

The background of the slide is a spiral-bound notebook with a light beige, textured paper. The spiral binding is on the left side, with the metal wire visible. The text is centered on the page.

International Seminar on
Intellectual Property & Development

*Topic 2: Biodiversity & Traditional
Knowledge*

*“traditional knowledge & biodiversity,
traditional creativity & cultural
expressions: what role for IP?”*

Outline

- One way of looking at the challenge
- Finding the way: reconciling preservation, protection and appropriate development
- What role for WIPO activities?

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One way of looking at the challenge

- The need for an ***holistic approach*** to the development, legal & policy aspects of genetic resources, traditional knowledge and folklore
 - at the ***community*** level - don't atomize, alienate or trivialize what is holistic, integral and vital to the cultural identity of communities
 - ***nationally*** - no one regulatory or policy process operating in isolation; how to integrate all interests, all stakeholders, all claims for equity?
 - ***internationally*** - a common task for many international agencies, in fulfilling their mandates and respecting and supporting those of their partners in the UN system

One way of looking at the challenge:

- The paradox: is there an *international* approach that can be at once:
 - *holistic* and respectful of diversity
 - *universal* and accommodating
 - international and yet *true to the local*
- One thing that distinguishes *traditional* knowledge is that it is inherently, irreducibly *local* in character - community-based, integral to the identity of a traditional community

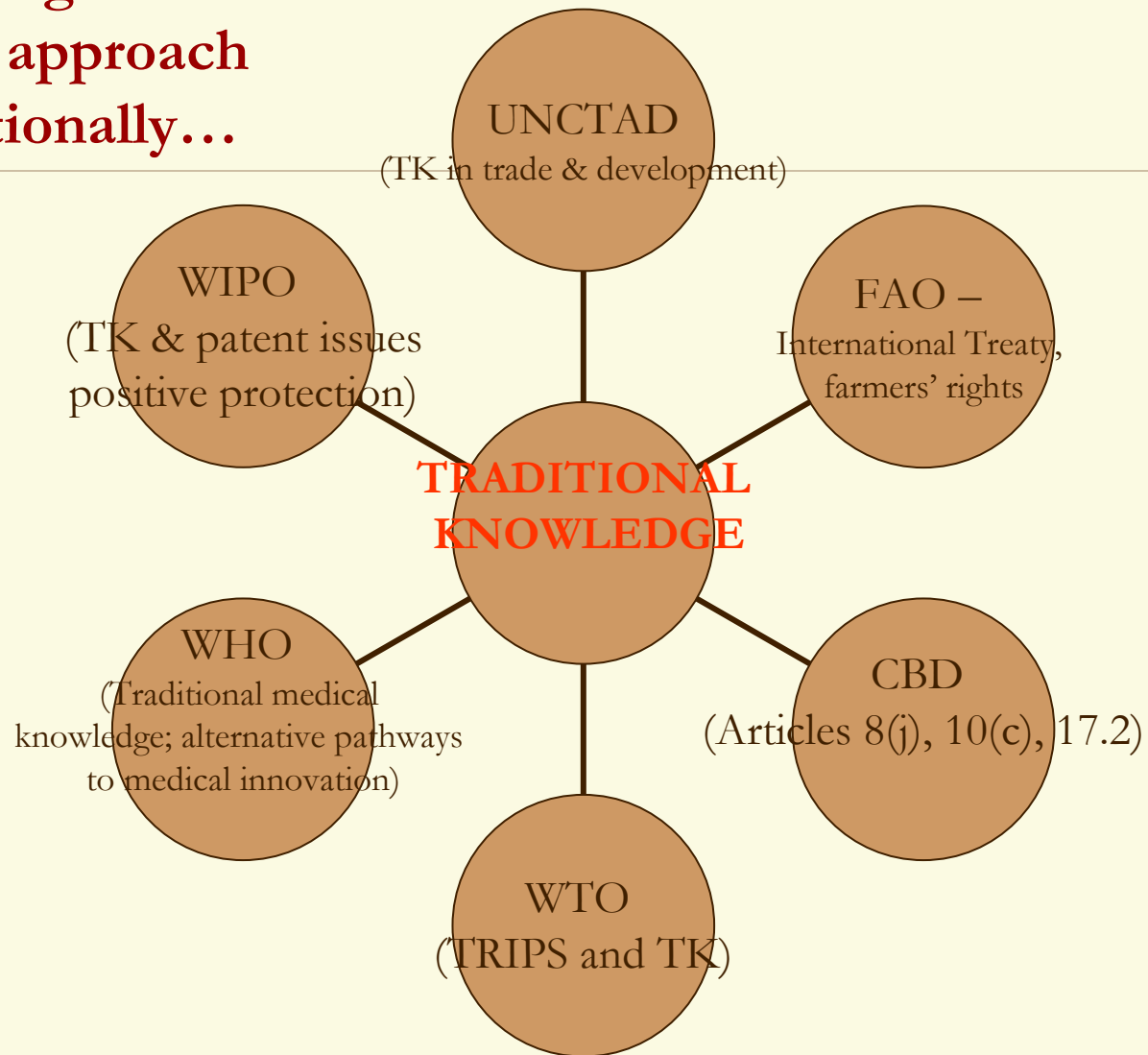
thinking locally, acting globally?

