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PROTECTION OF CROSS BORDER ETHNIC GROUPS' TRADITIONAL MEDICINE UNDER INTERNATIONAL LAW

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The conflict between traditional knowledge (TK) holders and users is the main issue, which is discussed among international organizations for the disputes are growing between TK holders. Cross border ethnic groups, in particular, will be spotlighted in the world for traditional medicine (TM) that they hold establishing state sovereignty on traditional medicine, and constructing a three-win's system and mechanism for cooperation between countries would be the best solution.

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INTRODUCTION

If the plundering of mineral and other material resources was recognized as the natural outcome of and accompanying colonial expansion of Western industrial countries in the mid-19th century to early 20th century, the dispute over patenting the product whose basis is a material extracted from Neem trees in India can be known as a new round of resource looting. However, it focuses on resources of traditional knowledge this time, which is launched by developed countries towards developing countries. Throughout the whole human history, the accumulation and development of knowledge is based on practices and processing of knowledge which was created in the past centuries by former generations and handed down to future generations. As time goes on, knowledge becomes the cornerstone supporting human civilization. As an essence of cultural heritage, traditional knowledge is not only being widely used in modern industries and life, such as the pharmaceutical industry, plant pharmaceuticals, cosmetics, agriculture and pesticides,[1] but more importantly, it is inextricably linked to the issues of food and health in most developing countries.[2]

The core of the intellectual property protection system formed and developed in developed countries, means however, to some extent, negating what is traditional and praising what is novel.[3] Traditional knowledge which progresses and develops together with the means of production and life of a specific region or ethnic group in the long course of history, on the contrary, is of a distinctive characteristic, and seems to be inconsistent with modern

[1] The combination of traditional knowledge with modern industries has achieved some achievements. For example, the sales volume of medicines developed from botany in OECD market has reached 43 billion USD in the year of 1985. *Report of the International Seminar on System for the Protection and Commercialization of Traditional Knowledge*, New Delhi, 3–5 April 2002.

[2] From the statistics of the World Health Organization which implicated that 80% of the world's population relied on traditional medicines to meet their need of healthcare, we can find that traditional knowledge has a deep influence over people's life and welfare.

[3] Guangliang Tang, 遗传资源、传统知识及民间文学艺术表达国际保护概述 (Overview of International Protection for Genetic Resources, Traditional Knowledge and Expressions of Folklore), (8) 知识产权文丛 (Intellectual Property Works), China Fangzheng Press (Beijing), at 3 (2002).

technical and legal standards. The argument between developed and developing countries on bio-piracy act caused by the dispute of patent on India Neem trees is just a reflection of the fierce conflict between the modern protection system of intellectual property and the rights of the holders of traditional knowledge. A presentation of such conflicts is the one between holders of traditional knowledge and owners of intellectual property rights based on traditional knowledge. But the real root of such conflicts lies in the struggle between developed and developing countries, with the former holding cutting-edge research and development technologies and the latter possessing rich traditional knowledge and genetic resources.

The issue of traditional knowledge and intellectual property has been discussed in international organizations like the United Nations Environment Programme/Convention of Biological Diversity (UNEP/CBD), the World Intellectual Property Organization (WIPO), the United Nations Conference on Trade and Development (UNCTAD), the Food and Agricultural Organization (FAO), the World Health Organization (WHO) and the World Trade Organization (WTO). Some of them have jointly discussed the issue of international protection of traditional knowledge. For example, WIPO has undertaken, in cooperation with UNEP, an on-site documentation project on the role of intellectual property rights in the sharing of benefits arising from the use of traditional knowledge and associated biological resources.[4] FAO and CBD have reached a regular cooperation agreement on common interest in agriculture. The roles of these international organizations vary from one to another, and their concerned points are different. WIPO pays attention to traditional knowledge from the perspective of intellectual property protection while WTO focuses on trade related intellectual property protection and CBD and FAO focuses on the protection of genetic resources.

The main focus of international community has always been on the resolution of conflicts between holders of traditional knowledge or their countries and owners of intellectual property rights or owners' countries that use traditional knowledge for innovation under the protection of modern intellectual property protection system. But there is another potential contravention brewing among countries which hold traditional knowledge.

