] humble contribution to this epic democratic struggle" (Davutoğlu, 2012, p.6). As he saw it, the uprisings would generate friendly governments that derive their legitimacy from Islam (Ozkan, 2014, p.134).

Iran too was delighted when the political landscape in the Arab countries appeared on the brink of transformation in 2011. However, unlike Ankara which officially framed its support for the uprisings in liberal terms, Iran was eager to proclaim it as an "Islamic Awakening" (Dalay and Friedman, 2013, p.132). However, while Iran at the outset of the uprisings did not engage itself and instead hoped that "the chaos would resolve itself in the form of an Iranian-type *enghelab* (revolution)," (Aras and Yorulmazlar, 2014, p.112), Davutoğlu, as the Minister of Foreign Affairs, acted immediately.

In the first months of the uprisings, Turkey engaged diplomatically with both the Libyan leader Muammar Gaddafi and the Syrian president Bashar al-Assad to convince them to heed the calls for political reforms (Davutoğlu, 2012, p.7). Ankara worried that a messy transition in Syria might allow the PKK to regain strength (Stein and Bleek, 2012, p.146) and in August 2011, Davutoğlu even flew to Damascus to convince Assad not to use violence against the crowds (Cagaptay, 2020, p.116). However, all these efforts failed – which might have been the first sign that Turkey's influence in the Middle East was not as large as Davutoğlu had hoped. Later in August, Ankara reversed its policy and stood beside Washington in opposing Assad's regime. By early 2012, Turkey was actively supporting and hosting the Syrian opposition and turning a blind eye to weapon transfers across its borders (Cagaptay, 2020, p.118). This sharp policy turn put Turkey and Iran, which continued to support Assad's regime, on the opposing sides of the conflict. Tehran reacted by entering into a lasting ceasefire with PJAK, thus allowing the Kurds to concentrate their efforts against Turkey. This resulted in a cascade of deadly attacks killing over 150 Turks in 2011 alone (Cagaptay, 2020, p.159-160).

These tensions were accompanied by two further issues. Firstly, while Ankara continued to develop ties with the KRG in Iraq, it was increasingly worried by the rising Shi'ite power in Baghdad and the Iranian influence over it. Secondly, in September 2011, Turkey accepted the deployment of US radars on its soil which was perceived by Tehran as a major threat. Iran feared the radars could easily monitor movements of Iranian armed forces and also threaten the Iranian "capacity for deterrence", facilitating a potential Israeli attack (Sinkaya, 2012, p.153).

By early 2012, Turkish-Iranian relations were probably at their worst in several decades if not centuries. However, for Davutoğlu, that was not an issue. He was still convinced that Assad would soon be ousted, and Turkey would consolidate its influence over Damascus. His conviction was only strengthened by the 2012 Presidential Election in Egypt won by Mohamed Morsi, an affiliate of the allied Muslim Brotherhood. This overconfidence was reflected in 2013 when the Iranian Foreign Minister Javad Zarif presented Davutoğlu with a plan to resolve the Syrian crisis. Zarif later said that they agreed on everything except on whether Assad should be barred, as Davutoğlu insisted, from the UN-monitored elections (International Crisis Group, 2016, p.8). The then-Turkish president, Abdullah Gül, later commented that the government "did not pursue an agreement

with Iran because it thought Assad would be toppled in a few months" (cited in International Crisis Group, 2016, p.8-9).

In the summer of 2013, three events coincided. On the 3rd of July, Morsi was ousted by the Egyptian military and Ankara's hopes for an allied and submissive Egypt were crushed. At the same time, Erdoğan's crackdown against the Gezi Park protestors in Istanbul sparked mass anti-government protests across the country. Erdoğan was probably worried that the protests could lead him to a similar fate to Morsi's and opted for a violent crackdown on the protesters and on the national media (Kirişci, 2018). Finally, after the massive deployment of chemical weapons by the Assad regime in Syria, the US proved itself greatly reluctant to engage directly in Syria despite President Obama's call for intervention (White House, 2013) and settled for a deal negotiated with Russia (Guardian, 2013). As a consequence of these three events, Turkey had to re-prioritise its foreign policy to focus on security challenges at home, and emanating from Syria (Özcan, 2017, p.12).

Most importantly, however, the then-Prime Minister Davutoğlu started to understand that his academic predictions were failing. By 2014, it was clear that Davutoğlu's Arab Spring strategy of exclusively supporting the Islamic parties, the "true children of the land" (Cagaptay, 2020, p.185), had failed. Instead of gaining major political influence in Syria and Egypt as Davutoğlu envisioned, Turkey engaged itself in a protracted and bloody civil war in Syria and ruined its relations with both Baghdad and Tehran. Moreover, the initial region-wide public support for the democratic reforms collapsed and the region had been "crippled by securitization, civil war, sectarian strife and power rivalries," (Aras and Yorulmazlar, 2014, p.114). Davutoğlu's vision of glorious Turkey soon becoming the leader of the "Islamic civilization" was in ruins.

In the final year and a half of Davutoğlu's premiership, Ankara, conscious of its precarious situation, tried to re-normalize relations with Iran. However, that proved almost impossible due to the enormous conflicts in their interests in Syria and Iraq, the failure of the 2013 peace talks with the PKK, and the increasing societal polarization in Turkey (Aydın-Düzgit, 2019). Nevertheless, in April 2015, Erdoğan visited Tehran to promote trade and signed eight new deals on, for example, energy cooperation or health investments (Foreign Policy, 2015). Iran was happy to do this since it clearly had the upper hand in the relationship. Ankara had a great influence on Iraq, the Russia intervention in September 2015 consolidated its influence on Syria (Kirişci, 2019) and, finally, the US-led nuclear deal which was reached in October 2015 unleashed Iran's economic power (Cagaptay, 2020, p.161). Moreover, as the US was now more worried about ISIS than Assad's regime (Cagaptay, 2020, p.125), Turkey had to refocus its Syria policy on issues of domestic security – especially since the conflict with PKK became particularly bloody in 2015 (International Crisis Group, 2016, p.4). At that point, Erdoğan realized that Davutoğlu's foreign policy visions had left Turkey completely abandoned in the Middle East and that a new foreign policy agenda was desperately needed (Cagaptay, 2020, p.199). Davutoğlu was ousted in May 2016.

Only a few weeks later, Iran was the first state to support Erdoğan in the attempted coup d'état which opened a path for the re-rationalization of the two countries' mutual relations. In 2017, despite Turkey's 2016

military intervention into Syria, the two countries signed a protocol for intelligence sharing to sever connections between the PKK and PJAK (Cagaptay, 2020, p.163). Further, they shared interests in opposing the 2017 Saudi-led embargo on Qatar as well as the Kurdish independence referendum in Iraq (Dalay, 2018). In 2018, Turkey publicly criticized Donald Trump's decision to withdraw from the 2015 nuclear pact, and in the following year, publicly denounced the US's renewed sanctions, refusing to partake in them (Reuters, 2019). Since Davutoğlu's departure, a renewed pragmatic rapprochement between the two powers is observable.

Conclusion

Even though Ahmet Davutoğlu's theoretical doctrine of *Strategic Depth* was ultimately unsuccessful and failed to fulfil its prophecies, it had an enormous influence on Turkish foreign policy between the mid-2000s and 2016. However, while it greatly shaped Turkish pre-2011 relations with Syria, Israel, and the EU, the influence on the relations with Iran was not so visible. Taking a step back and looking at the historical line of the relationship, it continued in the same lane it had taken for centuries – pragmatic cooperation without the potential to grow into a full-fledged partnership or strategic cooperation. Before 2011, Davutoğlu was happy to take this path with Iran and focus on building Turkish soft power in the region. After the Arab spring, due to developments in both Iraq and Syria, ideological and political confrontation with Iran was inevitable. However, Davutoğlu's vision of a series of swift revolutions with Turkey as the main supporter of the peoples' demands, did not materialize and Turkey was left abandoned in regional politics. It was only after Davutoğlu's departure as Prime Minister that the relations with Iran seemed to stumble back towards the pragmatic line they had followed since the 18th-century Treaty of Kurdan.

In 2020, the only legacy that remains of Davutoğlu's *Strategic Depth* doctrine is Turkey's continuing engagement with the Middle East. The government still strives to have "zero problems" with the neighbours but out of purely *realpolitik* reasons: good relations with Iran are necessary because of the economic and energy intertwinement of the two countries and with Iraq because of the Kurdish question. While Erdoğan, who accepted that the West views him as an authoritarian ruler, would surely like to become the leader of the "Islamic civilization", he has other, more imminent, policy concerns. *Strategic Depth*, therefore, is not poised to have much more influence on future Turkish politics – unless Davutoğlu's newly founded anti-AKP Future Party (Financial Times, 2019) gains substantial ground. But even then, Davutoğlu would surely be careful not to repeat his painful mistakes.

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Tensions Between the TRIPS Agreement, Intellectual Property Rights, and Traditional Knowledge: Strategies for Future Pathways of Reform, Convergence, or Harmonization

by Hermine Durand | 17572 words

"Biopiracy through [Intellectual Property Rights (IPRs)] has arisen as a result of the devaluation and invisibility of indigenous knowledge systems and the lack of existing protection of these systems. The protection of indigenous knowledge systems as systems of innovation and the prevention of biopiracy of biodiversity requires a widening of legal regimes beyond the existing IPRs regimes such as patents," asserts Shiva et al. (1997).

Intellectual Property (IP) refers to intangible innovations and creations originating from one's mind (e.g., literary works, music, computer programs, scientific works and discoveries, undisclosed information, names, fashion designs, artistic performances, marks, symbols, and signs, among others) (WIPO, 2015). In the wake of the codification of property rights over tangible goods and the subsequent privatization of common lands, the modern understanding of IP also emerged in England during the 17th and the 18th centuries through a second enclosure movement (Halliburton, 2017).

With the turn of the 20th century, the globalization of IPRs through the 1995 World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), IP claims have become embedded in an increasing number of products and services that are critical to not only economic growth, but also human development on a global scale (e.g., plants, food, educational materials, medicines, etc.) (Muzaka, 2016). As a result, various IPRs instruments, most notably patents, copyrights, trademarks, trade secrets, and geographical indications, now regulate knowledge and stakeholders' conflicting interest around it, constituting what one could call a "global IPRs framework." Indeed, IPRs are institutional arrangements aimed at establishing a compromise between the collective nature of knowledge and the private benefits appropriated by individual owners (Muzaka, 2016). However, as pointed out by Shiva et al. (1997), due to the fact that the modern concept of IPRs emerged in Europe, within a specific intellectual, social, economic, political, and developmental context, this intrinsic friction appears to be skewed towards an understanding of knowledge and innovation which may not encompass alternative understandings of these phenomena.

Preeminently, the preservation of traditional knowledge (TK) under IPRs has received growing attention since the 1990s. Concomitant with the emergence of the global IPRs framework and the growth of the biotechnology industry, an increasing number of public and private actors have recognized that indigenous communities around the world

possess valuable ancestral knowledge relating to herbal medicines, and/or traditional healing techniques, often maintained and transmitted orally (Correa, 2001; WIPO, 2015). This impulse, epitomized by the adoption of the United Nations Convention on Biological Diversity (CBD) in 1992, has nurtured international discussions around the need to provide some form of protection to TK. Emerging voices have proposed a series of actions to incorporate TK into IP protection of TK: chiefly, to revise existing legal frameworks, devise (a) new form(s) of IP protection instrument that would safeguard and recognize the social value of TK, promote its integration into existing global trade regimes, and/or compensate its original owners and custodians: significant divergences around the rationale and modalities of TK protection became increasingly salient (Dutfield, 2001).

In fact, the existing IPRs paradigm does not recognize TK as a form of "innovation" *per se*; TK is deemed part of the public domain (i.e., freely available for anyone to use), thus not necessitating formal IP protection (Laxman and Ansari, 2012). Consequently, since the 1990s, Western corporations have registered numerous patents relating to TK centered on plants and/or medicinal practices originating from developing countries, and more notably, from economically and socially marginalized communities. This practice, frequently referred to as "biopiracy" or "bioprospecting," constitutes one of the several points of contention drawing a distinct line between developing and developed countries at the WTO (Shiva et al., 1997). The multiplication of notable biopiracy cases since the entry into force of the TRIPS Agreement has unveiled the existing tensions between IPRs and TK: at the heart of these frictions lie diverging understandings of what constitutes "knowledge" and "innovation" eligible for protection (Isaac and Kerr, 2005).

With the aforementioned in mind, this essay will argue that, while the development of *sui generis* national systems constitutes an important step towards global convergence and harmonization, this process results in the creation of territorial rights that may not be sufficient to prevent biopiracy practices. A framework of international protection for TK is ultimately necessary. At the international level, however, because the issue of TK protection is one among many North-South issues currently at stake in the WTO, it may likely be used as a leverage argument for other requests deemed more critical for developing countries' access to trade and economic development, rather than as a central question.

After an in-depth examination of the conceptual tensions between IPRs and TK, this essay will uncover the power asymmetries underlying the TRIPS agreement. Lastly, the different options and current efforts for TK integration into domestic and global IPRs regimes will be discussed.

1. The Tensions Between IPRs and Traditional Knowledge: Analyzing Biopiracy Within an IPRs Paradigm

1.1 Traditional Knowledge: Definition, Characteristics, Value, and Dynamic

To understand the origins of the inherent contradictions between TK and IPRs, we must first define traditional knowledge. Unfortunately, there is no widely agreed formal definition of TK at the moment. Traditional knowledge can take on a variety of meanings depending on local and indigenous contexts. No single definition could adequately describe the abundance of knowledge that indigenous peoples develop and perpetuate across generations: such knowledge is inherently complex by nature.

To this day, the most widely used and most comprehensive definition of TK is that of the World Intellectual Property Organization (WIPO): TK is understood as "the know-how, skills, and practices [and learning] that are developed, sustained and passed on from generation to generation within a community, forming part of its cultural or spiritual identity" (WIPO, 2015). In other words, TK is a tradition-based living system of knowledge that is primarily generated and perpetuated by indigenous groups and founded on past experiences gained through repeated interactions with the surrounding environment (Reid 2009; Castle and Gold, 2007). TK is frequently unwritten and preserved orally rather than through texts (Mugabe, 1999). This form of knowledge generally revolves around properties that can be derived from local plants, animals, and microorganisms. It involves a variety of subjects, including traditional fishing and hunting techniques, water systems management, animal migration patterns, nutritional and agricultural properties, cosmetic applications, and medicinal plant uses (WIPO, 2015). For instance, traditional Thai healers utilize a plant called Plao Noi (i.e., Croton Stellatopilosus Ohba) to treat ulcers, while the San people of South Africa are known to use the Hoodia plant (i.e., Hoodia Gordonii) as an appetite-suppressant to aid in their hunting activities (see Fig. 1.).

Fig. 1. "Two examples of TK: (left to right) the Plao Noi and Hoodia plants are respectively used for the medical treatment of ulcers and as an appetite-suppressant". Digital image. *Flickr*. 18 September 2013, 14 September 2015. https://www.flickr.com/photos/vanlaphoang1945/9800449806, https://www.flickr.com/photos/slobirdr/23961853606.

According to Jackson (2005), there exist two types of knowledge: industrial/scientific knowledge (SK) and traditional knowledge.