- TK is already defined, preserved, transmitted and governed by Indigenous and local communities -- including through customary law systems and traditional practices – which are only fully meaningful within the *traditional community context*
- Yet TK now has a global context - cultural, ecological, technological and commercial interests
 - Concerns voiced about misappropriation of TK and misuse of TK that span national boundaries – calls for *international* action

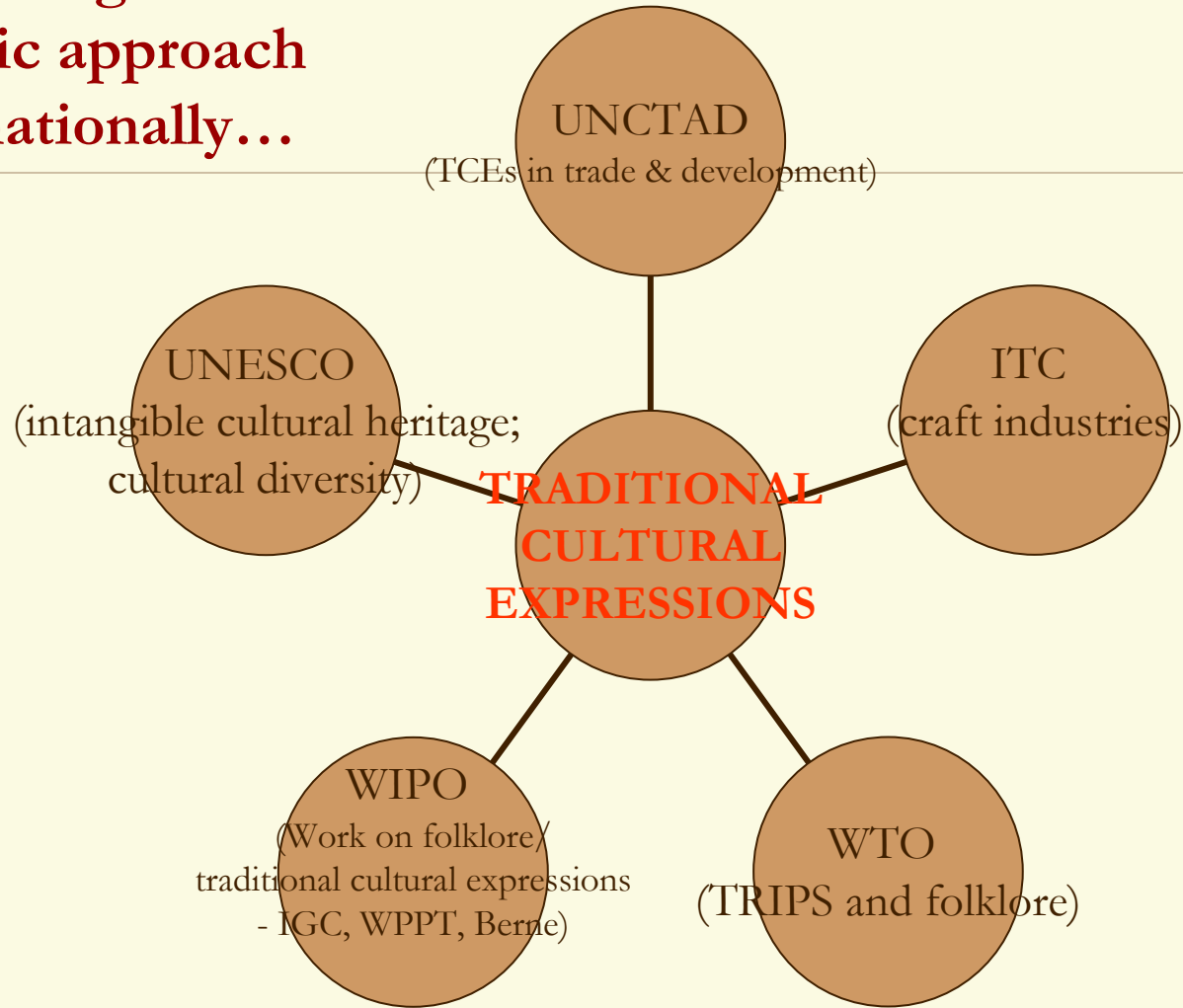
thinking locally, acting globally?