[4] WIPO, Statement to the CTE and TRIPs Council, WT/CTE/W/182 (Feb. 6, 2001)

As one NGO presented, conflicts may occur among countries that share the same or similar resources and compete for foreign markets. For example, with respect to the uproar over the patent of Basmati Rice, Nepal is concerned about not being acknowledged as a Basmati rice producer. Any settlement of legal rights or compensation related to the name, the knowledge or the plant in favor of one country — such as India or Pakistan — may leave Nepal out altogether.[5]

Another kind of conflicts, which is brewing among cross border ethnic groups, makes the problem more confusing. In early 2010, an online news report said that South Korea's SBS TV station and civil society organizations objected to the production of external publicity with performance of Korean mask dance, Taekwondo (跆拳道) and Arirang (阿里郎) song made by Yanbian Korean Autonomous Prefecture of Jilin Province of China, saying that "China is stealing the Korean culture."[6] The late 1860s witnessed a large influx of Koreans into China's territory. Chinese Koreans share with the Koreans in South Korea the same ancestors, histories and cultures. Thus, it is natural that they have the same traditional cultures like mask dance, Taekwondo and Arirang song. However, claims on the same traditional culture by the same ethnic minority from different sovereignties occur. Although it represents only a conflict between some peoples, not a conflict between countries now, it implies a new round of disputes over traditional knowledge.

In fact, cross border ethnic groups like Chinese Koreans and Koreans of Korea peninsula commonly exist in the world. Particularly, as a multiethnic country with a long history, vast territory and long border line of 20,000 kilometers, China boasts a large population of cross border ethnic groups, which is nearly 66 million.[7] They were cross border ethnic groups who originally lived in the same area but later separated to different countries, or

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[5] GRAIN & Kalpavriksh, *Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy and Protection*, at 9 (Nov. 2002), at http://www.grain.org/briefings_files/tk-asia-2002-en.pdf (last visited May 12, 2010).

[6] *A NGO of South Korea Alleged that China Stole Korean Culture*, at http://msn.huanqiu.com/2010-02/706705.html (last visited May 12, 2010).

[7] Chunzi Jin, 中国的跨界民族 (Cross Border Ethnic Group of China), 民族团结 (National Unity), at 22 (1995).

migrated to neighboring countries. Though the places where they traditionally inhabited are separated by political boundaries so that they become citizens of different countries, their living areas are together in nature. They are developing and forming the traditional knowledge together that can be passed down from generation to generation through common observation and practices in the same natural environment. Traditional knowledge can be commonly mastered and owned by these cross border ethnic groups. Therefore, the issue, which is related to benefit sharing and prior information consent of such traditional knowledge, may arise among cross border ethnic groups who hold the same traditional knowledge. If the current dispute over traditional knowledge is considered as a vertical conflict between holders and users, the potential dispute among cross border ethnic groups can be concluded as a horizontal conflict among the holders of traditional knowledge.

The "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity" was signed by CBD parties on 29 October 2010, established the basic principle to settle the conflict on access to genetic resources and sharing of benefits between developed countries and developing countries, so it is called as a cornerstone protocol. However, in instances where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities, the same case as mentioned above which is between cross-border ethnic groups, article 11 calls for related parties to endeavor to cooperate as appropriate where applicable, with a view to implement the protocol instead of giving clear resolution.

The articles on the protection of traditional knowledge which are drafted most recently by international government committee of WIPO[8] also call for the consideration of establishing a global mutual benefit sharing mechanism to address the problems occurring in trans-boundary situations, but did not put forward a substantial mechanism.

This paper attempts to find the origin of potential disputes over traditional knowledge of cross border ethnic groups, and provide possible solutions

[8] The Protection of Traditional Knowledge: Draft Articles, at http://www.wipo.int/tk/en/igc/index.html (last visited Apr. 26, 2012).

through international legal principles and theories. It consists of four chapters: The first part points out the main issue directly after the analysis of current research on traditional knowledge. Chapter I defines cross border ethnic groups and traditional medicine, which are associated with land. The Author, trying to get to the bottom of potential disputes among cross border ethnic groups over traditional medicine, concludes that the territorial sovereignty is the key point. Chapter II proposes to construct a three-win's system among countries of cross border ethnic groups, to not only protect and enlarge benefits from traditional medicine, but also realize the ultimate goal that improves the health standard for the world through efforts by users. The last part, as a conclusion of this paper, calls the attention of WIPO and other international organizations to potential disputes among cross border ethnic groups and the suggestion proposed in this paper to their inter-governmental legal works.