Analogously, Gupta (2001) points out that "many times researchers have tried to portray traditional knowledge systems as totally different and opposed to so-called modern (...) knowledge." Under this binary framework, traditional knowledge tends to be reduced to a negative category encompassing most practices and know-hows that cannot be regarded as proper SK. Indeed, several characteristics distinguish TK from SK: transmission through oral tradition, holism, qualitativeness, use of diachronic data, and cosmovisions of social/spiritual relations between all life-forms, among others (Dutfield, 2001). This SK-TK distinction is often made on the basis of alleged different rates of evolution, varying origins, as well as the diverging directions in which their practices tend to flow. For instance, while scientific knowledge tends to evolve through competition and innovation swiftly, TK is deemed to be more static and slowly evolves, depending on community needs (Jackson, 2005). Notwithstanding the above, it is possible to draw similarities between TK and SK. First, TK similarly yields replicable and testable outcomes enabling falsification. Furthermore, TK also incorporates a classification system deriving from empirical observations of the environment that also consider social and resource governance: in this sense, TK is both empirical and systematic (Gupta, 2001). Gupta (2001) further demonstrates that TK is also the product of an innovation process, as it emerges when there is a need for change within a community facing a crisis (e.g., extreme weather conditions like droughts, a changing ecosystem witnessing the arrival of new parasites, new plant diseases, or the spread of a new illness within the community). In such contexts, new plant varieties are selected, new medical techniques are elaborated, or new resource management systems are sought. Undeniably, SK investigates beyond the intrinsic serendipity of TK, for instance, aiming to understand why/how a specific plant provides a remedy for a disease (Isaac and Kerr, 2005), but we can contend that "TK is, at least to some degree, scientific even if the form of expression that may seem highly unscientific to most of us" (Dutfield, 2001).

Beyond its opposition to SK, it is undeniable that TK also possesses a major economic potential: although precisely estimating the quantitative value of TK in monetary terms is difficult, several indigenous communities are undoubtedly responsible for the development and conservation of wide ranges of botanical treatments, cosmetic and nutrition products, and plant-based drugs, which generate considerable economic value worldwide. For instance, Resnik (2007) asserts that "it costs on average $500 million to $800 million to develop a new drug, conduct clinical trials, and bring the drug to the market (...) this process may take ten to thirteen years (...) [and in the end] only 33% of new drugs are profitable." Therefore, because the process of screening, finding, and studying the beneficial uses of specific molecules, genes or plants can be very expensive, inefficient, and time-consuming, any information narrowing this process assumes a significant economic value, especially in the pharmaceutical and agri biotechnology industries (Reid, 2009). Hence, TK constitutes a gold mine of opportunity for biotechnology companies and

a precious knowledge source for future innovations that could benefit humanity. Reid (2009) points out that "obtaining traditional knowledge increases the efficiency of the screening process for plants with medicinal properties by more than four hundred percent."

The value that TK encapsulates is generated through progressive contextual findings, as opposed to the "discoveries" associated with SK. The term "traditional" may give the impression that TK is not inherently innovative. However, TK's "traditional" aspect does not reside in its antiquity but in how this knowledge is acquired and utilized by communities across space and time (Cottier and Panizzon, 2004). TK is not static. It mainly comprises the knowledge that has already been elaborated in the past but which continues to incrementally expand, adapt, and refine itself across generations as the environment and communities experience new circumstances. Therefore, although much of this knowledge is unquestionably "new," it also assumes foundational social and cultural connotations that render it holistic (Gupta, 2001).

TK is highly dynamic because it emerges from complex interface systems taking place between individuals and communities, their immediate needs, and the environment they live in (Reid, 2009). Gupta (2001) describes how TK is shaped by an intricate and sometimes contested interface between public and private interactions: "it is possible that an individual produces or discovers a specific bit of knowledge which he or she shares with the community. Feedback from the community helps improve [it and perpetuates it through generations]. Eventually, through word of mouth or otherwise, several other communities come to know of it, and this knowledge becomes well-known and [locally] enrooted" (Gupta, 2001). Hence, TK gains vitality from its entrenchment within people's lives (Mugabe, 1999). Nevertheless, while certain forms of TK indeed come to be diffused and understood outside of their local/traditional contexts, they also preserve spiritual components that make them very specific to their original community (Correa, 2001) (see Fig. 2).

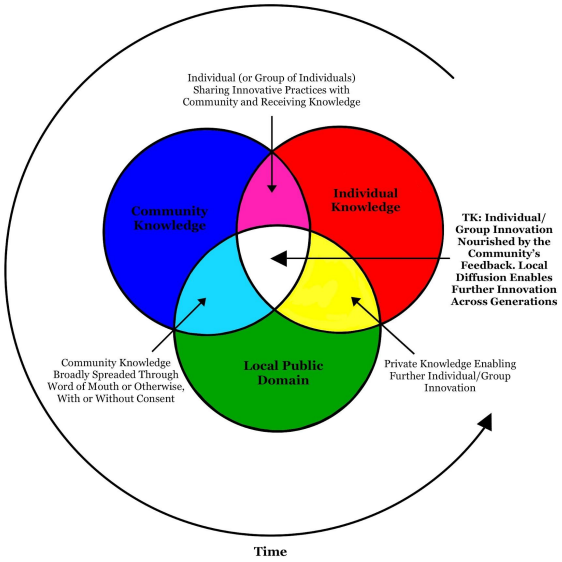

Fig. 2. "The dynamic of TK systems at the local level: a complex interface taking place between individuals and communities leads to the creation, dissemination and trans-generational perpetuation of TK". *Author's own design inspired by Gupta (2001)*. 25 May 2020.

Lastly, one shall also note that, because TK is mainly community-based, it also sometimes proves challenging to pinpoint (a) precise source(s) for its development: TK can be

produced over a long period by an isolated community, a group of individuals within the community, or through an informal collaborations involving certain individuals and other communities. It can also be transmitted through oral traditions, rituals, or written works (Correa, 2001). Furthermore, it can remain local, but also diffuse across wider communities/regions/countries across time (Gupta, 2001).

Thus, by gathering the characteristics we were able to uncover previously, we are able to go beyond the realm of working descriptions and propose a characteristic framework of TK based on its typical features (see Fig. 3). Four main TK conceptual pillars can be established: (1) holism, (2) cultural foundationalism, (3) community responsibility and ownership, and (4) evolutionarism and trans-generationalism.

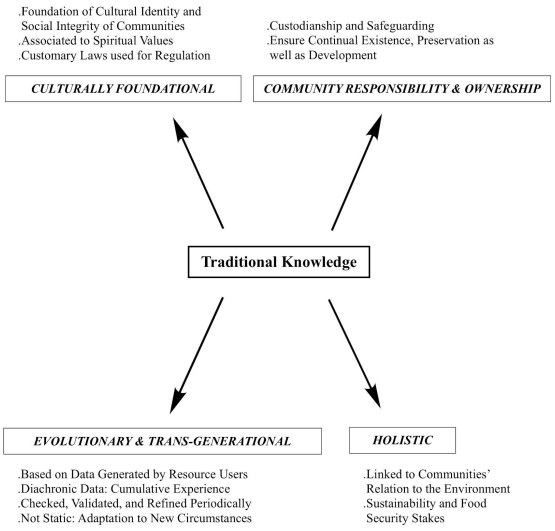

Fig. 3. "Broad characteristical framework of TK based on its most typical features." *Author's Personal Compilation and Design based on Various sources*. 25 May 2020.

1.2 Biopiracy: TK and Patent Rights

The WTO TRIPS Agreement allows for the patenting of food and agriculture eugenic resources (Art. 27.3(b)). However, it lacks specific, explicit provisions regarding TK per se, implying that this form of knowledge may not constitute innovation, and hence, shall belong to the public domain[89]. Consequently, indigenous communities' lack of resources to seek protection for their TK, the inadequacy of the current IPRs paradigm for such claims, the booming economic value of biotechnology-related innovations, and power asymmetries between marginalized communities and transnational corporations have led to the emergence of a phenomenon that many researchers have condemned: "biopiracy" (Shiva et al. 1997).

The first who coined the term is Pat Mooney, of the Canadian NGO Action Group on Erosion, Technology, and Concentration (ETC Group). He defines biopiracy as "the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (usually patents and intellectual property) over this knowledge and resources[90]" (Rose, 2016).

[89] In its 2015 *Intellectual Property and genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* publication, the World Intellectual Property Organization defines the "public domain" as the "elements of IP that are ineligible for private ownership and the contents of which any member of the public is legally entitled to use" (WIPO, 2015).

[90] ETC Group, http://www.etcgroup.org/issues/patents-biopiracy.

More comprehensive definitions also insist on the lack of informed consent and benefit-sharing arrangements with affected populations and countries (Hermann et al., 2014). Formerly recognized and characterized by WIPO, this phenomenon is tightly linked to the current international IPRs framework in two ways. First, it derives from the lack of protection towards TK. Since this knowledge is mainly in the public domain, while being, for the most part, unwritten and uncodified, it can be easily patented. Second, biopiracy dynamics are also reinforced by the subsequent patenting/trademarking of TK, which establishes a monopoly over the knowledge, practice, or plant, thereby limiting indigenous communities' wide use and commercialization of TK resources (Isaac & Kerr, 2005). This form of property does not include any form of compensation for the communities that developed and refined the TK that made the patent possible in the first place. Besides, upon closer analysis of the direction of the flows of biopiracy, one can note that TK, which is mainly nurtured within communities living in developing countries, is often unauthorizedly extracted by third parties (e.g., researchers, universities, and corporations) based in developed countries (Shiva et al., 1997; Isaac & Kerr, 2005). This adds a political-economic dimension to the issue of TK protection: the current IPRs-TK tensions are embedded within North-South (N-S) power dynamics, as we will uncover later on.

The label "biopiracy" is utilized whenever there is an allegation of abusive appropriation of TK (Srinivas, 2008). As there is no universally accepted definition, the alleged biopiracy cases show more diversity than what the biopiracy label indicates (Srinivas, 2008). Since the 1990s, a myriad of cases consolidated through patent applications have been extensively documented. Two examples are most eloquent: the Turmeric powder and the Neem tree.

Turmeric, or *Curcuma longa linn*, is a rhizomatous flowering plant of the ginger family historically farmed in Southeast Asia. An orange-yellow powder can be extracted from Turmeric for various culinary, medical, and textile applications that have been known for centuries. In 1995, US Patent n° 5,401,504 was granted for "a method of promoting healing of a wound [by] (...) administering a wound-healing agent consisting of an effective amount of Turmeric powder to the said patient" (WIPO, 2015). Although the patent applicant acknowledged the existing and widely known use of Turmeric in India for anti-inflammatory purposes, the proposed use for wound-healing was considered novel and, thus, innovative. However, the patent was later challenged by India and was found to be invalid upon submission by Indian authorities of documentation, including ancient Sanskrit texts, which demonstrated that this practice had been used for a long time in the region as part of local TK (Shiva, 2006; WIPO, 2015).

In India, the Neem tree, or *Azadirachta indica*, is commonly known as the "tree that cures everything" (Shiva, 2006). This tree of the mahogany family *Meliaceae*, possesses many medicinal uses deriving from its anti-inflammatory properties. Its derivatives and extracts are also widely used in agriculture as pesticides or cosmetics as soaps

(Reid, 2009). In the early 1990s, these attributes came to the attention of two American companies, W. R. Grace & Co. and AgriDyne, which resolved to register US utility patents with the United States Patent and Trademark Office (USPTO) for insecticides/fungicides derived from Neem tree extracts. Similarly, in 1994, the European Patent Office (EPO) granted W. R. Grace & Co. a patent related to a fungicide elaborated from Neem tree seed extracts (Reid, 2009). These patents were subsequently challenged by several Indian associations who contended that these IPRs instruments were confiscating documented TK that local farmers and researchers have developed and refined throughout the centuries. Upon patent prosecution proceedings, India proved that the plant's fungicidal effect had been known and utilized for hundreds of years. The EU law requirement of novelty for patents states that a claim must not "be made available to the public by means of a written or oral description, by use or in any other way, before the date of filing of the European Union patent application" (Ladas & Parry LLP, 2014). Hence, the EPO does not distinguish between foreign and domestic knowledge: any available trace of a knowledge/innovation/process somewhere around the world, whether published or unpublished, makes a patent non-novel. Therefore, the EPO's board of appeal eventually held that the information encapsulated in the Neem tree utility patent was already available in India and revoked it after ten years of proceedings, based on the demonstrated lack of innovative application (Reid, 2009).

These two cases were widely publicized due to the institutional disputes and prosecution proceedings that surrounded them: together, the Turmeric and Neem tree patent disputes cost India's government around $6 million USD (Reid, 2009).

Although these two instances exemplify the mechanisms involved in the alleged phenomenon of large-scale biopiracy, many additional examples demonstrate its scope and systematization (see Table.1).

TK Subject	Community/Country of Origin (Region)	TK	Third Entity Appropriating the TK (Country)	IPRs: Instrument for Appropriation	Appropriation Use
Arogya Paacha Plant (*Trichopus zeylanicus* ssp. *Travancoricus*)	*Kani tribe of Kerala*, South India (Asia)	Knowledge of the plants' properties has been kept for generations, notably through the *plathis*, the tribal physicians of the *Kani*. -Medical use(s) (chewing Arogya Paacha keeps away fatigue. It is also known for its revitalizing effects)	The National Tropical Botanic Garden and Research Institute (NTBGRI) *(India);* Greath Earth Inc.	IP Patent Application in India (No. 2319/DEL/2008, published in **2010**, not yet granted. -Link to the 2010 Indian Patent Application The NTBGRI authorized the licensing of *Jeevani* to Arya Vaidya Pharmacy Ltd.	"Herbal formulation with adaptogenic, anti fatigue and stamina-enhancing properties" (Indian Patent No. 2319/DEL/2008, 2010). The product commercialized is the *Jeevani*.

			(US)	(an Indian pharmaceutical manufacturer). US Trademark (No. 75955444 issued in 2002). -Link to the 2002 US Trademark	
Ayahuasca Vine (*Banisteriopsis caapi*)	Amazon rainforest tribes, notably the *Amazonian Kichwa people*, Peru, Ecuador, Bolivia, Chile, Colombia, and Argentina (South America)	Ayahuasca means "vine of the spirits" in the Amazonian Kichwa's language. Indeed, it is a sacred plant for several indigenous peoples of Amazonia. Evidence of the use of Ayahuasca Vine in shamanic rituals dates to 1000 A.D. in Bolivia. It is mainly used in religious healing ceremonies. Its use is extensively documented. -Medical use(s) (religious healing) -Spiritual use(s) (rituals by shamans)	Individual researcher and President of the International Plant Medicine Corporation *(US)*	US Patent (No. PP5,751P) issued in **1986**. Revoked by the USPTO in 1999 upon a reexamination request by the Coordinating Body for the Indigenous Organizations of the Amazonian Peoples and Their Environment (COICA), as well as lawyers from the Center for International Environmental Law (CIEL). -Link to the 1986 US Patent	Patent for a new, and distinct plant variety of the species of *Banisteriopsis caapi*. Patent for a strain of the Ayahuasca Vine (named "Da Vine") for medicinal purposes.
Basmati Rice	India/Pakistan (Asia)	Basmati rice has been grown in India/Pakistan since ancient times. -Nutrition	RiceTec Inc. *(US)*	US Patent (No. 5,663,484 A) on plants and on methods for breeding Basmati rice lines, issued in **1997**. Reexamined following public outcry in India, (cancellation of 17 out of 20 patent claims, confirmation of 3 others) and re-issued in 2002 under No. 5,663,484 C1. -Link to the 1997 US Patent	Patent concerning the Basmati rice plant, seeds, as well as breeding methods.
Blight Resistant Rice	*Bela People*, Mali (Africa)	This rice has been utilized by the Bela People for its blight resistance properties. -Agricultural use(s) -Nutrition	3 American researchers, and the University of California *(US)*	US Patent (No. 5,859,339) on nucleic acids responsible for blight resistance properties, issued in **1999**. After public outcries from NGOs the University of California established a Genetic Resource Recognition Fund to share benefits and support agricultural research in Mali upon commercialization of the patent. -Link to the 1999 US patent	Samples of the rice were extracted from Mali and sent to India and later, to the International Rice Research Institute in the Philippines during the 1970s. The gene causing the resistance was identified and transposed to other rice varieties.