- One way of phrasing the challenge; how to:
 - recognize, preserve, promote and **respect**
 - **characteristics that are intrinsically local** and specific, forming part of an holistic whole
 - through concerted *international* action
 - in a manner that is appropriate, meaningful, accessible to the *Indigenous or local community itself?*

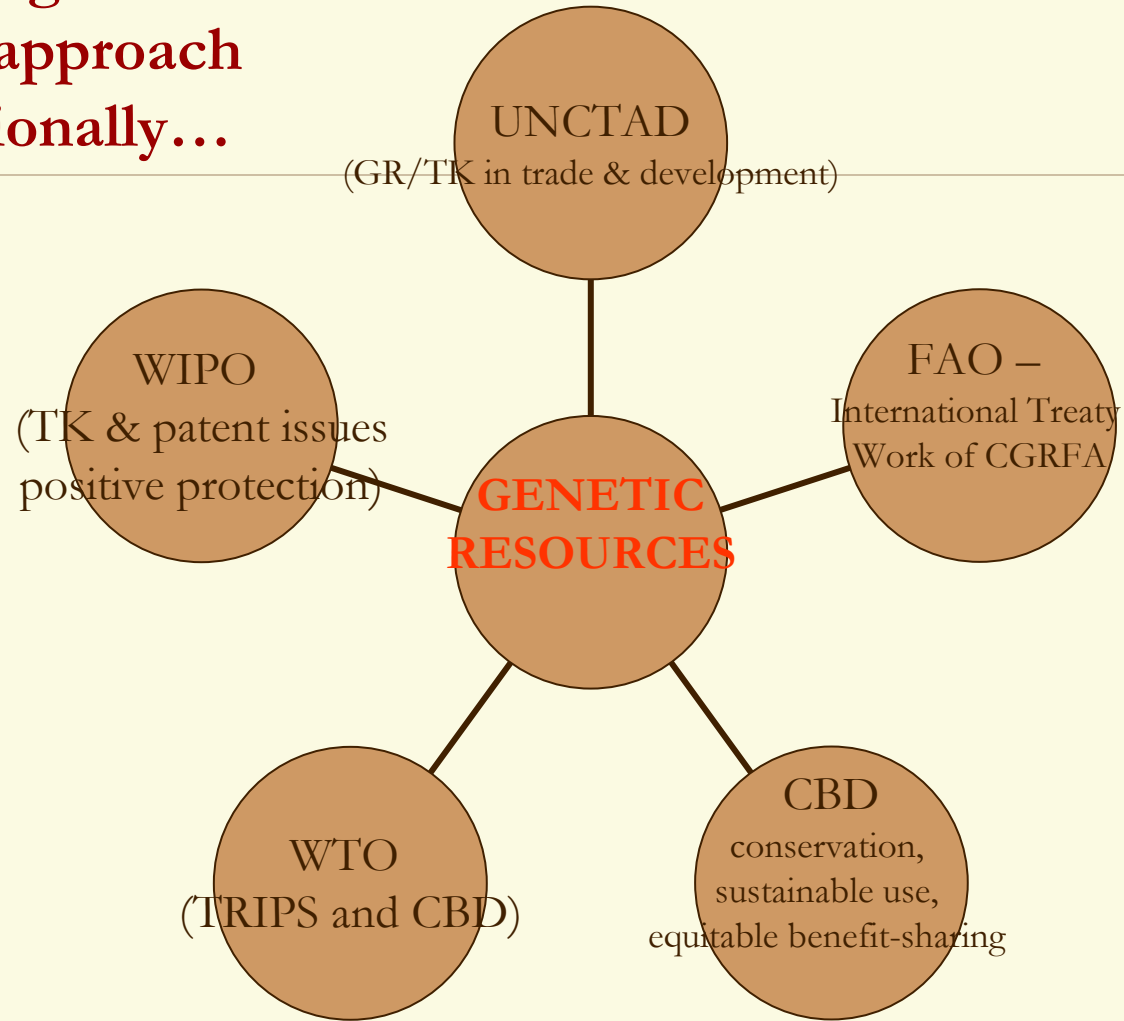
Sustaining an holistic approach internationally...