I. TRADITIONAL MEDICINE OF CROSS BORDER ETHNIC GROUPS AND POSSIBLE DISPUTES

A. Traditional Medicine and Its Characters

Traditional medicine derives from medical practices closely linked to ancient social cultures and shows diversity due to cultural differences of nations.[9] According to the World Health Organization (WHO) and other reports, up to 1980 all of the continental areas except Oceania used traditional medicines, although there are some differences in using traditional medicine and the degree of acceptance to the community. In the western Pacific region and south-east Asian region, as a part of the world's five major systems of traditional medicine,[10] Indian medicine and Qihuang (岐黄) medicine,[11] not only have several thousand years of practical experience as well as their own

[9] Ken Chen (Officer of Traditional Medicines, WTO Western Pacific Region), *What Is Traditional Medicine*, at http://www.zywx.org/tcmip/ArticleShow.asp?ArticleID=884 (last visited Apr. 8, 2010).

[10] The five ancient medical systems are ancient Greek-Rome medicines, Indian medicines, Egyptian medicines, Babylonian medicines and Qihuang medicines.

[11] China's earliest medical works, *Huangdi's Canon of Medicine* (皇帝内经), was said to be created by the Chinese ancestor Emperor Xuanyuan (轩辕黄帝) and his minister Qibo (岐伯), thus Qihuang medicine is a synonym to Chinese medicine.

theories, but also have united with western medicine and constituted one of the cardinal principles of the health work in these areas.[12] In the African region, while traditional medicine has become a part of people's culture, the form of medicine is not as well organized as in South-East Asian and West-Pacific areas.[13] Traditional medicine is generally accessible and acceptable to the community in the Eastern Mediterranean rural areas. However, official and professional attitudes vary widely, from recognition and support to rejection and even suppression.[14] Traditional medicine and practitioners can also be found in the South America and Central America.[15] Developed countries such as countries in North America and Europe, however, use little of traditional medicine or use many drugs of plant origin. They disapprove of promoting traditional medicine.[16]

What is traditional medicine? As WHO defines, traditional medicine can be described as the sum total of knowledge, skills, and practices based on theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.[17]

Traditional medicine relies exclusively on past experience and observation handed down form generation to generation, verbally or in writing.[18] These experience and observation are based on social, cultural and religious backgrounds, and beliefs, which constitute traditional knowledge altogether. But it is a dynamic system, not frozen in the past time like paintings painted

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[12] Abayomi Sofowora, *Medicinal Plants and Traditional Medicine in Africa*, John Wiley and Sons Ltd., at 22–23 (1982). China has boosted as rich in traditional medicines. It is estimated that there are 16 kinds of national medicines including Han, Tibet, Mongol, etc., and 12,807 sorts of traditional medicine resources. The total reserves of 320 sorts of commonly used medical plants reach 8.5 million tons. Weibo Zhang, *How the Chinese Traditional Medicines Be Protected through IPR?*, (11) 发明与创新 (Invention and Innovation), at 33 (2007).

[13] See Sofowora, fn. 12 at 20.

[14] Id.

[15] Id.

[16] Id.

[17] http://www.who.int/medicines/areas/traditional/definitions/en/index.html (last visited Jun. 11, 2010).

[18] See Sofowora, fn.12 at 2.

in past centuries. As any other inventions which are based on existing knowledge and development, "tradition" is the base for evolution of traditional medicine. However, along with the evolution of diseases and continuous discoveries of plants, animals and minerals, which are the core materials of traditional medicine, traditional medicine is evolving all the time and generating new knowledge.

Traditional medicine was usually transmitted secretly by word of mouth and partly through handwritten manuscripts, which sometimes were written in technical language which can only be deciphered by students who have been taught the meaning.[19] For instance, in Thailand, the herbal doctors acquire their basic medical knowledge by establishing a teacher-pupil relationship with someone who is already within the tradition.[20] In India, the ideal of education is, to treat it as a secret and sacred process, for the reason that the process of individual growth can only be achieved by a close and constant touch between the teacher and the disciples in their personal relationship from which the whole world was excluded.[21] Although the traditional medicine used by royal families or nobility is open for teaching,[22] from the way of teaching and transmitting we can find that the holders of traditional medicines are not willing to make public their description which is mastered by a minority of people.