Enola Bean (Mayocoba or *Phaseolus vulgaris*)	Mexico (South America)	Common, traditional food plant in Mexico. Yellow-colored field bean. -Nutrition	Individual American citizen (President of POD-NERS LLC.) *(US)*	US Patent (No. 5,894,079), issued in **1999.** The International Centre for Tropical Agriculture (CIAT) filed a request for reexamination in 2000 on the basis of non-novelty and misappropriation claims. The patent was revoked in 2003. -Link to the 1999 US patent	Patenting of the yellow bean in order to breed it for exclusive sale in the US. Both the plant and the breeding method were patented. All imports of Enola Beans from Mexico were thereafter prohibited, considerably hurting Mexican farmers and traders, and limiting their economic opportunities.
Hoodia Cactus (*Hoodia gordonii*)	*San Peoples*, South Africa (Africa)	Plant utilized in South Africa for its appetite-suppressant properties. -Medical use(s) -Nutrition	South African Council for Scientific and Industrial Research (SACSIR) (*South Africa*); Phytopharm Ltd. *(UK);* Pfizer *(US)*	South African Patent (No. 983170) UK Patent (No. 2,396,815B), issued in **2000** ; US Patent (No. 648,896,7B1) issued in **2002**. -Link to the 2002 US patent filed by Phytopharm Ltd.	Use of P57 (an active ingredient extracted from the plant) to develop a drug for appetite-suppression use.
Kwao Krua (*Pueraria mirifica*)	North Eastern Thailand *(Asia)*	Oestrogen and androgen-producing plant. Traditionally used by locals since the 13th century for youthfulness for both men and women. This medical use was first formally documented in Thai scientific literature in 1931. -Cosmetic use(s) -Medical use(s)	Several companies *(Thailand, South Korea, USA)*	US Patent (No. 6,673,377) issued in **2004**. A Thai Patent was also issued. -Link to the 2004 US patent	Patenting of kwao extracts for cosmetic and medicinal products.
Neem Tree (*Azadirachta indica*)	India (Asia)	Several uses documented since ancient times: -Agricultural use(s) (insect repellent, and fungicide) -Cosmetic use(s) -Hygiene use(s) (soap) -Medicinal use(s) (anti-inflammatory, contraceptive, and dental care uses. It is also used for cures against cancer and intestinal worms).	W.R. Grace & Co. ; AgriDyne *(US)*	-European Patent (No. EP0436257B1 issued in **1994**, revoked in 2000) -Link to the 1994 EP Patent -US Patent (No. 5,409,708) issued in **1995** -Link to the 1995 US Patent	"Novel pesticide and fungicide compositions (...) from Neem seed extracts" (European Patent No. EP0436257B1, 1994). The two first patents claimed a method to extract oil from the seeds, to be used as an insecticide and fungicide. At least 35 European patents related to Neem have been issued since the 1990s.
Pozol	*Maya*	Pozol is a pre-Columbian	Dutch	US Patent (No.	Isolation of an active

	Peoples, Mexico (South America)	traditional corn and cocoa beverage made from a fermented corn dough. The beverage is also praised for its nutritional and medicinal purposes, notably for the prevention of intestinal aches. -Medical use(s) -Nutrition	corporation and University of Minnesota *(Netherlands, US)*	5,919,695), issued in **1999**. -Link to the 1999 US patent	component in Pozol for medical uses. Patent relating to the breeding and cultivation method for extracting the desired antibacterial properties for commercial utilization in food packaging.
Rooibos Tea (*Aspalathus linearis*)	South Africa (Africa)	The leaves of the Aspalathus linearis are used to make a herbal tea usually called "rooibos," but also "bush tea," or "red tea." This use of the plant has been popular in Southern Africa for generations. As a fresh leaf, rooibos contains vitamin C (ascorbic acid). However, this high concentration is lost when the leaf is made into tea. -Medical use(s) -Nutrition	Rooibos Ltd. *(South Africa)* Forever Young Ltd. ; Burke-Watkins *(US)*	Multiple US Trademarks for "ROOIBOS" (No. 1,864,122 ; US 3,232,510 ; 3,182,142). Numerous cases were successfully brought against some of these trademarks. -Link to a 2020 US trademark on "rooibos"	Rooibos is a tea plant traded worldwide. Although some trademark owners claim that they have no rights on the rooibos plant, apart from the mark, these IPRs have in practice constituted significant barriers to trade.
Rosy Periwinkle (*Catharanthus roseus*)	Madagascar (Africa)	This plant has been utilized for centuries for a wide range of medical uses, from helping treat diarrhea, sore throats, chest pain, high blood pressure, and intestinal pain, to toothaches. -Medical use(s) (diabetes, and various intestinal and buccal aches)	Eli Lilly & Co. *(US)*	US Patent (No. 4,199,504), issued in **1980.** -Link to the 1980 US patent	Patent for pharmaceutical usage to develop drugs to treat Hodgkin's disease, juvenile leukemia and cancer. Eli Lilly developed two drugs from Rosy Periwinkle: *vinblastine* (for Hodgkin's disease), and *vincristine* (for childhood leukemia).
Tamate	Amazonian Indians, Ecuador (South America)	A small cylindrical tomato found in the Ecuadorian jungle. Tamate is utilized by Amazonian Indians for its cancer-fighting properties. -Medical use(s)	ADAMA Ltd., formerly known as Makhteshim-Agan *(Israël)*	2 Israeli inventors have isolated and patented the active ingredient in Tamate in several countries during the early 1990s. The first patent was issued in Israel in 1992. European Patent (No. 0600544B1), issued in **1993**. -Link to the 1993 EP Patent US Patent (No. 5827900A), issued in **1995**. -Link to the 1995 US Patent	Lycopene is the red pigment in the tomato fruit. It is thought to be an 'antioxidant' when consumed by humans. Studies have attributed anti-cancer properties to antioxidants. Medical use of lycopene in cancer treatments.
Turmeric (*Curcuma longa linn.*)	India (Asia)	Utilized in Asia for thousands of years. There exists prior art in Ancient Sanskrit documents, and in a 1953 Article from the Journal of *The Indian Medical*	Researchers from the University of Mississippi Medical	US Patent (No. 5,401,504A), issued in **1995**, and revoked in 1997. -Link to the 1995 US Patent	Medicinal purposes: "the use of Turmeric to augment the healing process of chronic and acute wounds" (US Patent No. 5,401,504A, 1995).

		Association. -Medical use(s) (Ayurvedic and Siddha medicine. Wound-Treatment as an Anti-bacterial powder) -Nutrition (cooking) -Textile use(s) (dyeing)	Center *(US)*		

Table 1. "Notorious cases of alleged appropriation or contested uses of TK by a third entity, usually without official consent from and proportional compensation to the original TK-holding community".
Source: *Author's own compilation from various sources (Reid, 2009 ; Correa, 2001)*. 22 May 2020.

The Turmeric and the Neem tree cases also illustrate how, in the absence of a framework aimed at sharing benefits and providing protection to local communities, granting private rights to third parties appropriating TK can negatively affect the country from which TK originates. The case of the patents for the extraction of Neem tree-derived fungicide/pesticide components is one of the most illustrative. In fact, as W. R. Grace & Co., the transnational company (TNC) that patented the method that enabled it to extract fungicide components from seeds started massively buying its primary material, it drove a surge in demand for Neem tree seeds. Three interdependent negative externalities arose from this development. First, faced with this sudden price explosion, local Indian farmers could no longer afford the seeds that they usually bought (Shiva, 2006). Certain farmers were forced to use the products that had been patented, making them economically dependent on the firm holding these IPRs. Second, the utility patent linked to the fungicide/pesticide properties of Neem tree derivatives witnessed the establishment of a monopoly that excluded initial TK holders (Shiva et al., 1997). Lastly, due to this monopoly, economic benefits emanating from the international sales of the Neem tree-based fungicide never returned to the country of origin of the TK that made this patent possible in the first place. More importantly, on a local scale, the patent and its IPRs implications seem to have damaged the financial welfare of many small Indian farmers (Reid, 2009).

These two alleged biopiracy cases further illustrate the underlying tension between IPRs and TK: while on the one hand, patents reward those who own the IPRs with a time-limited monopoly (i.e., usually twenty years from the date of the application), on the other hand, TK is usually developed over extended timeframes, embedded within community processes, and intended for local benefit-sharing. Furthermore, once a patent term expires, the IP protected by the patent falls into the public domain. Hence, anyone is free to make, use, import, or sell the IP object of the expired patent without its owner's permission, and without licensing constraints and costs.
In fact, Haider (2016) argues that "patent law does not provide an ideal legal framework to protect traditional knowledge, because it is

finite in nature and opens knowledge to the general public after a short amount of time." The fault lies not with the configuration of the patent system but with the conjugation of three factors. First, in modern market economies, the purpose of patents is to encourage fruitful investment and creative activity (Isaac & Kerr, 2005). In the biotechnology industry especially, the key objective of IPRs tools is to stimulate innovation. In this knowledge-intensive field, patents serve as instruments meant to correct a naturally-occurring market failure that could lead to suboptimal investment levels: without patents, once a researcher has invested many resources into innovation, its knowledge/process/product can easily be used, produced, and sold by others without permission, providing significant competitive advantages to competitors who did not have to incur any research and development (R&D) cost to profit from this invention. This paradox lies in the public-good nature of knowledge: because it is both non-rivalrous and non-excludable, once created, it is very costly and very difficult, if not impossible, to exclude others from using/consuming it. Hence, Isaac and Kerr (2005) state that "[a]ccording to this view of [IPRs], knowledge, including discoveries, should be a public good. It is only when the market failure associated with under-investment in innovation is manifest that the extension of intellectual property rights is justified. There is no "equity" justification for granting intellectual property rights." Second, the nature of TK, as opposed to SK, also obstructs its encompassing into IPRs protection under patents: TK is not based on short-term profit or monetary reward mechanisms but on dynamic generational systems. Additionally, although patents are based on entity/individual-based ownership claims, it is challenging to attribute ownership to a single individual with TK. Nevertheless, these two characteristics are not necessarily the primary obstacles to IPRs' protection of TK. Indeed, Correa (2001) highlights how "[TK relies on] informal systems of knowledge [which] often depend upon face-to-face communication, thereby limiting access to the information to persons in direct contact with one another. The public at large does not benefit from the knowledge, nor can the knowledge be built upon (...) if the information is not written down, that information is completely inaccessible to patent examiners everywhere as prior art (...)". Hence, the inaccessibility of TK beyond indigenous communities may contribute to making plausible patent protection inadequate. Lastly, Reid (2009) remarks that indigenous communities' lack of funds, resources, and access to information also makes the use of patents for TK protection, at least from these communities' sole initiatives, very unlikely.

Notwithstanding the above, it appears as though the multiplication of alleged biopiracy cases in the past three decades, made possible by the current public domain status of TK, and the lack of explicit definition/protection of TK in the TRIPS Agreement, inversely affects concerned indigenous communities in multiple social and economic realms. Instances of resources overexploitation, food insecurity threats, or violations of foundational cultural identity in communities that are already, for the most part marginalized, have nurtured rising advocacy

for TK protection through a wide range of proposals (Shiva, 2006).

1.3 Towards Integration of TK Protection Within the Existing IPRs Paradigm?

Though many scholars and IPRs specialists agree that the current framework should be changed to allow for the protection/reward of TK, substantial divergences exist with regards to the means and tools that could and should be used to achieve this goal. Some contend that under the existing IPRs framework, IPRs protection of TK, whether under patents or in any other form, is not possible nor desirable due to intrinsic and structural N-S asymmetries (Shiva, 2006). However, some scholars also argue that protection of TK under existing IPRs tools is possible (Correa, 2001). Lastly, some recommend new IPR tools, or a new IPRs framework altogether (Reid, 2009; Gupta, 2001).

The fundamental understanding behind all proposals is that TK should be protected. Most TK protection advocates highlight a wide range of arguments that justify, or make this protection allegedly beneficial. Correa (2001) lists five main arguments.

First, equity considerations: since the current IP appropriation/reward system does not adequately recognize nor compensate the value that TK generates, TK protection would bring equity to unjust/unequal configurations. Analysis of N-S asymmetries in biopiracy patterns and investigations into the historical roots of the current global IPRs structure often support these assertions (Shiva, 2006). Second, conservation concerns: TK is also tightly linked to the preservation of biological diversity through farming. For example, protecting TK could help preserve plant varieties by providing an incentive for farmers to keep certain practices, like breeding farmers' varieties. Furthermore, protection could also help ensure future innovation opportunities that could emerge from the perpetuation and maintenance of certain practices. Third, the preservation of traditional cultures: a comprehensive understanding of TK protection seeks to promote indigenous communities' rights to self-identification and assert the need to conserve their cultural heritage. Fourth: avoiding biopiracy cases and the associated risks for indigenous communities' sustainability, welfare, and food security. Lastly, economic development: many scholars stress TK protection's role in helping developing countries become more active players in international trade. With TK protection, indigenous communities could become an integral part of the world economy, not just as receivers but also as providers of economically and socially valuable innovations.

Although opportunities for the patent protection of TK are limited, other existing IPRs tools have already provided effective and successful protection to TK: copyright and performance rights can be used to protect artistic manifestations like literary, theatrical, textile, pictorial, and musical works and performances (Correa, 2001). Moreover, trademarks can be used to protect distinctive names, symbols or signs associated with TK (e.g., the Seri people from Mexico, registered "Arte Seri" under a trademark to protect their authentically-designed ironwood products) (Correa, 2001). Similarly, confidentiality and

trade secrets law can also be used to protect sacred or secret TK from public disclosure (e.g., the 1976 *Foster v. Mountford case* affirmed rights for Central Australian Aborigines to preserve secrecy around their secret traditional ceremonies which had been disclosed in a book) (Correa, 2001).

Thus, the current IPRs paradigm provides several opportunities for TK protection. The appropriate use and combination of various tools, depending on the type of TK, could protect it from misappropriation and allow local communities to control and benefit from TK's commercial exploitation. The proper combination of IPRs tools could enable communities to commercialize TK-derived goods and exclude free-riders. However, it is essential to note that IP protection would not necessarily automatically entail the "preservation" and "safeguarding" of TK. In other words, the existing framework may not necessarily deliver all the intended benefits of TK protection (e.g., equity, economic development, and the preservation of traditional cultures) as listed by Correa (2001). Moreover, some advocates contend that any form of IPRs protection inevitably alienates indigenous communities and contradicts the nature of TK – the primary basis of this argument relies on the affirmation that no existing form of legal protection can replace the customary laws embedded within traditional contexts (Gupta, 2001). Furthermore, seeking TK protection may sometimes entail the public disclosure of secret practices or internal traditions meant only to be unveiled within specific circles or under determined circumstances (Gupta, 2001).