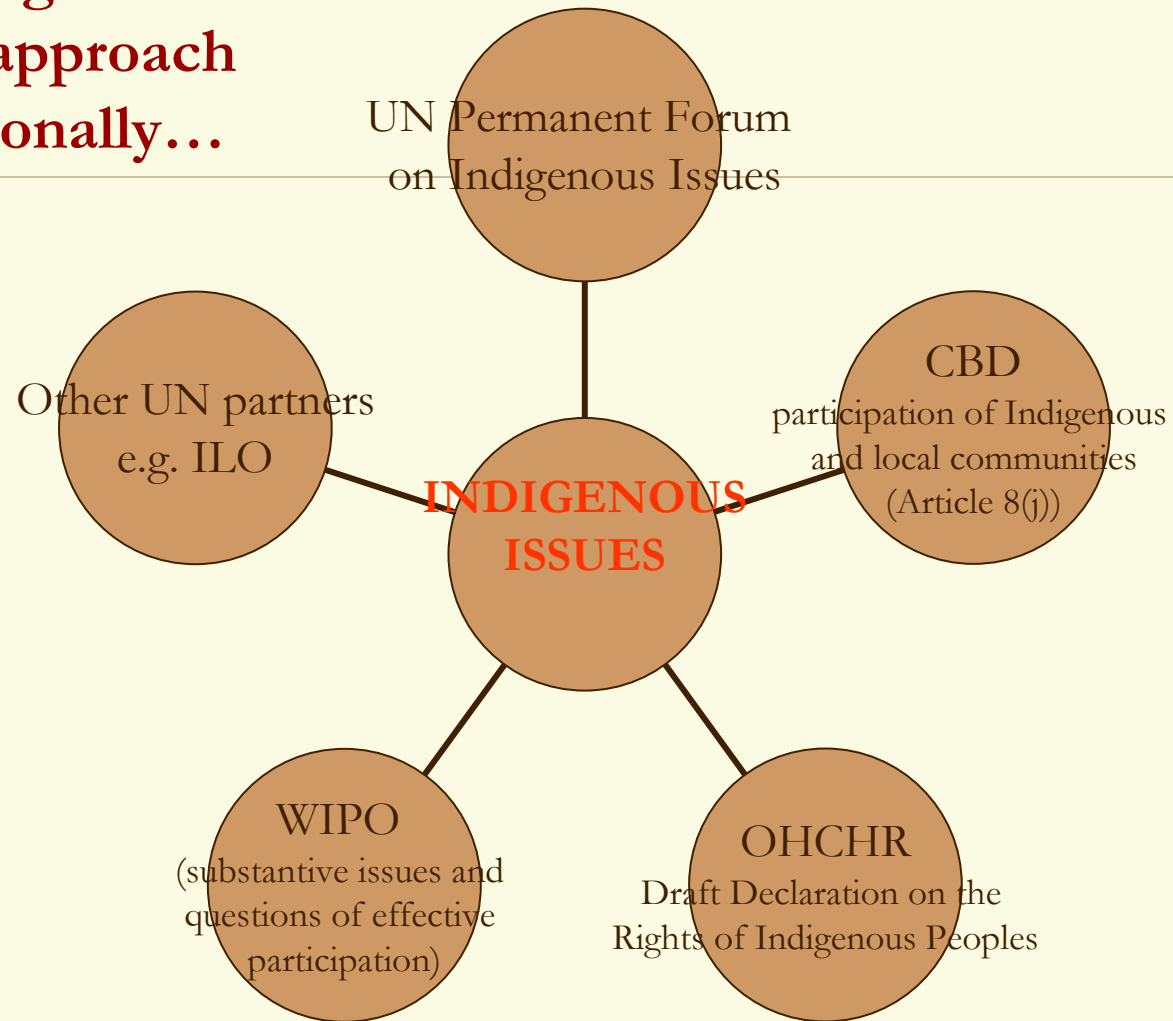
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- **Finding the way: reconciling preservation, protection and appropriate development**
- What role for WIPO activities?

reconciling preservation, protection & appropriate development

- Consider an example arising from the preservation of traditional cultural expressions – expressions of folklore
- Field recordings of Fateleku & Baegu music from Northern Malaita, Solomon Islands, first published in the 1970s, issued on a CD in 1990
- Includes *Rorogwela Lullaby*, sung by Afunakwa
 - Sleeve notes: “The rorogwela lullabies are often sung not by the mother but by the child’s elder sister. The words refer to such a situation: the elder sister asks the baby not to cry because its parents are dead and there is no one else there to hear it.”

reconciling preservation, protection & appropriate development

- In 1990s, Deep Forest produce the track “Sweet Lullaby” – described as ‘a rare & unusual mix of modern music and the songs of the Pygmies of the Central African Rain Forest’
- This example illuminates some legal questions:
 - rights associated with Rorogwela as a *musical work*
 - economic rights
 - moral rights (rights of attribution and integrity)
 - rights associated with its *performance* by Afunakwa
 - economic rights
 - moral rights (rights of attribution and integrity)

reconciling preservation, protection & appropriate development

- But the example also illustrates underlying policy questions:
 - How to **protect** traditional cultural expressions against unauthorized or illegitimate use while **preserving** against their loss, yet appropriately **sharing** with a wider audience
 - **Improved capacity** for members of remote communities to identify & enforce existing legal rights, if they choose to
 - Legal recognition of traditional cultural expressions (expressions of folklore) and traditional performances as **eligible objects of protection** (Berne 15(4), WPPT – performances of expressions of folklore)
 - Recognizing **collective or communal** ownership or custodial interests
 - Recognition of any **customary law**, and interests and obligations created by customary law

reconciling preservation, protection & appropriate development

Similar examples concerning TK raise question of how to:

- **preserve** TK against loss and dissipation (sustaining knowledge systems and community practices),
- while **sharing it appropriately**, consistent with prior informed consent,
- while **protecting it against misappropriation** and misuse,
- so that it contributes to a traditional community's own choices for their **pathways to economic & social development**

Main choices for protection against misappropriation & misuse:

- *sui generis* (tailored or stand alone) protection
- adapting or extending the use of IP systems
- better, more equitable use of the existing IP system

Outline

- One way of looking at the challenge
- Finding the way: reconciling preservation, protection and appropriate development
- **Where do WIPO activities fit in?**

Where do – or should - WIPO activities fit in?