Medicinal materials are taken mainly from the botanical kingdom, but also with ingredients from the animal and mineral kingdoms. These plants, animals and minerals show great difference in ingredients and quality due to their different natural environments and climates. Hence, the methods and

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[19] Richard S. Weiss, *Recipes for Immortality-Medicine, Religion, and Community in South India*, Oxford University Press (Oxford), at 15 (2009).

[20] V. Viggo Brun & Trond Schumacher, *Traditional Herbal Medicine in Northern Thailand*, University of California Press (Berkeley), at 41(1987).

[21] V. R. Madhavan, *Medical Education of the Tamils*, in S.V. Subramanian & V. R. Madhavan, Madras eds., *Heritage of the Tamils: Education and Vocation*, Int'l Inst. Tamil Stud. 227 (1986).

[22] Traditional medicine historically has been developed in two paths. One was developed by royalties and the other was by rural civilians. The former usually were taught at various traditional medical schools, which held explicit theories; the latter, however, usually practiced in rural areas. The distinction between them, however, is not a clear cut one. They influenced each other and have many things in common. See Brun & Schumacher, fn. 20 at 5.

description of the same effect for dealing with the same disease from the viewpoint of modern medicine may be different from the traditional medicine. In this sense, traditional medicine is of regional characteristics.[23] The difference between Indian traditional medicines and Chinese traditional medicines are obvious, while Chinese and Korean traditional medicines are mostly similar. Ginseng, which grows naturally across the boundary of China and Korea, is widely used in both of Chinese and Korean traditional medicines as an important material. Similar environment and physiognomy impact ecosystems which are the base of traditional medicine, and cause the same or similar results in traditional medicines.

B. Cross Border Ethnic Groups

In late 1980s and early 1990s, with the disintegration of the Soviet Union and the collapse of Eastern European Socialist Camps, conflicts among cross border ethnic groups accelerated by the Third World Nationalism replaced the cold war between the East and the West, which are also a major reason for the unrest and instability of modern international society.[24] Cross border ethnic groups are those whose ethnic and traditional residences are separated into different but interrelated territories.[25] The most typical example is the Kurdish crossing the borders of Iraq, Turkey, Iran and Syria.

There are two ways of formation of cross border ethnic groups, namely, national boundary's demarcation and migration according to international law. The former is an act of a state and having nothing to do with the will of the

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[23] See Chen, fn. 9.

[24] From the perspective of anthropology, cross-border ethnic groups are the result of separation of territories. However, the issues arising out of cross-border ethnic groups are not only the result of separation of territories but also the outcome of the interaction between separation forces of politics and centrifugal forces of nations. That is, they are derived from the interaction of external forces of separation of politics, emotional appeal of nation's traditional culture and national interest constraint. See Xing Gao, 跨界民族问题及其对地缘政治的影响 (Issues on Cross-Border Ethnic Groups and Its Impacts on Geopolitics), (6) 民族研究 (Ethno-National Studies), 1996.

[25] Xing Cao, 论跨界民族问题与跨境民族问题的区别 (Adopting Different Attitudes towards Trans-border Ethnic Issues and Trans-territory Ones), 24(2) 中南民族大学学报 (Journal of South-Central University for Nationalities) 39 (2004).

ethnic group itself; while the latter is an act of a group or an individual of a group due to political and economic reasons. For example, the original residency of some nations are along the borders of China and its neighboring countries since the ancient time, while some settled in the same regions later divided into different countries after the demarcation of territories. However, a considerable part of the Koreans migrated to northeast China to avoid Japanese invasion after the forced merger of Korea and Japan in 1910.[26] As a similar concept to cross border ethnic groups, transnational ethnic groups or trans-boundary ethnic groups, not only include cross border ethnic groups but also those groups living in different and disconnected territories, such as the Jewish people, the Chinese, Gypsy and Arabians.[27]

As an ethnic group, a cross border ethnic group is gregarious within a larger society having common ancestry, either in theory or in reality, the same memories of a shared historical past, and similar cultural focus on one or more symbolic elements defined as the epitome of their people hood.[28] Members of the group must recognize themselves as descendants of members of an historical society, must share a common culture, or part of a culture, which serves as a connection among them, through a continuous history.[29] In addition, the character of cross-border shall be taken into full consideration. That is, cross border ethnic groups shall reside in two or more than two countries which are naturally connected with one another.[30] After a long separation, their languages, ways of living and dresses are changing gradually. Nevertheless, their customs, religions, festivals, legends, family ethics and such other intangible cultures remain the same[31] and are passed down from generation to generation.

