

## 摘要

隨著文化商業化的興起，文化被挪移後商品化的現象日漸頻繁，尤其原住民族因過去受到歷史剝削而處於弱勢，對其文化之挪移不僅將加深大眾對原住民族之誤解與壓迫，更可能引發原住民族文化傳承與存續之危機，而非原住民族之他人挪移原住民族文化表現製作電影與周邊商品，並透過國際貿易將這些挪移商品行銷全球的情況，是最為常見且影響深遠，導致國際上許多原住民族受到經濟、文化與道德之侵害，惟國際中尚未有相關法律規範解決這些文化挪移之爭議，僅能回歸各國法律進行解決。

而對於這些文化挪移之爭議，我國於 2007 年制定《原住民族傳統智慧創作保護條例》，將原住民族文化表現作為智慧創作給予保護，而原住民族或部落對這些智慧創作即擁有使用這些智慧創作之專用權。若發生非原住民族之他人挪移原住民族智慧創作製作電影與周邊商品的情況，則原住民族或部落可透過原創條例第 20 條，阻止這些侵害智慧創作之產品進入我國市場，遏止他國挪移我國原住民族獲利的情況。惟這些對於原住民族文化挪移之處置卻可能產生貿易障礙，而與 WTO 下相關協定產生衝突，且他國亦可能藉此向 WTO 提出貿易控訴，此時我國可能被迫修改相關規範而無法對原住民族文化挪移進行處置。為了避免上述結果發生，我國需調和 WTO 與原創條例之衝突，在貨品與服務貿易部分，由於原住民族權益與我國公共道德相關，可透過 GATT、GATS 之公共道德條款調和衝突；智慧財產權貿易部分，由於 TRIPS 相關例外條款難以適用，因此改採其他調和方式，著作權部分，採 TRIPS 連結之伯恩公約透過其對著作權例外之規定進行調和，商標與工業設計部分，則可參考 WTO 爭端解決案例，因為 TRIPS 採最低保護原則，原創條例可能並未與 TRIPS 義務不一致，又他國就 TRIPS 不得提出非違反協定義務之控訴。

若能夠透過上述方式調和我國原創條例對原住民族文化挪移處置與 WTO 產生的衝突，則得以在 WTO 下繼續實施原創條例解決文化挪移，他國亦可能參考我國經驗於其境內實施類似措施保護原住民族文化，促進國際原住民之保護，此外雖然有其他解決文化挪移之措施存在，惟僅有透過 WTO 與原創條例之調和解決國際文化挪移的方式，較能夠有效且全面的解決原住民族文化挪移爭議，因此雖然該方法僅在本文假設的情況下得以實現，但仍得作為未來國際解決途徑、制定相關規範之參考，使原住民族得以在不受文化挪移之侵擾下，繼續發展、傳承其文化。

## Abstract

With the rise of cultural commercialization, the phenomenon of appropriating culture to make products becomes more frequent. In particular, indigenous people are underprivileged because of historical exploitation. The appropriation of their culture will not only exacerbate the misunderstanding and oppression of them, but also trigger the crisis of the inheritance and survival of their culture. The most common and far-reaching situation is that non-indigenous people appropriate indigenous culture to produce movies and surrounding goods, and make profits of these products through international trade. The situation may cause invasion of indigenous peoples on economy, culture and morality aspects. However, there are no international regulations to resolve disputes of indigenous cultural appropriation. These disputes can only be solved by domestic laws of countries.

Taiwan formulated Protection Act for The Traditional Intellectual Creations of Indigenous Peoples (hereafter “The Protection Act”) in 2007. The cultural expression of indigenous people will be recognized as intellectual creations, and be protected by The Protection Act. The indigenous peoples or tribes will have the exclusive right to make use of or make profits of these intellectual creations. If non-indigenous people illegally take their intellectual creations to produce films and surrounding goods, the indigenous peoples or tribes can make these products unable to enter Taiwan through Article 20 of the Protection Act (hereafter “article 20”). However, the disposition of article 20 may create trade barriers, and make conflict with the WTO agreement. Moreover, other countries may file a dispute settlement case under WTO agreement, which may force Taiwan to revise The Protection Act and fail to dispose of disputes on indigenous cultural appropriation.

In order to avoid the results, Taiwan has to reconcile the conflict between the WTO and The Protection Act. The conflict on trade in goods and services is able to solve through the general exceptions of public morals in the GATT and GATS agreements.

The conflict on trade related aspects of intellectual property rights is able to solve through Article 9.1 of the TRIPS Agreement or other ways beside agreement. If these ways can reconcile the conflict, other countries may refer Taiwan experience to protect their indigenous people. Therefore, article 20 may advance the protection of indigenous people in the world. Although there are other ways to solve the disputes, only article 20 can resolve the disputes more comprehensively and effectively. Taiwan can take The

Protection Act for reference to figure out the way of disposal indigenous cultural appropriation, and make indigenous people continually to develop without any bother in the future.