



*Options for
Incorporating TK and
Customary Law into
MAT*

**Preston Hardison
Vilm Workshop
Tulalip Tribes of Washington
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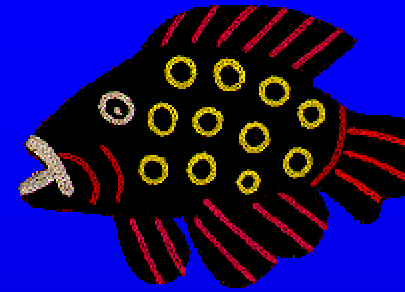


Five General Approaches

- 1. Use existing IPR (trade secrets)**
- 2. Accomodation into National Systems:
constitutional law, policies, executive orders**
- 3. Sui generis: Law of itself**
- 4. Direct recognition of customary law/indigenous
regulatory authority**
- 5. Contract law**



Use existing IPR

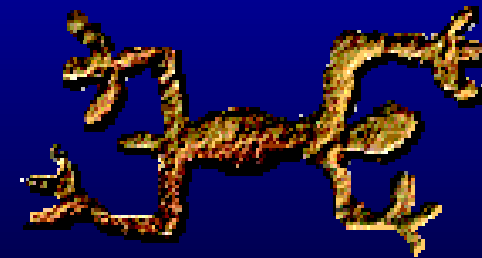


- **Existing forms of IP inadequate in incorporating TK and customary law into MAT.**
- **Public domain**
- **Trade secrets**
 - **Positive: Mechanisms in place for in camera review**
 - **Negative: Restricted use, non-disclosed TK, and problem of leakage**



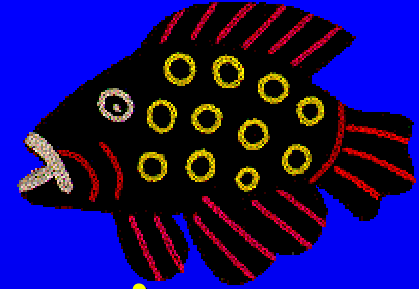
Accomodation into National Systems

- **Many Nations have not developed their systems**
- **National/state conflicts**
- **National systems may not adequately recognize IPs, PIC, or customary law**
- **Extraterritorial application**





Sui generis



- **Law in and of itself: “without precedence”**
- **Some equivocation: Without precedence relative to legal system**
- **Parties tend to use it to refer to new laws within modern legal systems**
- **Indigenous peoples use it to refer to customary law: sui generis recognition**
- **Basis for recognition: Inalienable rights vs. stakeholders**



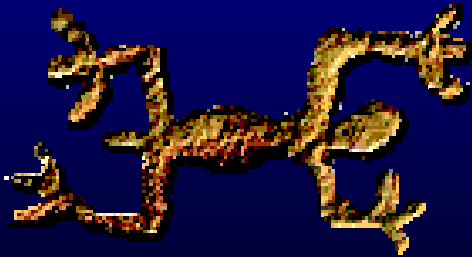
Direct recognition

- **United Nations DECRIPS**
- **Article 11: right to practice and revitalize cultural traditions and customs**
- **States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.**



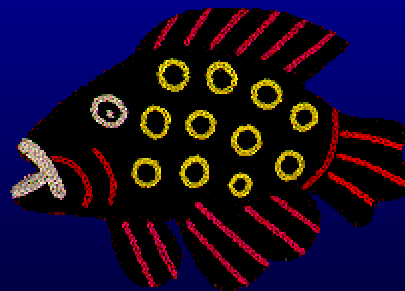
Direct recognition

- **Article 31: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge . . . including . . . 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.**



Direct recognition

- **Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.**



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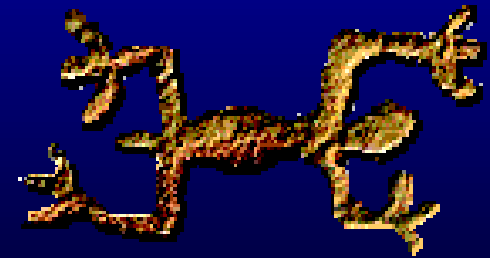
Direct recognition: Tulalip Tribes

- **Treaty tribes: Treaties negotiated under Law of Nations**
- **Treaties not enumerated rights: reserved rights doctrine**
- **Treaties did not surrender right to customary law, TK or genetic resources**
- **Retained sovereign rights and fiduciary obligations**
- **Tulalip Cultural Resources Heritage Act**



Direct recognition: Problems

- **Tulalip code based on treaty system**
 - **But, consistent with DECRIPS**
- **“Oren Ishi-i! We have unfinished business!”**
Longstanding debate over indigenous rights versus stakeholder interests.
- **Extraterritorial application**