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[26] See Jin, fn. 7 at 23–24.

[27] See Cao, fn. 25 at 39.

[28] Richard Schermerhorn, *Ethnicity and Minority Groups*, Ethnicity, John Hutchinson & Anthony D. Smith eds., Oxford University Press (Oxford), at 17 (1996).

[29] Thomas W. Pogge, *Group Rights and Ethnicity*, in *Ethnicity and Group Rights*, Ian Shapiro & Will Kymlicka eds., New York University Press (New York), at 193 (1997).

[30] Yong Lei, 跨界民族问题研究：理论与现实 (A Study on the Problems of the Transnational Ethnic Groups: Theory and Reality), (5) 贵州民族研究 (Studies on Guizhou Nationalities) 15 (2005).

[31] Qiwang Hu, 跨界民族探讨 (Research on Cross Border Ethnic Groups), (4) 中南民族学院学报 (社科版) (Journal of South-Central College for Nationalities) (Social Science Edition) 52–53 (1994).

C. Possible Ownership and Disputes between Cross Border Ethnic Groups over Traditional Medicine

Different measures for protecting traditional knowledge adopted by various countries may lead to different models of ownership of traditional medicines in domestic laws. It can be presented as personal ownership and group-joint ownership of private property[32] and state ownership or whole community ownership of public property.[33]

From the practices of various countries in protecting traditional medicine, we can find more practices of protecting traditional medicines by the existing system of intellectual property rights, such as patent. For example, as one of the big countries of traditional medicines, China is undergoing a growing trend in application for patent for Chinese traditional medicines.[34] As the largest market of pharmaceutical products and base of research and development, a significant number of patents have been obtained on knowledge of traditional medicine and related products in the United States. Applicants are generally companies or researchers from developed countries, while the number from developing countries is growing.[35] Because patent is granted on the basis of intellectual achievements of an individual or several individuals, patent should be attributed to individual inventors or co-partners but not a legal entity or state, according to the principle of original acquisition. But in accordance with the system of service invention and commissioned invention, legal persons or other unincorporated bodies can be

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[32] Private property is under the control of a single person or by a group of persons jointly. John Schrems, *Understanding Principles of Politics and the State*, University Press of America, at 234 (2004).

[33] Id.

[34] For example, the number of patent applications relating to Traditional Medicine in the past years before 2002 is more than 12,000 cases and most of them are domestic applications, out of which about 1400 cases relating to Traditional Medicine were filed every year since 1992. In that year, the Chinese Patent Law was first amended. Yongfeng Zheng, *The Means and Experiences of Patent Protection of Traditional Medicine in China*, paper presented at the International Seminar on Systems for the Protection of Traditional Knowledge, UNCTAD, New Delhi, Apr., 3–5, 2002.

[35] Carlos M. Correa, *Protection and Promotion of Traditional Medicine: Implications for Public Health in Developing Countries,* South Centre, at 71 (August 2002).

patentees.[36] The exclusive right of patent can prevent others from applying for the same patent in one country. But the territorial limit of a patent cannot warrant that the competitors apply for the same patent in another territory when there are arguments on prior use, especially traditional medicine, which is held by a cross border ethnic group.

The development history of traditional medicine in East Asia, which was developed separately by royalties and citizens, provides a *sui generis* system for traditional medicine protection and makes the country be the owner of traditional medicine possible. According to the Thai Traditional Medicinal Intelligence Act,[37] the Ministry of Public Health shall announce that traditional medicines, which are crucial for human health, belong to the state. And any kind of commercial use and R&D should get permission from the government.[38]

The overgeneralization that all forms of knowledge are held communally among indigenous and local communities[39] makes the community to be the owner of traditional medicine possible. However, communal ownership is not a synonym for public domain.[40] For instance, in the two Australian cases of *Yumbulu v. Reserve Bank of Australia* and *Milpurrurru v. Indofurn Pty*, the courts recognized the copyrights of individual aboriginal artists to their creative designs in the context of an intricate communal ownership structure.[41]

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[36] State-owned entities have the right to apply for a patent for a service invention in some countries. Therefore, there is possibility that a state can indirectly own patent rights.