Notwithstanding the above, two approaches to the IPRs protection of TK currently co-exist in most reform proposals: (1) a "positive" protection approach and (2) a "defensive" protection approach. The first approach consists of granting rights that bestow communities with the power of controlling and self-promoting the uses of their TK. This approach, which usually relies on a skillful use/adaptation of the existing national IP system, also seeks to help indigenous communities directly benefit from any commercial exploitation of their TK (Srinivas, 2008). On the other hand, the "defensive" approach is designed to prevent any illegitimate acquisition of IPRs by third parties outside the community. The use of searchable databases like the one created by India in the aftermath of the Turmeric biopiracy case to document ancient texts relating to TK is an example of such an approach (WIPO, 2015).

In any case, the complex nature of TK necessitates a contingency approach to IPRs protection of TK, especially when it comes to the design of compensation systems and the drawing of the boundaries of the public domain. For example, in the case of a "positive" protection approach, the matrix proposed by Gupta (2001) for compensation evaluation draws a possible pathway for the future harmonization of national/international laws on IPRs-based protection of TK. Gupta enriches the understanding of what TK's protection, safeguarding, and compensation may entail through this approach. He extends it to material and non-material returns, with a three-dimensional paradigm, and each

dimension corresponding to a different variable at the core of a possible "positive" protection of TK (see Fig. 4).

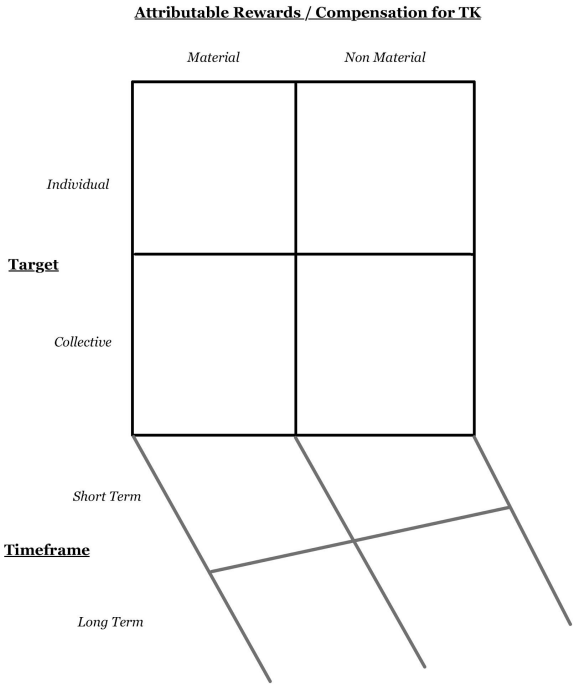

Fig. 4. "Mapping of the characteristics of TK compensation through a three-dimensional matrix." *Author's own compilation and design inspired by Gupta (Gupta, 2001).*

2. Developing Countries and the TRIPS Agreement: Previous Attempts at Reforming the Global IPRs Framework

2.1 North-South Divisions Around the TRIPS Agreement

In a 2008 Article, while narrating the reasons for his skepticism regarding the TRIPS Agreement during the Uruguay Round negotiations, Joseph Stiglitz ascertained that "what separates developed and developing countries is not just the disparity (...) in resources but also the disparity in knowledge, and closing that gap in knowledge is an essential part of successful development. [The members of President Clinton's Council of Economic Advisers from 1993 to 1997, among which Stiglitz] had become concerned that TRIPS might make access to knowledge more difficult - and thus make (...) development more generally, more difficult". Stiglitz's words highlight the links between knowledge-based economic development, N-S dynamics, and the global IPRs framework. At the heart of these relationships lies the TRIPS Agreement.

Several authors have noted that the inclusion of IPRs within a stand-alone agreement in the Uruguay Round of trade negotiations was mainly the result of intense lobbying by special interest groups from the private sector, particularly from the entertainment, the agri biotechnology, and the pharmaceutical industries (Stiglitz, 2008; Mayer, 1998; Pugatch, 2004). Considering that the stronger the IPRs protection, the better, these industries pushed for stronger IP law both at the national and WTO levels during the 1990s, contributing to the signing of the TRIPS Agreement. Interest groups intended to explicitly tie together IPRs protection and international trade in order to frame IPRs as a trade matter that could be resolved through the dispute settlement mechanism of the WTO (Picciotto, 2003).

Interestingly, investigating these three industries' structures allows us to understand better the linkages between the TRIPS Agreement and N-S asymmetries.

The entertainment and media (E&M) industry comprises various sectors: television, radio, recorded music, video games, movies, publishing, sports, internet, advertising, and gaming (Evans, 2009; Mukherji & Sengupta,

2021). The global market value of this industry was 2.1 trillion USD in 2019 (Watson, 2020). Although the sector relies on many small niche players and SMEs, it is largely dominated by a few gigantic conglomerates. Notable examples include Walt Disney, Comcast, ViacomCBS, AT&T, Alphabet, Facebook, Netflix, Sony, Vivendi, and Nintendo (Reiff, 2020).

In 2019, the biotechnology sector (agri biotechnology and pharmaceuticals) consisted of 11,343 businesses employing 886,386 people worldwide. Encompassing major TNCs like Pfizer, Bayer, Roche, Johnson & Johnson, GlaxoSmithKline, Dupont, or Syngenta, the industry peaked at 295 billion USD in 2019 (Martin et al., 2021).

The pharmaceutical industry has traditionally been a de facto technologically-intensive sector from its beginnings in the 19th century with medicines like aspirin (1897) and penicillin (1948). Today, the field is dominated by research-based pharmaceutical MNCs. It is a very concentrated industry: Pugatch (2004) notes that "a relatively small number of about 50 companies account for more than two-thirds of world production and export." On the other hand, the agri biotech industry emerged in the late 20th century along with scientists' ability to manipulate DNA's molecular structure and computer systems' capacity to codify vast amounts of genetic data. Rapid scientific developments provided a myriad of innovation possibilities to an industry that increasingly became technologically intensive. The agri biotech sector is analogous to the pharmaceutical industry, with a highly concentrated market leaders circle (Pugatch, 2004).

Therefore, it is evident that the quintessential trait of the agribiotechnology and pharmaceutical industries is their heavy reliance on technological innovations and scientific research. On the other hand, the E&M industry's primary goods and services consist almost exclusively of IP products which are mainly protected by copyrights and trademarks. It is precisely these characteristics, which make them sensitive to the global IPRs ecosystem. IPRs constitute a safeguard against potential loss and assurance of potential return upon successful innovation. For instance, for the pharmaceutical industry, patents, with their 20-years market monopoly allowance, provide crucial protection against other market entrants, particularly generic drug makers who could free-ride others' R&D investments.

However, in addition to being highly concentrated in terms of market actors, these industries are also remarkably geographically concentrated: most major pharmaceutical, agri biotech, and entertainment corporations are based in North America, Europe, and Asia-Pacific (primarily in Japan) (Fig. 5).

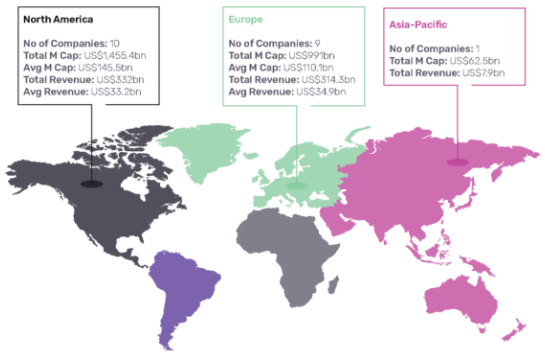

Fig. 5. "Geographical distribution of the top 20 pharmaceutical companies." (Source: GlobalData, 2020).

In other words, it is because major IP-intensive corporations are mainly located in North countries that IPRs protection and N-S asymmetries became intrinsically linked within debates over the TRIPS Agreement. Unsurprisingly, the TRIPS Agreement's leading supporters were countries with well-developed knowledge-based industries and R&D-intensive production systems, like the US, European countries, and Japan (Lanozska, 2003). These countries insisted that the General Agreement on Tariffs and Trade (GATT) negotiations should include all trade-related aspects of IPRs, and submitted proposals in this sense (Patel, 1989). In sharp contrast, developing countries considered that creating a highly restrictive and protective global IPRs regime may harm domestic economic stimuli by hampering possible technology transfers between developed and developing countries. Therefore, developing countries opposed any negotiations on IP in the Uruguay Mandate for the GATT negotiations because they argued the GATT had limited jurisdiction on this matter. Instead, they pointed out that WIPO could be a more appropriate arena to deal with all IP-related matters (Patel, 1989). For instance, the Group of Ten (Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia) submitted a resolution that did not contain any reference to IP but limited itself to the traditional areas of the GATT (Patel, 1989).

Therefore, two conflicting dynamics prefigured the TRIPS Agreement: on the one hand, developed countries' main objective was to strengthen the global IPRs framework and link it to international trade policy. On the other hand, developing countries' main objective was to enable the free flow of knowledge to encourage transfers of technology from which they could develop domestic IP-intensive industries (Srinivas, 2008). It is developed countries' position that prevailed: Arewa (2006) notes that "the negotiation, implementation, and substantive content of TRIPS reflect the influence of its beneficiaries. Primary among those are private and public interests in [developed] countries."

Effective from 1 January 1995, the TRIPS Agreement of the WTO, comprises 73 Articles establishing minimum protection levels for seven forms of IPRs[91], prescribing dispute settlement procedures for conflicts, and extending all GATT clauses of national treatment and most favored nation to IPRs (Lanozska, 2003; Nachane, 1998). Art. 7 outlines the objective of the Agreement: "[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, (...) in a manner conducive to social and economic welfare, and a balance of rights and

[91] The TRIPS Agreement covers seven types of IPRs: copyrights, geographical indications (e.g., appellations of origins), industrial designs, integrated circuits, patents, trademarks, and trade secrets. For all these forms of IPRs, all WTO members must provide identical protection levels for foreign firms, as they provide for domestic firms (Mayer, 1998).

obligations" (WTO, 1994). Hence, the core of the Agreement relies on the alleged balance between the protection of IPRs, and economic development. This balance determines the possibility for cross-national technology flows to occur, influencing, in turn, developing countries' development opportunities. However, as noted by the World Bank in 1999, the current TRIPS-generated regime may not strike the desired balance between private interests and technology transfers in favor of developing countries (Stiglitz, 2008). As pointed out by Arewa (2006), in the current state, "the relative scientific and technological disparity between North and South means that countries in the South may, in the aggregate, suffer a net loss as a consequence of TRIPS. As a result, in the short-run, developing countries are worse off under TRIPS."

This imbalance has been increasingly intensified by the rise of the knowledge-based economy (KBE): since the 1990s, knowledge and information have become the primary mediums for production and capital accumulation (Lanozska, 2003; Shie & Meer, 2010; Stiglitz, 2008). Within this new context, which exacerbates the importance of the global IPRs framework, the distribution of the short-term benefits of the TRIPS Agreement have mainly accrued to countries of the North. An analysis of patent and trademark applications by origin in 2019 highlights the significant concentration of patent and trademark filing activities in very few origins, mainly countries of the North (Fig. 6 and Fig. 7). Some scholars have described this large-scale IP pattern as the securing of a "technological rent" by developed countries at the expense of developing countries (Muzaka, 2016).

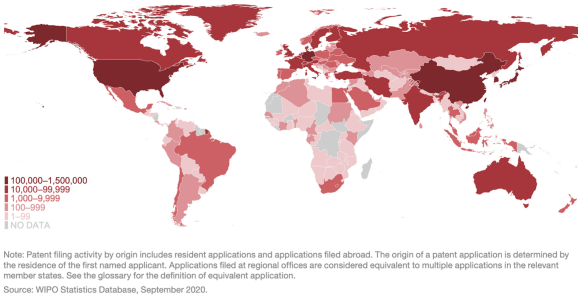

Fig. 6. Geographical distribution of equivalent patent applications by origin in 2019 (Source: WIPO, 2020).

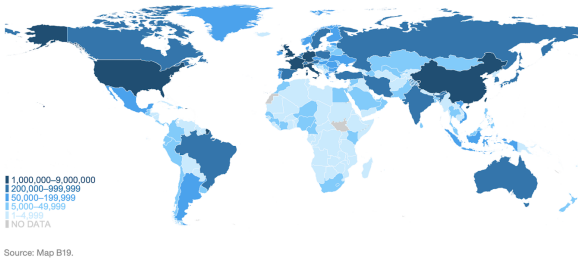

Fig. 7. Geographical distribution of equivalent trademark applications by origin in 2019 (Source: WIPO, 2020).

This dynamic has led to growing opposition against the TRIPS Agreement in countries of the South (Arewa, 2006). Therefore, biopiracy cases, among others, have gained greater exposure as symptoms of the asymmetry at stake in mainstream antagonism to the TRIPS Agreement (Laxman & Ansari, 2012).

2.2 TK and Public Disclosure: Highlighting the Boundaries of the Sharing Ethos

With regards to TK, criticism of the TRIPS Agreement has concentrated on the default relegation to the public domain and the

associated lack of protection. A 2015 WIPO report notes that "policy debate has underlined the limitations of existing IP laws in meeting all the needs and expectations of [TK] holders." In fact, with regards to the IPRs structure, two main concerns are usually shared. First, there are concerns that the current IPRs architecture creates inadequate "positive" protection for TK. In other words, although several IP tools can protect TK, in practice, indigenous communities may not be able to leverage all resources necessary to effectively control the uses of their TK and benefit from IPRs. Second, some have pointed out that this framework may instead enable and facilitate the misappropriation and exploitation of TK (WIPO, 2015).

These concerns directly stem from specific IPRs standards laid out by the TRIPS Agreement. As a matter of fact, the agreement: (1) provides that patent-holders can exclude all others users from growing and selling patented plants; (2) contains no provision requiring compulsory prior informed consent from local communities or national institutions before the utilization or patenting of any local kind of practice, know-how, skill, or innovation forming part of a traditional knowledge system; (3) lacks any arrangement for the sharing of benefits, or the fair material/non-material rewarding of local communities that developed, refined, and maintained this body of knowledge across generations; (4) lacks dispute settlement provisions and rules for the clear identification of parties' interests and stakes in alleged biopiracy cases; (5) lacks arrangements aimed at the preservation of biodiversity, especially in alleged cases of biopiracy that often lead to a sudden increase of the exploitation of certain resources; (6) is not suited for the collective ownership and custodianship characteristics of TK, but only addresses the individual ownership or IPRs; and (6) establishes IPRs registration procedures and costs that are not easily accessible to most indigenous people (Gupta, 2001).

Interestingly, Art. 8 of the TRIPS Agreement states that "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of [IPRs] by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology" (WTO, 1994). This article seeks to circumscribe the extent of IPRs and limit potential abuses of IPRs granted by the TRIPS Agreement. However, the main limitations outlined are (1) a perturbation of the "international transfer of technology" and (2) "practices which unreasonably restrain trade." Abuses regarding TK, and more specifically alleged biopiracy cases, and their associated economic, environmental, social, and cultural repercussions for local communities and developing countries are not explicitly mentioned.