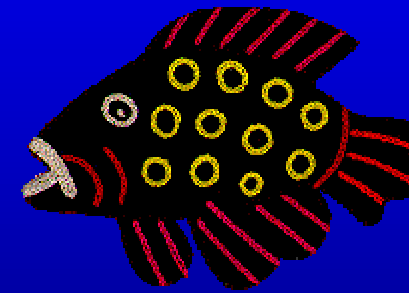
Contracts

- **Contract law presumed by the terms of reference: “MAT”**
- **Not an endpoint**
- **Contracts can override existing IPR and impose stricter restrictions (e.g.: covenants, 3rd party)**
- **Contracts can be used to “contract into customary law”: procedural and substantive**
- **Doesn’t require codification of customary law**



Contracts

- **Problem of shared knowledge, mixed property**
 - **Indigenous institutions and limits**
 - **Ownership clarity**
 - **Conflict resolution**
- **Good faith safeguards**
- **Capacity for F&E negotiation**
- **Bargaining power imbalances**
- **Negotiating authority**
- **PIC standards**



Contracts

- **MAT: Potential conflicts between inalienable rights and negotiation of terms**
- **Financing PIC/MAT process**
- **Access to justice/legal representation for conflict resolution**
- **Transparency/contract privacy**
- **Does no mean no? Responses to rejections**
- **Monitoring, oversight (trust, fiduciary, ombudsman)**



Competent Authorities

- **National competent authorities**
 - **Decisions, fiduciary obligations, transmittal role**
 - **Certification of IPs as parties**
- **Indigenous competent authorities**
 - **Indigenous-defined institutions**
 - **Multi-level institutions**
 - **Transboundary: Subnational and international**
 - **Transmittal of ABS decisions**
- **Conflicts when:**
 - **NCA says yes, ICAs say no; or ICAs say yes, NCA says no**



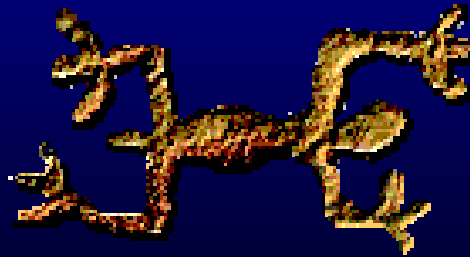
Elements of FPIC/PIC

- **FPIC/PIC Debate: FPIC the language of ILO and DECRIPS**
- **“Free” is an emphasis word, but worth having**
- **Dilemmas of “prior”**
 - **Prior to access or use**
 - **Access between 1992-2010 (?)**
 - **Access prior to 1992**
 - **Access where TK and GRs encountered separately (e.g. markets, ex situ collections, academic publications)**



Elements of FPIC/PIC

- **“Informed”**: Standards for what information must be provided about:
 - **Intended uses of TK/GRs**
 - **Potential effects of commercialization**
 - Release of TK into the public domain
 - Disclosure of TK in patent applications
 - Crowding out and spillover effects
 - Non-monopolistic uses/competition



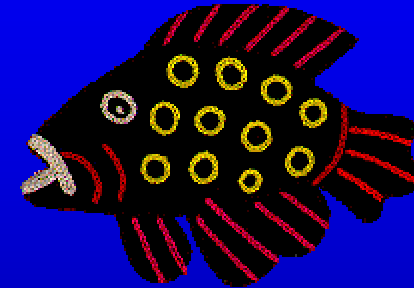
Elements of FPIC/PIC

- **Realistic assessments of potential benefits**
- **Reversability**
- **Conscientization/Options**
- **Remedies**
 - **Mechanisms to withdraw consent**
 - **Milestone points for reauthorization**
 - **Third party controls**
 - **Compensation**
 - **Enforcement measures**



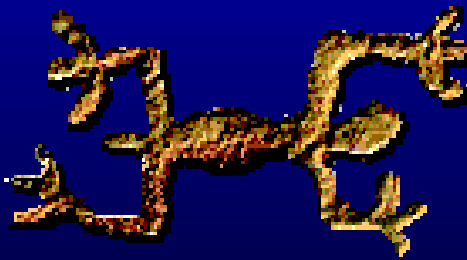
Consent

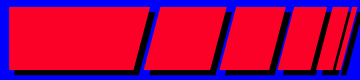
- **Indigenous identification of authorities**
- **Indigenous authority**
 - **Certification**
 - **Review**
- **Indigenous certificates of compliance**
- **Locus of consent: vested in communities, institutions, or representative organizations**
- **Rules of contact and engagement, do not call lists**
- **Parameters/scope of consent**



Fiddly Bits

- **Responsibility for monitoring costs and activities**
- **Responsibility for enforcement costs and activities**
- **Reasonable due diligence**





Fiddly Bits

	Conditions of Encounter of <u>TK</u> and <u>GRs</u>	
	<u>GR</u> On Territory	<u>GR</u> Off Territory
<u>TK</u> On Territory	<u>TK</u> On/ <u>GR</u> On	<u>TK</u> On/ <u>GR</u> Off
<u>TK</u> Off Territory	<u>TK</u> On / <u>GR</u> Off	<u>TK</u> Off/ <u>GR</u> Off