[37] There are three kinds of traditional medicines. In addition to the one mentioned above, the second one is granted as a personal exclusive right by the register. Once the traditional medicine is registered, the rights will subsist throughout the life of the owner and for a further 50 years from the date the applicant dies. The last one is a well-known traditional medicine that remains free of use by anybody. Jakkrit Kuanpoth, *Legal Protection of Traditional Knowledge: The Case of Thai Traditional Medicine*, Paper presented at the ASEAN Workshop on the TRIPs Agreement & Traditional Medicine, WHO, Jakarta, at 6–7 (Feb. 15, 2001).

[38] Id.

[39] Mohammed Khalil, *Biodiversity and Conservation of Medicinal Plants: Issues from the Perspectives of the Developing World,* in Timothy Swanson ed., *Intellectual Property Rights and Biological Diversity Conservation: Interdisciplinary Analysis of the Values of Medicinal Plants*, Cambridge University Press (Cambridge), at 240 (1995).

[40] Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity and Traditional Medicine*, University of Toronto Press (Toronto), at 158 (2006)

[41] Id. at 159.

The Andean Community Decision 486 also recognizes the right and the authority of local communities in respect of their collective knowledge.[42]

Although nothing can prevent states from developing *sui generis* systems (whether based on IPRs or not) at national level for the protection of traditional knowledge and medicine in different areas,[43] absence of a unified international regime makes it difficult to resolve the potential disputes between traditional medicine holders of cross border ethnic groups.

The first kind of dispute would arise between holders whose rights can be ensured under the current system of international intellectual property law or *sui generis* systems. In this case, the traditional medicine holder is clear whether he is a personal owner or a communal owner. Supposing Country A and Country B are neighboring countries with the same cross border ethnic group, and the traditional medicine holder in Country A has applied for a patent based on a traditional medicine in Country C. Under such circumstance, the holder of the same traditional medicine in Country B may petition to invalidate the application. When traditional medicines of cross border ethnic groups marked with the same place of origin are exported to a third country, disputes may arise.

The second kind of dispute would arise between holders of both sides of the border over sharing the rights and holding percents when they meet to make a process on prior informed consent and benefit sharing from the user of traditional medicine under *sui generis* systems. For example, when a pharmaceutical company of a third country signs an agreement on prior informed consent and benefit sharing with one cross border ethnic group of Country A, the cross border ethnic group of Country B may take action over the ownership of relevant traditional medicines and benefit sharing at the court with jurisdiction over this agreement. WIPO is making efforts to promote a prior informed consent and benefit sharing mechanism not only

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[42] Andean Community Commission, *Decision 486: Common Intellectual Property Regime* (Dec.1, 2000), art. 3, at http://www.sice.oas.org/trade/junac/decisiones/DEC486e.asp (last visited Jul. 18, 2010).

[43] Carlos M. Correa, *Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge*, at 17, at http://www.quno.org (last visited Jul. 16, 2010).

focusing on that between users and holders, but also calling for the consideration to establish a global mutual benefit sharing mechanism to address the problems occurring in trans-boundary situations, but did not put forward a substantial mechanism.

D. May the Cross Border Ethnic Group Co-hold Traditional Medicine?

A traditional medicine which has a deep-rooted relationship with natural geographical features was created and developed commonly by the cross border ethnic groups before separation of territories or migrations. So the cross border ethnic groups shall be the co-owners of the said traditional medicine. However, the territorial delimitation divided the co-owners into two different sovereign states which led to disputes over traditional medicine-related benefits between the cross border ethnic groups. Do the cross border ethnic groups still co-hold the traditional medicine? The answer to this question may affect the establishment of prior-informed-consent and benefit-sharing system, which are under discussion in WIPO. If the answer is yes, then the users of traditional medicine can just get consent from either of the co-holders and benefit sharing can be resolved by negotiation with a uniformed subject. However, if the answer is no, then the users have to get consent from both or all of the holders and pay respectively to the holders. What is worse, they may be not able to obtain prior-informed consent from the holders.