First and foremost, it is essential to emphasize that TK, as defined in the 2015 WIPO report or the CBD, is not explicitly named nor characterized in the TRIPS Agreement (Srinivas, 2008). The absence of any explicit acknowledgment of TK in the agreement is justified by the TRIPS' understanding of the nature of TK: Dutfield (2001) explains that "TK is often (and conveniently) assumed to be in the public domain." Assignment to the public domain implies that TK is, for the most part, considered to be ineligible for private ownership. Therefore, any member of the public may be legally entitled to freely use, patent, and commercialize derivatives of TK (Srinivas, 2008; WIPO, 2015).

Several scholars have pointed out that such interpretation of TK denies its significant economic value while overlooking the many negative side-effects that its assignment to the public domain has brought (Dutfield, 2001;

Laxman & Ansari, 2012; Juma, 1999; Reid, 2009; Shiva, 2006). Dutfield (2001), in particular, has pointed out that "[the TRIPS Agreement's silence regarding TK] is likely to encourage the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely." As a matter of fact, advocates who support the protection of TK claim that its allotment to the public domain opens the way for undesired and unwanted misappropriation and misuse by third entities who can leverage IPRs to this aim. For instance, Laxman and Ansari (2012) argue that "[t]here is an erroneous assumption that TK, by virtue of it being collectively held and generated, is knowledge that falls within the public domain (...) [this conception] violates [indigenous people's] rights."

In fact, beyond the characteristics which have motivated the TRIPS Agreement's silence regarding TK, it is often assumed that traditional communities have a strong sharing ethos, particularly when it comes to information and resources (Dutfield, 2001). Indeed, we have identified earlier that two of the most common characteristics of TK were "cultural foundationalism" and "community responsibility and ownership" (see Fig. 4). Hence, although there is some truth to such claims, it is nonetheless necessary to point out that a "sharing ethos" does not necessarily equal consent for granting "generic," universal IPRs on their knowledge, practices, and know-how to everyone. This general "sharing ethos" principle is a vastly reduced understanding of the complexity and multiplicity of local communities' customs of TK custodianship. In fact, local communities and indigenous peoples often employ localized jurisprudence in everyday internal affairs, including TK management. Within traditional communities, various customary laws govern the classification and use of TK and the nature of the responsibilities and rights attached to the preservation, maintenance, and transmission of it (Gupta, 2001). Interestingly, a close examination of these cultural jurisprudences informs us that some indigenous peoples reject the concept of the public domain in their customary laws: for example, the Miskito healers of Nicaragua consider that their cure is a "private property" (Dutfield, 2001). This phenomenon is especially widespread among indigenous healer groups, who possess the exclusivity and responsibility towards the knowledge they have transmitted. In some communities, the secrecy of the TK is believed to be the very source of its power. Thus, public disclosure is perceived as harmful to the value of the TK itself (Dutfield, 2001). Hence, upon closer look, these innumerable cases illustrate how the automatic allocation of TK to the public domain may not be as intuitive as the "public sharing" ethos may initially suggest.

Thus, we have seen that integrating TK into existing IPRs frameworks would require designing **a policy framework with a clear understanding of the role and boundaries of the public domain with respect to TK**. Many argue in favor of increased inclusion of indigenous people, in particular, to help combine their existing customary laws with potential TK protection through IPRs. Many arrangements could achieve this aim. For instance, Arewa (2006) suggests giving "local communities some ability to participate in decisions regarding the uses of local knowledge as well as the development of intellectual property frameworks that influence the treatment of such knowledge."

2.3 Reform Propositions from Developing Countries: Integrating TK and Local Communities' Needs to the TRIPS Agreement

Arewa (2006) asserts that "[i]nternational trade accords are negotiated and implemented in a real-world of power asymmetries and webs of history and culture (...) relative

competitive advantage, including scientific, technological, and institutional capacity, can play an important role in determining the beneficiaries of a particular global intellectual property framework. As a result, the negotiation and implementation of agreements such as [the] TRIPS cannot be understood without assessing the relative position of the parties at the negotiating table." In multiple countries, the first forms of IPRs regimes were introduced and established by colonial powers during the 19th century. Patel (1989) notes that "India (...) had its patent law in 1859 - just two years after the Great Rebellion, and long before any laws on subjects of vital public concern were enacted. The patent law was introduced in Liberia in 1864, Mauritius in 1875, Zaire in 1886, [and] Sri Lanka in 1892." Drawing from the colonial period, Arewa (2006) details, through a historical perspective, how and why international IPRs frameworks like the TRIPS Agreement were shaped by developed countries' understanding of knowledge and innovation. For example, Geographical Indications (GI), defined through Art. 22 and Art. 23 of the TRIPS Agreement were mainly pushed by European countries that currently protect over 1,000 GIs for regional foods such as the Greek Feta cheese, the Italian Parma ham, and the French Roquefort cheese (Curzi & Huysmans, 2021; Josling, 2006). Thus, given the historical roots of the current IPRs' framework, several developing countries consider the TRIPS Agreement to be a concession to developed countries made under duress in an imbalanced historical, economic, and geopolitical configuration with limited mutual benefits (Dutfield, 2001).

The consequences of this asymmetry are multiple, and TK may appear as a minor IPRs-related issue at stake in the TRIPS Agreement, compared, for example, to certain developing countries' pressing needs for technology transfers of medicines and biotechnologies (Lanoszka, 2003). Dutfield (2001) notes that the growing interest around TK and the particular focus on the TRIPS Agreement may indeed seem contradictory, given the fact that this matter was, until very recently, considered to be just a "ponytail issue." Dutfield (2001) also highlights an interesting paradox: developing countries have increasingly raised their voices around TK at the WTO with very little success, yet for the most part, they have nonetheless done very little at the national level where they can have more leverage to protect their local TK. He identifies four main reasons that could motivate developing countries' seemingly inconsistent strategy regarding TK and the TRIPS Agreement: (1) first, he posits that developing countries may be mainly focusing on the TRIPS Agreement because they might have identified it as the main factor facilitating biopiracy and consider this issue to be important enough to deserve major attention in view of eradicating this problem; (2) second, he argues that, rather than just limiting biopiracy cases, developing countries may want new IPRs standards to be inserted into the existing TRIPS Agreement in order to recognize and protect TK fully; (3) alternatively, Dutfield proposes that developing countries may solely want to take advantage of the public attention around biopiracy cases to obtain concessions from developed countries on the TRIPS Agreement for other IPRs matters. In this case, potential

economic and trade advantages derived from TK protection or the fair rewarding of indigenous communities would only be secondary and contingent. (4) Lastly, this could again be a strategic tool to gain bargaining power in the negotiations of other WTO agreements.

Regardless of the strategy adopted with regards to the TRIPS and the WTO, since the implementation of the agreement, developing countries have become increasingly proactive on the issue of TK in various relevant international instances (Dutfield, 2001; Juma, 1999; Srinivas, 2008). Beyond the WTO arena, they have also raised issues related to TK and biopiracy in a myriad of international fora discussing indigenous knowledge, genetic resources, and measures against biopiracy through a variety of angles (e.g., gender equality, economic development, human rights, employment opportunities, biological diversity and plant varieties' protection, and IPRs). Although several intergovernmental organizations, UN entities and the UN General Assembly itself have been concerned with TK, it is undeniable that the main object of discontent remains the TRIPS Agreement, and thus, the WTO. It seems as though many developing countries believe that the introduction of a reformed IPRs framework, better suited to their needs, could represent a significant step towards a more trusted and more balanced WTO, which would, in turn, benefit their integration into the world economy and their access to technology transfers. Moreover, it appears as though they may be considering granting IPRs protection to TK as an opportunity to progress towards this goal. However, proposals made at the WTO in this sense have remained very controversial and unsuccessful.

Developing countries have attempted to bring the subject of the IPRs protection of TK on the WTO negotiation table at various occasions. The two most relevant instances were the 1999 negotiations on the review of Art. 27.3(b), and the 2001 Doha Development Round. The former illustrates most eloquently the spectrum of propositions put forward by developing countries and the dynamic that emerged at the WTO and prevented these proposals from receiving concrete answers. When the TRIPS Agreement was adopted in April 1994, all parties agreed to review Art. 27.3(b), five years later, in 1999. Entitled "Patentable Subject Matter," Article 27 of the TRIPS Agreement detailed which inventions WTO members had to make eligible for patenting (e.g., technological products and processes, plant varieties, etc.), and which elements could be excluded from patenting (e.g., "biological processes for the production of plants or animals other than non-biological and microbiological processes" (GRAIN, 2000).) Subparagraph 3(b) is the part of the Article that specifically dives into what may be patentable and what may be excluded from patentability regarding plants, animals, micro-organisms, and biological processes. In particular, it specified that in any case, plant varieties had to be made eligible for IPRs protection (i.e., either through patenting, through a sui generis system, or a combination of the two). Nevertheless, the subparagraph concluded with this remark: "[t]he provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement" (GRAIN, 2000). In the

eyes of many, Art. 27.3(b) abounded with problems. NGOs like GRAIN pointed out (1) the lack of precision, notably regarding the exact nature of the proposed alternative *sui generis* system, (2) the lack of consensus regarding the possibility for private individuals to own IPRs on genes and microbiological processes, (3) the absence of any benefit-sharing mechanism for profits extracted from the patenting of plant varieties, genes and microbiological processes, (4) the absence of any recognition of TK and systemic biopiracy phenomena, and of any provision regarding information sharing relative to prior art which could prevent misappropriations of TK (5) inconsistency with legal standards previously laid out in the CBD in 1992, and lastly, (6) the bias in favor of developed countries' interests (e.g., favoring the biotechnology industry and breeders' rights at the expense of local farmers and indigenous communities) (Correa, 2001; GRAIN, 2000).

The preparations for the review process started in 1998 with the December Session of the Council of TRIPS. This session was crucial, as its primary goal was to set up the review process' agenda. Hence, it was the theatre of a major arm wrestling between developed and developing countries: while the former party attempted to minimize the breadth of the revision, the latter party attempted to enlarge it as much as possible, in order to bring in provisions relative to the CBD, national legislations, rejection of the patentability of certain life forms, and another extension of the revision period (Correa, 2001). Most developed countries' priorities were to (1) prevent the lowering of the standards of protection on life patenting, (2) prevent the extension of transition and revision periods, and (3) maintain few and simple requirements for patent applicants. Some countries, like Singapore and the United States, even argued for eliminating the exclusion of plants and animals so that they could also be patentable in all countries, like plant varieties (Correa, 2001). GRAIN (2000) notes that developed countries motioned to focus the review on how countries were implementing Art. 27.3(b). Many developing countries objected and argued that the sub-paragraph mandated a review of its substance rather than its implementation. Furthermore, only developed countries were required to have fully implemented Art. 27.3(b) by 1998. Hence, developing countries further argued that limiting the scope of the review to the progress on implementation would de facto annihilate the purpose of the review process (GRAIN, 2000). Eventually, the Secretariat decided to collect information about the implementation of the Article. By April 1999, 30 countries had submitted information regarding their experience with the implementation of Art. 27.3(b). Led by India, discussions relative to the substance of the Article were only initiated in July 1999. One of the observations of India was that "not only formal systems of innovation but [also] informal systems of innovation (...) especially with regards to biodiversity" needed to be recognized in the TRIPS Agreement (GRAIN, 2000). During four months, nearly a hundred developing countries signed onto a dozen proposals calling for the reform of the TRIPS Agreement with regards to biodiversity and TK. The most active groups of developing countries on this matter were the African

Group, the Southern Africa Development Cooperation (SADC), the South Asia Association for Regional Cooperation (SAARC), the Group of 77 (G77), and the Least Developed Countries Group (LDCs). Moreover, through their individual proposals, the most proactive countries were Brazil, Cuba, Honduras, India, Jamaica, Kenya, Nigeria, Pakistan, Peru, Sri Lanka, Tanzania, Uganda, Venezuela, and Zambia (Correa, 2001; GRAIN, 2000).

These groups/countries' proposals mainly ranged along six main categories: (1) time extension(s) of the transition and/or review period(s), (2) harmonization of the TRIPS Agreement with other international legal frameworks (i.e., predominantly the CBD), (3) exclusion from patentability of certain life forms and biological processes, (4) protection of TK and indigenous communities' rights, benefit-sharing systems, and technology transfer(s), (5) prior-informed consent of government and communities of the country of origin, and (6) flexibility and adaptability of the *sui generis* option, (see Table 2).

Stakeholder	Patenting (life forms & biological processes)	*Sui generis* rights (plant varieties)
Kenya	- Need five-year extension of transition period - Harmonise TRIPS with CBD	- Need five-year extension of transition period - Increase scope of 27.3(b) to include protection of indigenous knowledge and farmers' rights - Harmonise TRIPS with CBD
Venezuela	In 2000, introduce mandatory system of IPR protection for traditional knowledge of indigenous and local communities, based on the need to recognise collective rights	
Africa Group	- Review should be extended + additional five year transition after that - Review should clarify that plants, animals, microorganisms, their parts and natural processes cannot be patented	- Review should be extended + additional five year transition after that - *Sui generis* laws should allow for protection of community rights, continuation of farmers' practices and prevention of anti-competitive practices which threaten food sovereignty - Harmonise TRIPS with CBD and FAO
LDC Group	- There should be a formal clarification that naturally occurring plants and animals, as well as their parts (gene sequences), plus essentially biological processes, are not patentable. - Incorporate provision that patents must not be granted without prior informed consent of country of origin - Patents inconsistent with CBD Art 15 (access) should not be granted - Need for extended transition period	- *Sui generis* provisions must be flexible enough to suit each country's seed supply system - Need for extended transition period
Jamaica, Sri Lanka, Tanzania, Uganda, Zambia	No patenting plants without prior informed consent of government and communities in country of origin	
SAARC	There is a need to prevent piracy of traditional knowledge built around bio-diversity and to seek the harmonization of the TRIPS Agreements with the UN Convention on Biological Diversity so as to ensure appropriate returns to traditional communities.	
SADC	- The transitional period for implementation of 27.3(b) should be extended and the 2000 review should be delayed. - The review of 27.3(b) should harmonise TRIPS with CBD. - The exclusion of essentially biological processes from patentability should extend to microbiological processes.	- The transitional period for implementation of 27.3(b) should be extended and the 2000 review should be delayed. - The review of 27.3(b) should retain the *sui generis* option.
G77	Future negotiations must make operational the provisions relating to the transfer of technology, to the mutual advantage of producers and users of technological knowledge and seek mechanisms for a balanced protection of biological resources and disciplines to protect traditional knowledge	

Legend:
Time Extension
Harmonization
Patentability of Life Forms
TK Protection and Benefit-Sharing
Prior Informed Consent
Sui Generis Option

Table 2. "Official proposals for the review or renegotiation of Art. 27.3(b) with regards to biodiversity and associated TK by developing countries (1999)."

Source: GRAIN (2020) "For a Full Review of TRIPS 27.3(b) An update on where developing countries stand with the push to patent life at WTO." *GRAIN Genetic Resources Action International*, Mar. 2000, https://www.grain.org/Art./entries/39-for-a-full-review-of-trips-27-3-b. Accessed 20 May 2020.

These proposals were unfruitful: till this day, the substantive review of 27.3(b) has not been conducted, and the proposals mentioned above were not successfully implemented, leaving TK, concerns for indigenous communities' rights, tentative benefit-sharing mechanisms, and the requirement of prior informed consent outside of the scope of the TRIPS Agreement (GRAIN, 2000; Shiva, 2006).