- What does WIPO have to do with TK?

Some have expressed deep concerns:

- Imposing IP straitjacket on traditional cultures, overriding collective values of indigenous and other traditional communities
- IP concerns ‘mainstream’ technology. It commodifies knowledge and culture, facilitates misappropriation of TK and cultural expressions
- IP rights are atomistic, private, individual - at odds with values and laws of traditional communities

Consultative basis of WIPO activities

- From 1998-99, visited some 60 locations for dialogue with around 3,000 representatives of TK holder communities
 - Idea was to base the new program on a direct learning of the needs and expectations of TK holders themselves
 - These insights still central to our work
- Intergovernmental Committee established in 2001 - building on practical experience and legal measures developed worldwide

IGC mandate for 2004-05

- IGC to continue its work on questions included in its previous mandate
- new work to focus on consideration of international dimension, without prejudice to work in other fora,
- no outcome is excluded, including possible development of an international instrument(s)
- the ICG urged to accelerate its work and to present a progress report
- International Bureau to continue to assist by providing necessary expertise and documentation.

Some key elements

Legal essence of protection against misuse & misappropriation, through defining policy objectives and core principles of protection

- Draft provisions on TCEs (WIPO/GRTKF/IC/8/4)
- Draft provisions on TK (WIPO/GRTKF/IC/8/5)

Policy guidance on options for specific legal mechanisms to give effect to these objectives and principles

- WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6

Enhanced participation of *Indigenous and local communities*

- 110 NGOs specially accredited for the IGC, many representing indigenous and local communities
- proposal for voluntary fund
- array of practical steps to enhance input: consultations, publication and circulation of positions, Indigenous consultative forum, cooperation with United Nations Permanent Forum on Indigenous issues, Indigenous-chaired panel session during IGC

Some key elements

Defensive protection: especially the greater legal and practical recognition of TK in patent procedures

- An array of prior art measures (e.g. PCT, IPC, India's TKDL)
- Studies on disclosure of origin (continuing CBD dialogue)
- Draft guidelines for examination of TK-related applications (based on Member State case studies)

Capacity building materials and community tools

- Toolkit to deal with IP implications when TK is documented
- Database and draft guidelines to assist in weighing IP implications and IP options when concluding mutually agreed terms in line with prior informed consent
- Practical guide on the protection of TCEs/EoF
- Overview leaflets, consolidated analyses, case studies, detailed background studies (joint UNEP-WIPO study on role of IP in equitable benefit-sharing), distance learning course

Some key substantive issues

- **misappropriation** - what is it to misappropriate TK/TCEs, what is the cause of action and the nature of the damage?
- **retroactivity** - is the existing public domain legitimate & inviolable?
- **localisation** - how to recognize and defer to a community's customary law?
- **collectivity** - what legal status or legal personality for traditional communities?
- **ownership/custodial interests** - what is the nature of custodianship? Who benefits?
- **subject matter** - what makes knowledge and cultural expressions 'traditional' ?

Some key legal issues

- *holistic coordination* - already an active area of national and regional legislation - what is the international layer? What relationship with other international legal instruments?
- *interface with IP law* - what is the sui generis element of protection of TK and TCEs; how should this interact with conventional IP systems?
- *interface with other law* – law of indigenous peoples, access regimes for genetic resources, laws concerning cultural policy, etc.; what is the (adapted, expanded or sui generis) IP element?