The regional characteristic and the geographical proximity of cross border ethnic groups provide a theoretical basis for the proposition of co-ownership. They are linked by land, and land is the foundation of the lives and cultures of indigenous peoples all over the world, which has been recognized as a universal principle. Land rights and access to land and control over it and its resources are central to indigenous peoples throughout the world.[44] They are of a collective character, including a combination of possession, use, and management rights. As the Convention No. 169 of the International Labor Organization affirms, the rights of ownership and possession of indigenous

[44] UN Permanent Forum on Indigenous Issues, May 14–25, 2007, Report on the Sixth Session, at 2–3, E/2007/43,E/C.19/2007/12.

peoples over the lands which they traditionally occupy shall be recognized, and shall be safeguarded by appropriate measures to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.[45]

While the relationship between land and knowledge, such as traditional medicine, gives effect to the right to self-determination, not as alienable property but as a cultural archive, the historical and cultural stories of the community shall be narrated and preserved through land.[46] Land is a critical and contested zone in interpretations of the right to self-determination for indigenous peoples.[47] The United Nations Human Rights Committee and the Inter-American Commission on Human Rights, in the cases of Miskito Indians of Nicaragua[48] and Yanomami Indians of Brazil,[49] also acknowledged the importance of lands and resources to the survival of indigenous cultures and to indigenous self-determination.[50] Cross border ethnic groups propose that they should co-hold the traditional medicine because they share the rights

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[45] *ILO Convention No.169*, art. 14(1).

[46] Johanna Gibson, *The UDHR and the group: Individual and Community Rights to Culture*, 30 Hamline J. Pub. L. & Pol'y 285, 289 (2008).

[47] *Declaration on the Rights of Indigenous Peoples,* G. A. Res. 61/295 (Sept.13, 2007)

[48] In a case concerning the Miskito Indians of Nicaragua, the Inter-American Commission on Human Rights cited Nicaragua's obligation under article 27 and found that the "special legal protection" accorded the Indians for the preservation of their cultural identity should extend to "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands." *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population o Miskito Origin,* Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.UV/II.62, doc. 10 rev. 3 (1983), O.A.S. Doc. OEA/Ser.UV/II.62, doc. 26 (1984) (Case No. 7064 (Nicaragua)), at 81.

[49] In 1985 decision concerning the Yanomami of Brazil, the commission again invoked article 27 and held that "international law in its present state recognizes the right of ethnic groups to special protection on their use of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."

Case No. 7615 (Brazil), Inter-American Commission Res. No.12/85 (Mar. 5, 1985), Annual Report of the Inter-American Commission on Human Rights, 1984–1985, O.A.S. Doc. OEA/Ser.L/II.66, doc. 10, rev. 1, at 24, 31 (1985)

[50] S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 Ariz. J. Int'l & Comp. L. 13, 36 (2004).

of self-determination which are formed centering on lands and traditional medicine.

But the right to self-determination will be not necessarily effective in the protection of community knowledge if the traditional management of resources is seen as challenging national interests.[51] Because comparing with internal self-determination, which is explained as forms of self-government and separateness within a state rather than separation among states, the international self-determination therefore indicates customary self-government within the nation-state according to the general political structure of that state. Self-determination regarding traditional medicines proposed by cross border ethnic groups is an international self-determination excluding their own countries' sovereignty over traditional medicine. As a result, cross border ethnic groups would become the key targets of the countries. If one of the relevant countries is a single-nation state, it may become a conflict between two states for any multi-nation country is always suspicious of its neighboring state having the same ethnic group.

The existence of sovereign rights over a nation's territory, including its natural resources, genetic resources and its people, is the main reason for the proposition of separate holding mechanism over traditional medicine by cross border ethnic groups. As the Sole Arbitrator Max Huber stated in the Island of Palmas Arbitration Case, "sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other state, the functions of a state."[52] This means that a state has an exclusive right to control over its territory and the resources in that territory. The United Nations General Assembly's Declaration on the Permanent Sovereignty over Natural Resources[53] asserted the right of all peoples to permanent sovereignty over their natural wealth and resources to be exercised in the interest and for the well being of the people of the state concerned.[54] CBD and International Treaty on Plant Genetic Resources for Food and Agriculture detailed state's

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[51] Shelly Wright, *International Human Rights, Decolonisation and Globalisation Becoming Human*, Routledge, at 153–54 (2001).