3. Strategies for Future Pathways: Towards (International or National) Reform, Convergence and Harmonization?

3.1 The need for Innovative Instruments: Protecting, Safeguarding, or Preserving?

Established in September 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) carries out text-based negotiations to elaborate an international legal tool(s) for the protection of TK, genetic resources (GRs), as well as traditional cultural expressions (TCEs). Every two years, the WIPO General Assembly agrees on the renewal of the IGC's mandate and work plan for the next biennium (WIPO, 2021). Although its work primarily revolved around gathering information, documenting indigenous communities and NGOs' views, proposing model guidelines, mandating studies, and raising awareness around TK, GRs and TCEs, in 2009, it added to its original mandate the drafting of an international legal instrument(s) that would give TK, GRs and TCEs effective protection (WIPO, 2021). In the course of its forty sessions, the IGC's work mainly revolved around attempting to place TK within the current IPRs framework[92]. The possible instrument(s) that the IGC could put forward could range from a set of recommendations, to a formal treaty which would legally bind all WIPO members ratifying it (WIPO, 2015). Although representatives of indigenous and local communities have been actively involved in the IGC talks thanks to the WIPO Voluntary Fund, given the previously mentioned focus on the WTO as the nevralgic point of the IPRs protection of TK, "indigenous and other local communities have generally viewed [the IGC's] approach with skepticism" (CIEL, 2007; WIPO, 2015). In fact, Srinivas (2008) points out that IGC meetings have witnessed "more divergence than convergence on the need and scope of protection for TK. Even if the IGC comes out with a well thought model law and provisions (...) it is unlikely to be supported by all countries (...) we need not be surprised if the process ends with model laws and studies without any consensus among countries on the need and scope of protection for TK." Currently, although the IGC has proposed various draft provisions, so far their practical implementation has been very limited.

Nevertheless, the IGC constitutes a crucial forum for TK protection and biopiracy prevention because it has been an arena where, in addition to the N-S divide, the divide between indigenous communities and developing countries has also been made apparent (Srinivas, 2008). Representatives of indigenous communities have had an opportunity to voice their concerns about the current IPRs system. They have repeatedly expressed that they consider the current IPRs framework to not adequately protect their knowledge, practices, traditions, livelihoods, and biodiversity. However, more importantly, they have also had an opportunity to provide insights into what practical impacts and limitations any reform on TK protection could have on their respective community. For instance, indigenous groups have pointed out

[92] IGC 41 is scheduled to take place from August 30 to September 3, 2021 (WIPO, 2021).

that measures to extend the current IPRs frameworks in its existing rationale to TK may threaten both their customary laws and traditional practices regarding TK and resource management (Dutfield, 2001). A member of the Indigenous Peoples' Council on Biocolonialism (IPCB) summed it up in the following words: "[w]estern property law, and in particular, [IPRs], are contradictory to the laws of indigenous peoples to safeguard and protect their knowledge, which requires collective ownership, inalienability and protection in perpetuity" (CIEL, 2007). Analogously, the 2015 WIPO report also notes that: "indigenous peoples and local communities have unique needs and expectations in relation to IP, given their complex social, historical, political and cultural dimensions and vulnerabilities" (WIPO, 2015).

Thus, insights from indigenous communities' representatives at the WIPO IGC demonstrate the inherent intersectionality of TK protection. Through their involvement, indigenous communities have also brought light to the many ethical, cultural, environmental, and epistemological components of their approach to the protection of TK. They have also highlighted how their quest for TK and genetic resources protection derives from human rights concerns. These particular overlapping and intersectionality circumstances require comprehensive approaches to TK protection. These requests are what sets developing countries apart from indigenous groups. While the former seem to focus on fairness claims, economic considerations, and geopolitical dynamics embedded in international frameworks, the latter focus on biodiversity protection, cultural and epistemological matters, and human rights law.

Therefore, ***before establishing IPRs protection for TK, it is necessary to distinguish between developing countries' and indigenous communities' core concerns.*** As a matter of fact, focusing on IPRs and the TRIPS Agreement may primarily correspond to developing countries' concerns and set aside many of indigenous groups' fundamental considerations. Hence, it seems as though priorities should be set with respect to the concerns to be put forward within international fora and through various legal tools.

Moreover, in addition to the divide between developing countries and indigenous groups, another essential pathway for reform is the distinction between "protection," "preservation," and "safeguarding." The "preservation" and "safeguarding" of TK correspond to the identification, documentation, transmission, revitalization, and promotion of indigenous knowledge and traditional know-how to ensure its maintenance and viability throughout time (WIPO, 2015). The aim is to ensure that TK is promoted and maintained over time and that it does not disappear, becomes degraded, or desecrated. However, "preservation" and "safeguarding" can sometimes conflict with "protection": for instance, the documentation of TK through open-access digital libraries is often put forward as a possible solution for the preservation and safeguarding of TK.
Several initiatives of indigenous peoples' innovation databases, local biodiversity

registers, or community intellectual rights projects have emerged worldwide (Dutfield, 2001; Reid, 2009). Two notable examples from India are the SRISTI and the TKDL. The Society for Research and Initiatives for Sustainable Technologies and Institutions (SRISTI) is linked to the India-based Honey Bee Network. "Sristi" means "creation" in Sanskrit: the SRISTI database was established in 1993 to support the activities of the Honey Bee Network in acknowledging, recognizing, and rewarding grassroot traditional innovations (Dutfield, 2001)[93]. On the other hand, India's Traditional Knowledge Digital Library (TKDL) was initiated in 2001 under the initiative of the Council of Scientific & Industrial Research (CSIR) and the Ministry of Ayurveda, Yoga & Naturopathy, Unani, Siddha & Homeopathy (AYUSH),[94] is one of the most preeminent TK databases worldwide. Following the Turmeric and Neem tree biopiracy cases, India sought to reunite information from all the main Indian systems of medicine (i.e., Ayurveda, Sowa Rigpa, Unani, Yoga, and Siddha). With the help of nearly a hundred doctors, existing Sanskrit, Urdu, Arabic, Persian, and Tamil literature relating to TK were converted, digitized, classified, and translated into five international languages (i.e., English, French, German, Spanish, and Japanese) for convenient use by patent examiners from around the world (Reid, 2009; TKDL, 2021).

All these projects aim to propose alternatives/solutions for the IPRs-based protection of TK by allegedly reconciling "protection," "preservation," and "safeguarding." The extent to which these initiatives can be exported, extended, or generalized to different contexts and traditional communities remains yet to be studied in-depth. In any case, the documentation of TK might indeed enable its identification and promotion throughout time. Some scholars have also argued that this solution could enable a greater IPRs protection of TK by providing easy access to the prior art and preventing flagrant biopiracy cases: published work cannot be patented (Reid, 2009).

However, an open digital database of TK may also make it readily accessible to anyone, everywhere, for free (Reid, 2009). In this case, the community of origin may no longer be able to maintain an overview of the uses of their TK. Hence, while the safeguarding of TK might be ensured, its full and effective protection could be undermined (Reid, 2009).

Furthermore, on its own, the database solution does not include any access and benefit-sharing provision, which seems to be indispensable for the long-term preservation of indigenous groups' livelihoods. Reid (2009) summarizes these points followingly: "[the] only benefit the indigenous peoples receive is that the database system prevents others from selling them back their own knowledge. The databases help credit the knowledge to their country, but as far as

[93] The SRISTI database can be accessed at https://www.sristi.org/database/. Upon searching for "Neem" in the SRISTI Library, 72 results appear, and can be accessed at http://honeybee.org/sristi_library.php?search_case=neem&btnsubmit=Search (Accessed on 13 May 2020).

[94] The TKDL database can be accessed at http://www.tkdl.res.in/tkdl/langdefault/common/Global_Search.asp?GL=Eng. (Accessed on 13 May 2020).

monetary rewards go, there are likely not any."

In addition, constructing a database of TK is very expensive: India's TKDL project cost $2 million (Reid, 2009). Despite this high cost, it is implausible that such a database might be able to map out all TK. Because tracking down TK across centuries requires significant resources in addition to full cooperation from all indigenous groups concerned, it is probable that such projects, if carried out on small scales and/or at national levels, may often be partial and incomplete. This might, in turn, limit the efficient use of these databases as primary sources for prior art identification by patent offices (Reid, 2009).

Lastly, this method may not fit certain TK which are regulated by customary laws imposing non-disclosure to external parties. In response to this concern, some projects like that of the NGO Ecociencia in Ecuador and its 8,000 entries from six indigenous groups have proposed creating closed-access databases to help protect TK as trade secrets (Dutfield, 2001)[95].

Thus, in practice, this approach to the "preservation" and "safeguarding" of TK may also be limited.

Therefore, ***distinguishing between the "preservation," "safeguarding," and "protection" of TK may also enable the designing of more effective instruments.*** It appears as though any single approach may have its own adequate tools, as well as its own limitations. These divisions which overlap with the distinction between positive and defensive approaches to TK protection are crucial to identify the desired outcome to any reform of the current global IPRs system. Hence, a proper approach should map out and selectively navigate all these elements in order to progress towards (the) targeted aim(s).

In addition, another pathway to explore may be the existing customary laws that traditional communities already rely on. The Center for International Environmental Law (CIEL), a non-profit, public interest organization established in 1989 to strengthen the international environmental law frameworks, noted that "local communities have also expressed the need for wider respect of their customary laws and practices. Such laws can also constitute an alternative means in respect of which appropriate protection of their traditional knowledge can be achieved (...) much of the confusion surrounding how to define international standards could be avoided by a regime that provides recognition of customary law and requires mutual recognition across borders to enable enforcement" (CIEL, 2007). The CIEL (2007) argues that preserving TK would necessarily imply to strike a regulatory balance between "indigenous and non-indigenous sources of law." Nevertheless, achieving comprehensive and adequate recognition of these laws remains a significant challenge for local communities. Few countries recognize customary laws in their domestic legislation, while many countries experience policy

[95] The closed-access database project by Ecociencia also proposes that "the trade secret can then be disclosed to companies with benefit sharing guaranteed by a standardized contract. These benefits can then be distributed among the trade secret-holding communities and the Ecuadorian government" (Dutfield, 2001).

tensions with their indigenous communities regarding land tenure and access and/or preservation of resources (Dutfield, 2001). Thus, several member states do not support an agenda promoting the use of customary laws for TK protection.

Hence, ***identifying the role that existing customary laws should assume is crucial for any reform seeking to integrate TK into the existing IPRs framework.*** Leaving these customary practices aside could occult part of the answer to the tensions between the TRIPS Agreement, IPRs, and TK.

3.2 The Bottom-Up Approach: Developing Sui Generis National Systems

Since 1999 and the attempted revisions of the TRIPS Agreement, the international dialogue on TK and IPRs has shifted to WIPO and mainly to the IGC. Nevertheless, as indicated previously, discussions relating to the IPRs protection of TK have also been very active in at least ten international fora:

- intergovernmental organizations like the International Union for the Protection of New Varieties of Plants (UPOV) founded in 1998;
- UN specialized agencies like the Food and Agriculture Organization (FAO) through the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the United Nations Educational, Scientific and Cultural Organization (UNESCO) through the Local and Indigenous Knowledge Systems (LINKS) Programme, the International Labor Organization (ILO) through the International Labor Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries, No. 169 adopted in 1989[96], and WIPO through the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) since 2000;
- international legal instruments like the CBD and its supplementary Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, respectively entered into force in 1993 and 2014. The CBD Secretariat overseeing the implementation of the Convention operates under the United Nations Environment Programme (UNEP);
- UN Conference of the Parties (COPs) like the fourteen UN CBD COPs, carried out every two years since 1993[97];

[96] The most relevant Article of the Convention concerning TK is Art. 5, which reads: "In applying the provisions of this Convention:

> (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
> (b) the integrity of the values, practices and institutions of these peoples shall be respected;
> (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and cooperation of the peoples affected." The Convention (also called C169) entered into force on 5 September 1991. Accessible at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314. Accessed on 13 May 2020.

[97] Composed of all contracting parties to the CBD, the COPs review the implementation of

- the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) under the Office of the High Commissioner for Human Rights (OHCHR) since its establishment in 2007 by the Human Rights Council (HCR). Composed of seven independent experts on indigenous peoples' rights appointed by the HCR, the Expert Mechanism meets annually in sessions of five days. The 14th session took place on July 12-16, 2021. This body has replaced the UN Working Group on Indigenous Populations (WGIP) which operated between 1982 and 2006 under the now defunct United Nations Commission on Human Rights;
- high-level advisory bodies to UN principal organs like the UN Economic and Social Council's (ECOSOC) Permanent Forum on Indigenous Issues (UNPFII) and its yearly thematic sessions since 2002 (United Nations, n.d.);
- UN General Assembly Entities like the UN Conference on Trade and Development (UNCTAD) through several expert meetings reuniting NGOs, IGOs, indigenous groups, scholars, and private companies[98], as well as publications like "Protecting and Promoting Traditional Knowledge: Systems, National Experiences, and International Dimensions[99]" published in 2004; and
- the UN General Assembly, which adopted the UN Declaration on the Rights of Indigenous Peoples in a resolution passed on 15 September 2007[100].

The multiplication of the arenas dealing with TK-related matters and the growing focus on the IGC since 2009 could be the sign of two potentially overlapping trends. First, it may be the sign of increased concern for the protection of indigenous rights, greater global willingness to change the current situation, and active engagement from indigenous

the objectives of the Convention. They also provide adequate forums for developing countries to openly debate and criticize both the TRIPS Agreement and the global IPRs framework.

[98] See Correa (2001) for additional information relating to UNCTAD, TK and IPRs in international fora.

[99] The 2004 UNCTAD Publication is accessible at https://unctad.org/webflyer/protecting-and-promoting-traditional-knowledge-systems-national-experiences-and. Accessed on May 13 2020.

[100] The most relevant Article of the Declaration concerning TK is Art. 31, which reads:
"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 (...). 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." Accessible at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf. Accessed on 13 May 2020.

peoples in TK-related debates. However, this could also represent an effort from developed countries to exclude discussions on TK from the WTO. Indeed, Arewa (2006) points out that "Western States might be using the WIPO IGC as a safety valve for Third World countries to divert issues from the WTO and reduce pressure to address such issues at the WTO." In fact, most critics of the IGC point out the slow pace of the work, as well as the reluctance of many countries (e.g., Japan or the USA) to consider the draft objectives and guidelines originating from the IGC as a potential backbone for an international agreement (Srinivas, 2008).

Withal, debates around the IPRs protection of TK currently taking place at the IGC profoundly affect the global normative dynamic. WIPO supports a bottom-up approach: the organization encourages countries to focus primarily on developing their national IPRs mechanisms to promote and protect TK. Scholars like Taubman (2005) affirm that "[n]o international mechanism can supplant the role of national laws in protecting TK." This opinion is also shared by Dutfield (2001) and Srinivas (2008), who also urge for effective legal and institutional measures for the protection of TK at the national level. Indeed, several countries, including some actively voicing their concerns regarding TK protection, have not yet instituted strong IPRs protection provisions for TK within their national legal frameworks. The CIEL (2007) points out that "[i]ndigenous and other local communities are seeking protection at the international level that has, for the most part, not been provided for at the national level." This situation has two main conjecturable consequences. First, (1) the lack of existing national frameworks makes it difficult, if ever impossible, for developing countries to draw from national-scale experiences to propose tangible and concrete reforms for international-scale agreements. Second, (2) this may enable certain developed countries to avoid engaging with the problem of systemic transboundary misappropriations and misuses of TK through the use of IPRs. In fact, countries that may be reluctant to engage in reform efforts may claim that biopiracy issues principally emanate from developing countries' lack of initiatives for TK protection at the national level. Therefore, WIPO postulates that "developing countries [sh]ould first assess how existing national mechanisms of [IP] could be more effectively used to protect TK before introducing protection at the international level" (Cottier and Panizzon, 2004). To this aim, WIPO and UNESCO jointly devised several model provisions for national laws on TK and TCE protection[101]. Despite this initiative, the authors note that "regional model laws based on the WIPO initiatives are full of definitions but rather devoid of operational language" (Cottier and Panizzon, 2004).

[101] The 1985 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other prejudicial Actions* was jointly published by UNESCO and WIPO. The goal was to assist national governments enacting domestic legislation providing protection to traditional knowledge and folk innovation. Accessible at https://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf. Accessed on May 13 2020.

In order to address these challenges, developing countries have been ingeniously crafting special hybrid regimes that combined specific IGC draft proposals, UPOV breeders' rights, as well as CBD provisions[102]. Several countries have developed their own *sui generis* systems by drawing from the international normative corpus revolving around TK (WIPO, 2015). These initiatives are documented by country in an exhaustive WIPO database[103]. Excellent examples of national *sui generis* systems involving the bottom-up integration and combination of various international IPRs instruments relating to TK protection into national law are India, Peru, Thailand, Costa Rica, and the Philippines.

India passed the Indian Biological Diversity Act in 2002, establishing the National Biodiversity Authority (NBA) able to protect TK and to impose various benefit-sharing provisions[104] (Correa, 2001). Section 36 (iv) of the Biological Diversity Bill ensures the protection of TK related to biodiversity through the development of a *sui generis* regime and the registration of TK. In fact, it is also this bill that establishes the TKDL aimed at preventing biopiracy by notably cataloging, indexing, and translating prior art resources on an online database. Sections 19 and 21 state that the NBA's approval is necessary for every firm applying for IPRs to protect an innovation that utilizes or bases itself on Indian biological resources or local TK. In addition to granting approvals, the NBA also imposes terms and conditions to secure equitable benefit-sharing mechanisms (Correa, 2001).

Peru, on the other hand, passed Law No. 27811 on the Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources on 24 July 2002[105]. While explicitly defining TK and indigenous peoples in Art. 2, the law also recognizes that indigenous groups have ownership and associated rights over their TK in Art. 42 (Correa, 2001). The text enables indigenous groups to register voluntarily in the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI), founded in 1992 through Executive Order No. 25868. When the TK is not in the public domain, the text obliges any company seeking to use, commercialize or derive new applications from it to seek prior informed consent from indigenous groups and agree upon a "knowledge licensing contract" specifying the terms of use of their TK. Thus, this sui generis

[102] For example, some countries choose to integrate CBD provisions explicitly relating to the establishment of benefit-sharing mechanisms in their national law framework.

[103] The "Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws" database is accessible at: https://www.wipo.int/tk/en/databases/tklaws/. Accessed on May 13 2020.

[104] Such provisions might include royalties, fees, technology transfers, a VCF benefiting local communities, joint ownership, or monetary compensations (Correa, 2001). Additional details on this law can be found on the WIPO TK Laws Database accessible at https://www.wipo.int/tk/en/databases/tklaws/articles/article_0011.html. Accessed on May 13 2020.

[105] Additional details on this law can be found on the WIPO TK Laws Database accessible at https://www.wipo.int/tk/en/databases/tklaws/articles/article_0016.html. Accessed on May 13 2020.

law aims at protecting Peruvian TK against unfair misappropriation by third parties by systematizing prior informed consent and benefit-sharing agreements (Correa, 2001).

Thailand has also devised a very comprehensive *sui generis* system established in the 1999 Protection and Promotion of Traditional Thai Medicinal Intelligence Act, B.E. 2542[106]. After defining "Traditional Thai Medicine" and "Thai Traditional Drugs," this Act introduces three types of Traditional Thai Medicinal IPRs in its Section 16: (1) National Formulae are formulations crucial to public health that have special medical value. Upon decision by the ministry of public health, the Thai State has full rights over these formulae, and its permission must be sought before any commercial and/or R&D use(s). Infringement of this rule may result in criminal sanctions. (2) General Formulae are well-known formulae that anybody can freely use. Lastly, (3) Personal (or Private) Formulae are owned by private individuals who have exclusive rights over them and can freely use them for private R&D and/or commercial use(s). Registration with the Institute of Thai Traditional Medicine can be sought by an inventor, developer, or inheritor of a formula. Any third party wishing to use a personal formula should first obtain permission from the owner. Exclusive rights over a registered private formula last throughout the owner's lifetime and fifty years from the date of its death (Correa, 2001). The law also states provisions for the sustainable use of TK and the conservation of plants at risk of extinction. In addition, all three types of formulae can freely be used domestically by local Thai communities and traditional healers (Correa, 2001).

Costa Rica pioneered one of the most comprehensive biodiversity laws in the world. Six years after the signing of the CBD, it passed the 1998 Biodiversity Law that created a legal framework integrating all three objectives of the CBD in an interconnected manner (Miller, 2006). Starting from a broad definition of biodiversity encompassing TK, the law created conservation areas managed by local and regional councils, established access and benefit-sharing mechanisms aimed at preventing biopiracy cases, and led to the creation of two national authorities under the Ministry of Environment and Energy regulating the private use of Costa Rican genetic resources, biodiversity and TK (Future Policy, 2020). The Sistema Nacional de Áreas de Conservación (SINAC) and the Comisión Nacional para la Gestión de la Biodiversidad (CONAGEBIO) are the only institutions delivering permits and licenses for the collection, study, exportation, bioprospection and/or commercial exploitation of Costa Rican biodiversity[107] (Future Policy, 2020; Reid, 2009). Another key tool in this strategy is the privately-run Instituto Nacional de Biodiversidad (INBio) founded in 1989. This institution establishes an inventory of the Costa Rican heritage, promotes conservation and bioprospects for possible compounds and

[106] Additional details on this law can be found on the WIPO TK Laws Database, accessible at https://www.wipo.int/tk/en/databases/tklaws/articles/article_0024.html. Accessed on May 13 2020.

[107] Additional Details can be found on the website of the CONAGEBIO, accessible at https://www.conagebio.go.cr/Conagebio/public/permisosInfo.html. Accessed on May 13 2020.

utilizations that could be of interest for the pharmaceutical and cosmetics industries. Atta, its computer database also reunites precise information on thousands of different species of insects. The INBio also enters into partnerships with corporations wishing to explore the biodiversity of Costa Rica (Castle & Gold, 2007).

Lastly, similar to Costa Rica, the Philippines have also established a licensing mechanism for companies wishing to conduct bioprospecting activities in the Philippines (Srinivas, 2008): "licenses are only granted upon the written consent of a knowledge-holding community," describe Cottier and Panizzon (2004). Establishing a contractual relationship, such agreements usually include an initial fee to be paid and the negotiation of royalties to be paid after that. Special additional payments can also be negotiated to provide funding for biodiversity conservation and education or infrastructure projects benefiting local communities and original TK holders (Reid, 2009).

Established in the wake of the CBD and under the impetus of the infructuous negotiations at the WTO and the myriad of IGC meetings at WIPO, all these examples of *sui generis* TK protection laws are very ambitious. They go beyond conferring protection to TK: drawing from the CBD objectives[108] and other TK-related international legal tools, they also seek to integrate measures and standards related to environmental protection, human rights, and indigenous peoples' rights, unfair competition prevention, preservation of local cultures and cultural material, and access and benefit-sharing mechanisms (Srinivas, 2008). In order to effectively carry out all these objectives, they often rely upon national institutions and/or government agencies (e.g., India's NBA, Peru's INDECOPI, Thailand's Institute of Thai Traditional Medicine, and Costa Rica's SINAC, CONAGEBIO, and INBio). This trend in the focus of *sui generis* systems is not surprising: as the debates on biopiracy revolve increasingly around property-based rights, environmental protection, human rights, and economic development opportunities, rather than on the novelty of knowledge, it seems inevitable that innovative and comprehensive IPRs tools, other than just patents, will be required. Analogously, Gupta (2001) points out that "we should not assume that every bit of [TK] can be protected by the same instrument."

3.3 The Need for an International Framework: Assessing the Feasibility of Reform, Convergence, and Harmonization Strategies

As seen earlier, most alleged biopiracy cases are perpetuated by foreign companies which often obtain IPRs protection abroad (see Table 1). Biopiracy is an inherently international phenomenon skewed by N-S dynamics. Therefore, implementing *sui generis* IPRs protection at the national level only creates territorial rights that cannot be enforced in another country. Focusing on national hybrid regimes does not fully address all TK-related problems, especially biopiracy (Correa, 2001).

HUMAN RIGHTS:

[108] For example, the CBD drew an explicit link between TK and biodiversity. Many national *sui generis* legal tools for TK protection also establish this link (Srinivas, 2008).

Despite these encouraging signs of progress, we shall nonetheless note that "[f]or certain communities, the concept of free, prior and informed consent can be described as a bundle of rights, such as (...) indigenous peoples' rights to self-determination and our land and resource rights. Per definition, human rights can never be subject to national legislation" (CIEL, 2007). Thus, the fact that national legislation often emphasizes national sovereignty over natural resources, at the expense of traditional communities' rights over their environmental resources, prompts indigenous peoples to seek an international framework instead. Dutfield states: "solutions have more to do with basic human rights than with intellectual property rights" (2001).

N-S:

Effective and reliable protection of TK can only be achieved by equally binding both developed and developing countries: this undoubtedly necessitates a comprehensive, global-scale protection scheme that would unfailingly protect indigenous communities against any violation of their rights, whether by their government or by other States. A holistic approach to TK protection appears to be imperative, mainly due to the international scale of the misappropriations and misuses of TK cases. These factors seem to pledge for a "top-down" approach centered on the WTO, and more particularly the TRIPS Agreement, rather than a bottom-up approach.

TOP-DOWN APPROACH:

-IGC

First, the IGC, beyond the unlikeliness of its Draft turning into actual legislation, also presents numerous caveats[109] like the primary focus on the "protection" of TK, at the expense of other objectives such as "safeguarding" and "preserving." The CIEL notes that "[w]hile any process such as the IGC will inevitably be unable to address all the issues favored by all the stakeholders, the IGC is striking in how far it is from meeting the core demands of the acknowledged primary beneficiaries of the treaty: indigenous and other local communities" (2007).

-CBD

Currently, the CBD is the only international treaty that explicitly acknowledges the role of TK and related practices, innovations, and relationship to the environment. It is one of the most advanced international foundations for TK protection, relying on three main innovative principles: the ABS (access and benefit-sharing), "mutually agreed terms" and PIC (prior informed consent) principles. However, the CBD does not affect practical trade-related aspects of TK protection. For example, "[i]t does not guarantee that a TK-derived good can effectively enter an industrialized country market" describe Cottier and Panizzon (2004). Thus, the WTO's TRIPS Agreement seems to be a more appropriate arena for the elaboration of the legal protection of TK that could ensure economic development and allow for the global economic integration of traditional communities. In addition, the WTO possesses much more potent and effective enforcement powers through international trade mechanisms, than WIPO, for example.

[109] Beyond the lack of concrete recognition of indigenous peoples' customary laws we already examined.

Furthermore, the CBD also places ownership of resources in the hands of the State rather than in the hands of indigenous communities[110].

-TRIPS & CBD:

Since the 2001 Doha Development Round, one of the objectives of the WTO has been to attempt at merging and incorporating the CBD principles in the TRIPS Agreement: "efforts are currently underway to make the CBD and its Bonn Guidelines mutually compatible with TRIPS. If successful [it] would require IPRs under TRIPs to be given an interpretation consistent with the principle of access and benefit-sharing, and conversely, the CBD would have to be viewed as consistent with TRIPS-imposed IP obligations", as indicated by Cottier and Panizzon (2004). Notwithstanding, the current "interface between these two legal instruments can be depicted as one of uneasy coexistence" (Laxman and Ansari, 2012). The authors further argue that a potential ground for harmonization could depart from the TRIPS Preamble (Laxman and Asari, 2012).

-GLOBAL FRAMEWORK & TRIPS:

A coordinated and comprehensive international regime could reconcile the different notions currently at use on the international level. This confusion hinders the elaboration of mutually compatible regimes. An agreed and consensus-based set of global rules regarding TK would contribute to the expansion of the TRIPS Agreement. Such a direction will unquestionably entail a substantial revision of the 27.3(b) of TRIPS, a far-reaching merging of TRIPS and CBD standards, and the acknowledgment of other innovative steps towards progress, the likes of the IGC work.

In conclusion, we proposed to investigate the conceptual tensions between TRIPS, IPRs and TK, before uncovering the legitimacy issues and power asymmetries underlying the TRIPS agreement, to then analyze the need for TK integration within domestic and global IPRs regimes. Throughout this development, we uncovered TK the complex significance and stakes associated with the discussions surrounding TK protection. There is a lack of consensus uniting both developing and developed countries on whether or not a global instrument for TK protection should be a legally binding international tool. The divisions stem from the very lack of unanimity regarding the definition of TK. In addition, while some countries advocate for a new *sui generis* system with innovative and flexible tools, other countries argue that existing IPRs regimes already provide TK with protection. On the other hand, indigenous communities defend and voice other concerns, among which the recognition of their customary laws, the preservation of TK throughout generations, and the acknowledgment of their responsibility and custodianship of TK-related environments. The multiplicity of treaties and discussion arenas in the last few years illustrated the progressive distancing of TK protection issues from the WTO. This phenomenon is partly due to developed countries' skepticism and efforts to avoid engaging with the problem of transboundary

[110] The CBD Art. 15.1 reads as follows: "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation" (CBD, 1993).

TK misappropriation. There is an undeniable need for an international, coordinated, and comprehensive legal regime that could reconcile the different notions currently at use at the international level. Due to the more significant enforcement capabilities of the TRIPS and its relationship to international trade, and thus, economic development, a reform of the TRIPS seems to be an ideal objective to achieve. Yet, many scholars have insisted on the unlikeliness of such extensive reform in the near future.

Thus, we can deduce that the question of the resounding the demands of developing countries at the WTO revolving around TK, mainly demonstrate the ability of these countries to frame and articulate issues at stake to them as trade-related and become proactive in international IP and trade negotiations. It is relevant to note that developing countries may be strategically utilizing TK protection debates as a way to leverage more bargaining powers for other agendas regarding the TRIPS, or for WTO negotiations in general: the issue of TK transcends both IPRs and the TRIPS Agreement. In this strategic paradigm, the exact place of traditional communities' demands and rights remain yet to be defined. Dutfield sums up this intuition in the following terms: "the complexity of the issue and the improbability of developed countries agreeing to accept new norms on TK suggest that [the real motivation is] serves a strategic purpose at the WTO that is unlikely to serve the interests of traditional peoples and communities" (Dutfield, 2001).

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ASEAN members being part of the 'New Asia': Opportunity or Self-Risk?

by Amir Harith Bin Saipolyazan | 3734 words

Abstract

After Cambodia joined the Shanghai Cooperation Organization (SCO) in 2017, scholars have posited that there is a potential for other ASEAN member countries to follow suit. This article seeks to explain whether this hypothetical decision would be beneficial for the member countries. To answer this question, it first argues that ASEAN and the SCO share the same principles, institutional design and objectives. Therefore, ASEAN countries could reap a lot of security and economic benefits from the membership in the SCO. However, this article also explains that this decision might risk them getting caught in the crossfire of the US-China battle for global dominance.

Introduction

In recent years, there has been a drastic development in the China-ASEAN relationship. This occurs through China's extensive trillion-dollar project, the Belt and Road Initiative (BRI), funded by its Asian Infrastructure and Investment Bank (AIIB), which seeks to connect more than 60 countries from Asia, Europe and Africa. China, through its soft power approach, has been attempting to convince many countries, including nation-states in Southeast Asia to be part of this unprecedented mega-project. Behind this project is the emerging important regional and international organization, Shanghai Cooperation Organization (SCO). The SCO has provided a platform for diverse opportunities for China to expedite the planning operation of the BRI. Using the SCO's platform of bilateral and multilateral relations, Beijing could advance its security, economic and foreign policies (Rab and Zhilong, 2019). In 2017, one of the Association of Southeast Asian Countries (ASEAN) members, Cambodia, joined the China-led growing pan-Eurasia regional entity, and became a Dialogue Partner along with Armenia, Azerbaijan, Nepal, Sri Lanka, and Turkey. Scholars have questioned whether this would mean a higher possibility of other regional members becoming part of what scholars called "New Asia" as they strive to diversify their potential economic and military capabilities. "New Asia" represents China's effort to push for new regionalism in Asia by multilateralizing Asian countries through the SCO (Chabal, 2016). According to Chabal, the SCO becomes a platform through which cooperation becomes possible where smaller nation-states could share the strategic and military might of Russia and the economic power of China.

Accordingly, the question that needs to be asked is: To what extent can SCO contribute

to ASEAN members' development, and what are the potential threats and limitations? Are the characteristics of ASEAN and SCO congruent enough for both regional entities to achieve their goals? That being said, this study seeks to first look at whether SCO and ASEAN, as regional organizations, are compatible in regard to their principles, level of institutionalization and their objectives. `Then, this paper would demonstrate how the construction of "New Asia" with ASEAN could be a very huge opportunity for both sides. After establishing the plausible benefits, we could explore the limitations of the agreement between member countries and the SCO and why this could potentially escalate tensions in the Pacific region.

I. The compatibility of SCO and ASEAN: Institutional mechanism, principles upheld and objectives

In this first part, I will attempt to demonstrate whether the SCO and ASEAN are compatible in terms of the way they function, the values they treasure as well as the goals all of the members have in mind. Studying the compatibility between SCO and ASEAN is imperative in helping us see whether the hypothetical decision of ASEAN members to join the SCO is aligned with their initial objectives in joining the regional body in the past. By establishing their main features or, potentially, the common or dissimilar characteristics of both regional organizations, it is easier to consider the magnitude of utility when talking about the benefits and risks of hypothetical decisions that could be made by member states.

If we look at the basis of the inception of both regional organizations, it might seem like ASEAN and SCO were established, in 1967 and 2001 respectively, for distinctive reasons. In regard to the former, the regional institution was established in order to fight against the spread of Communism in the context of the Cold War era and ultimately, they had relatively better relations with the West than the latter. On the other hand, the SCO was initiated to address security concerns within the Eurasian region in opposition to foreign intervention and has been viewed by the West with great distrust. However, despite the different reasons for establishment, these two organizations share similar principles that were rooted from the nature of their own members and the objectives they are trying to achieve – economic advancement and regional stability. First of all, it is important to characterize that most members from Southeast Asia and Central Asia can be categorized as 'weak' states; that is to say, the elite groups within those countries do not carry overwhelming legitimacy and recognition domestically (Ayoob, 1995).[111] It is also 'weak' in the sense of their economic development and their social cohesion relative to bigger and developed states. Both ASEAN and SCO drive agendas that are usually imposed by the elites according to their interests – prioritization of regional stability by eradicating challenges to their political authority and legitimacy. The members of ASEAN and SCO focus more on regime security as it provides symbolic political

[111] Mohammed Ayoob (1995) characterizes third world states (or less developed states) as those that are weak (lack of internal cohesion and legitimacy), vulnerable (marginalized and easily permeated by external actors) and insecure (susceptible to internal and interstate conflict) (Ayoob 1995, 15–16).

legitimacy to their own regimes that struggle to profess this on the broader international arena; this allows the states to focus on pursuing their own domestic political and socio-economic agendas (Allison, 2004).

What is more important is the institutional design of ASEAN and SCO in regard to the degree of autonomy of the member states. In both organizations, consensual decision-making is the main mechanism, and this gives a form of autonomy in determining the members' own domestic policies. This was evident from the clear set of normative values upheld by their 'ASEAN Way' and 'Shanghai Spirit' which put an emphasis on informality, consensus building and more importantly 'the absence of any highly institutionalized legal framework' (Sharpe, 2003). This flexible mechanism or institutional design has its origin from a common purpose to strengthen a sense of trust between nations and to 'remove' mutual suspicion towards multilateral organizations that exists as a consequence of the elite's highly protective manner of their own national sovereignty. ASEAN and SCO always highlight the significance of sustaining a regional body that is in line with the values of the nation-states and who 'share the same commitment to economic development, regime security and political stability' (Acharya, 2001). Essentially, both regional institutions have more or less indistinguishable underlying principles and dynamic: consensus, flexibility, informality and enhancing sovereignty of their members.

The principle of 'Shanghai Spirit' is also crucial because it challenges the common counterargument for the compatibility of ASEAN and SCO values. The prevalent claim is that SCO is different because it is composed of a disparate group of nation-states where Russia and China's interests could potentially overshadow the smaller members' point of views. However, this argument disregards the SCO's commitment to protecting the representation of smaller member states against larger dominant member states. It also ignores the fact that both SCO and ASEAN do not seek to 'pool' its members' sovereignty and act as supranationalistic regional bodies like the EU (Aris, 2009). Even Russia and China have been extremely careful not to be seen as unpleasantly overpowering the other members; on the contrary, they have been encouraging countries from Central Asian Republics to play an active role within the institution. Ultimately, in principle, given that SCO and ASEAN share nearly the same objectives (regional stability and economic development) and operate in the same informal and consensual mechanism, it shows the compatibility and the positive dynamics that is important to substantiate the potential utility and viability of ASEAN members joining the SCO.

II. Mutually beneficial cooperation: Achieving military, geopolitical and economic aspirations

In view of the fact that there is some form of compatibility in regard to the institutionalizing mechanism between SCO and ASEAN, it is important now to discuss the potential practical implications, that is to say the benefits of the budding cooperation between members of ASEAN with the SCO. This issue could be dealt with in two ways: 1) why

approaching ASEAN is strategic for China's aspiration as the leader of the SCO; 2) from the perspectives of ASEAN members, why it would be beneficial in regard to economic and military prospects.

In June 2020, the secretary-general of the SCO, Vladimir Norov talked about their accomplishments during that year's Bishkek summit. One of the agendas of this summit was the discussion about propping up the organization's cooperation with ASEAN, especially in terms of trade, economy, investment and finance. The extension of the SCO membership could offer current members, especially China, a number of benefits. A Chinese state-owned news outlet, Xinhua recently said that the enlargement of the SCO would "infuse fresh vigor into the group's future development and boost its influence and appeal on the international arena."[112] This statement is hugely important because it shows how this process is directly aligned with Beijing's foreign policy that seeks to expand its influence globally and to restore its glory through Xi Jinping's Belt and Road Initiative (BRI). China, especially during the post-Cold War period, has been using a multilateral approach, which is a method that is safer to hold onto in comparison to classic power-balancing through alliances against a far more powerful United States, to bolster its international influence. A relevant example would be China's participation and joint declaration on a strategic partnership for peace and prosperity in the ASEAN+3 where it shows Beijing's attempts to bring development through multipolarity. From this point of view, diplomacy is made possible from the Chinese side by socializing into the realism of international society – multilateral regional organizations – for the sake of power-balancing. This implies that opening up a platform for ASEAN members within SCO is, in a way, contributing to the effort of strengthening regional diplomacy with ASEAN members in particular.

This strategic China-ASEAN relation could also advance other SCO members' economic interests. This relation could boost the cooperation in regard to the BRI deal which would help to accelerate the construction of regional or Eurasian transport infrastructure that will push trade even further. Moreover, the inclusion of India and Pakistan as members of the SCO since 2017 promised them, especially the members from Western and Central Asia, a better connectivity with the Southeast Asian region. Given all of these potential benefits for the SCO, it is viable and geostrategically important to open this opportunity to the Southeastern part of Asia.

On the ASEAN members side, so far, only Cambodia has joined the SCO as a Dialogue Partner. This could set a very important precedent for other neighboring countries in Southeast Asia to jump on the bandwagon and potentially gain from this partnership. Nevertheless, regardless of whether or not they join the SCO in the near future, pragmatically-speaking, this is a huge opportunity for Southeast Asian countries' diplomatic relations and domestic development too. First and foremost, it is

[112] Xinhua. "Deeper SCO cooperation promises regional peace, development" 2014. Retrieved from: https://www.globaltimes.cn/content/880948.shtml

important to clarify that this step is still parallel to most ASEAN members' stance for neutrality within the global arena. The reason why this is the case is because being a Dialogue Partner is not necessarily a step indicating states' alliance or alignment towards China or Russia. They can still maintain established relations with Western powers, especially with the United States that has increased its presence in the Asia-Pacific region. Thus, it is a strategic leverage for these 'weak' states. ASEAN members could yield significant benefits for being part of the most vigorous Eurasian diplomatic progress and regional architecture. There is a lot of fiscal and monetary potential that can be gained from being part of the overland connectivity routes (Silk Road Economic Belt). Even Russia, who is developing its Eurasian Economic Union, is part of SCO which might also further upgrade ASEAN members' opportunities for energy cooperation, infrastructure projects, industrial parks and many more.

Apart from being an opportunity for economic integration through trade and investment, joining the SCO is also beneficial for security prospects. The SCO, from the very get-go, sets its ultimate goal as achieving development and prosperity through politics and security. In the surge of growing security threats, especially with the rise of Islamic State or other international terrorist organizations, domestic extremist threats, as well as the transnational criminal structure in Southeast Asia (such as drug and human trafficking), cooperation with the SCO could be beneficial to potential members. With the existence of the Regional Anti-Terrorist Structure that is based in Uzbekistan, even if the ASEAN member states do not necessarily have the same counter-terrorist policies, they could learn and exchange knowledge and practices in terms of increasing security. For example, even under the SCO, joint military exercises are carried out by member states, which could prove useful for ASEAN members if they decide to be part of the institution. Moreover, ASEAN members could potentially benefit from the multilateral intelligence sharing (data, knowledge, information, etc.) with other members to combat, for instance, transnational syndicates or cross-border terrorism.

III. Limitations and potential risks of escalating tension

After establishing the plausible benefits, it is equally important to address the possible shortcomings if ASEAN members seek to join the SCO. One aspect that should be noted is that all the benefits that can be gained by Southeast Asian countries, and that were mentioned earlier, could be maximized if the forces which stimulate growth or development within the SCO progress smoothly. However, the reality is that there are numerous risks and stumbling blocks that could hamper the SCO's vision to become an effective regional forum, which ultimately affects the avenue for pre-existing and potential members to make the best use of their membership in the Eurasian institution.

One of the risks could be the presence of the long-standing rivalry between India and Pakistan, the two nascent members, that could translate their hostility into poorer prospects

for greater regional cooperation. Furthermore, the enlargement of the SCO could make the organization seem like 'even more of a symbolic organization rather than a vehicle for any kind of substantive regional integration or cooperative problem solving.'[113] The rapid change in the number of members of the SCO could make the regional body more divisive and indecisive which, as a consequence, would do little to push forward its objectives. Additionally, the principle of consensus in the SCO has received an ambiguous interpretation by scholars, which is making decisions based on general agreement. SCO members, because of the prevailing political culture within the organisation, often try to avoid a firm refusal or negation to an issue and prevent themselves from being in open disputes even if the Charter of the SCO allows member states to show disagreements for specific aspects of that particular decision. Apart from that, occasionally, they also leave nonconsensual issues on the agenda for a very long time. For instance, the organization's agenda regarding the idea for the construction of the SCO Bank was mentioned for 3 years in a row before they had expressed their progress from "study" to "implementation". However, even after that, there still has been no sign of movement towards the creation of the bank because there has not been any consensus on the issue. This simply shows that the complexity of making decisions with more members combined with the political culture within SCO would make it harder for ASEAN members, if they decide to join, to reap the benefits from SCO.

Apart from the limitations, Southeast Asian countries should be particularly cautious with regards to the Chinese expansionist vision for a global domination, even if it claims that it "unswervingly pursues an independent foreign policy of peace. The fundamental goals of this policy are to preserve China's independence, sovereignty and territorial integrity, and create a favorable international environment for China's reform and modernization."[114] ASEAN member states should take into consideration the security risks of geopolitically moving under the Chinese influence umbrella especially with the increased presence of the US in the Asia-Pacific region, principally the South China Sea. If we observe the region carefully, from Australia to China, from India to the Philippines or all the way to the US, most holders of the world's economic and military power encounter one another within the region. Nevertheless, through special agreements with countries like Japan, Malaysia, Taiwan, and South Korea, for plenty of military grounds and for patronage over the powerful ASEAN, the US has, until now, dominated this region. The US till today acts like the "Big Brother" to many members of ASEAN through "economic surplus, big market trade and investments of American and other companies, selling weapons and military equipment, settling up American military bases in almost most countries in Southeast Asia" (Sipovac, 2016). The reason why this is vital is because any moves by ASEAN member states to join the SCO could increase suspicion on the other side of the Pacific, Washington, and could risk the escalation of

[113] Statement by Alexander Cooley, Barnard College Scholar.

[114] Ministry of Foreign Affairs of the People's Republic of China. (19 February 2015)

tension between these two global military and economic powerhouses. Any obvious inclination to the side of the US rival, China, could violate the domination of the US in the region. This is extremely risky especially when China now is more than ever "ready to go all the way" (ibid), including military options, which should be expected in the case of opening any conflict for protecting Chinese sovereignty' for the islands in the South China Sea. As a result, the victims could potentially be the Southeast Asian countries that might be caught between the crossfire.

Conclusion

Fundamentally, broadly-speaking, ASEAN and SCO share the same principles, institutional design and objectives. These common characteristics and compatibility are vital to corroborate the fact that they have positive dynamics which is useful to understand whether it is theoretically viable and feasible for ASEAN members to be part of the SCO in the first place. It helps us to comprehend that on a principle level, hypothetically, joining SCO as a regional entity is aligned with Southeast Asian countries' interests. On a practical level, for ASEAN members to be part of the SCO is something that is beneficial for both sides, the SCO members and the potential new members from Southeast Asia. On one hand, having new members from Southeast Asia would help China to improve its diplomacy with the nation-states in the region and this parallels its vision to become more influential on the global stage. This strategic advancement of ASEAN-China relations also could contribute to economic and military opportunities for other member states in the SCO and ASEAN. However, there are some limitations for the potential new members from ASEAN to maximize benefits from being part of the 'New Asia' given the following considerations: the rivalry between pre-existing SCO members, the indecisive nature of the member states, and political culture in SCO. In addition, there is a huge geopolitical risk, on the side of the ASEAN members, to get caught in the middle of potential military and economic confrontation by the two powerful countries, the US and China if they choose to violate the historical domination of Washington in the Asia-Pacific region.

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