[52] Island of Palmas Case (*The Netherlands. v. U.S.*), 2 R.I.A.A. 829 (1949).

[53] G.A. Res.3281, UN GAOR, 29th Sess., Supp. No. 31, at 51, U.N. Doc.1/9631(1974)

[54] Id. para 1.

sovereign rights over genetic resources,[55] which are the basis of products of traditional medicine and knowledge. Although no state has announced state sovereignty over traditional medicine currently, with the expansion of traditional medicine related benefits, it is not impossible that permanent sovereignty over traditional knowledge, traditional medicine included, will be put into practice. When the announcement of sovereignty over traditional medicine is made, the co-holding model will become an illusion, except otherwise agreed by both parties. Because according to the principle of state sovereignty of international law, no state may interfere in another state's internal affairs. States are essentially free to determine and apply laws and policies within their territory, if only not violate international law, in particular, human rights law.[56]

E. May Traditional Medicine as a State Property Be Succeeded?

The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 (hereinafter, the "1983 Vienna Convention") refers "succession of states" to the replacement of one state by another in the responsibility for the international relations of territory.[57] So the changing of territorial sovereign is the down-lead that causes the problem of state succession.[58] The division of state property is usually one of the

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[55] FAO as the first international organization who recognized state's sovereign rights with respect to plant genetic resources, endorsed the conception that nations have sovereign rights over their plant genetic resources in its resolution 3/91 of 1991. *FAO Resolution 3/91*, 26th Session of the FAO Conference, Rome, 1991; Convention on biological diversity, which was adopted in Rio de Janeiro in June 1992, also recognized state sovereignty over their natural resources, as well as their authority to determine access to genetic resources subject to their national legislations. *Convention on Biological Diversity*, art. 15; International Treaty on Plant Genetic Resources for Food and Agriculture, which succeed to affirm the sovereign rights over plant genetic resources in international treaty in 2001, however, limited the scope in plant genetic resources for food and agriculture.

[56] CBD, *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, across Jurisdictions, and International Law*, UNEP/CBD/WG-ABS/7/INF/5 (Mar. 6, 2009), para. 49.

[57] *The Vienna Convention of 1983*, art. 2.

[58] Gengsheng Zhou, 国际法 (International Law), Wuhan University Press (Wuhan), at 127 (2007).

main issues discussed at negotiations especially on the occasion of state separation; and archives are usually treated as a separate category in cases of succession, because they often have historical or cultural value or are linked to a specific territory, although they are formally part of state property.[59] According to the 1983 Vienna Convention, the property, rights and interests owned by a state or archives preserved or controlled by a predecessor state, whether immovable or movable, can be succeeded on the date of succession. However, the predecessor state has the right to determine what constitutes state property or which belongs to state archives according to its domestic laws.[60] The Thai Traditional Medicinal Intelligence Act authorizes the Ministry of Public Health of Thai to announce that traditional medicines belong to the state, meaning that traditional medicine as a state property or archives can be succeeded when territorial area is changed in the future. If a traditional medicine can be succeeded as a state property or archive, it will help to distinguish whose statement on the right of traditional medicine is correct, and will provide an agreement on benefit sharing and ownership.

But there are still obstructions to accepting traditional medicine as a state property or archive for state succession under the current convention, because traditional medicine as an intangible assets falls short of characteristics related to movable or immovable properties, even though the predecessor state has the right to determine what constitutes state property or which belongs to state archive according to its internal laws. If traditional medicine as an archive is succeeded in the future under the current convention, traditional medicine should be linked to a specific territory or have a functional connection between the archives and the related territory.[61] So a successor state shall provide the best available evidence from its part of the state archives of predecessor state which bears upon the title to the territories or boundaries of the other successor state, or which is necessary to clarify the

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[59] Carsten Stahn, *The Agreement of Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 Am. J. Int'l L. 379, 393 (2002).

[60] *The Vienna Convention of 1983*, art. 8, 20.

[61] Eli Nathan, *The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in Yoram Distein ed., *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne*, at 489 (1989).

meaning of documents of state archives of the predecessor state which passes to that state or states pursuant to other provisions of the existing article.[62] But the Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia shows that in state succession on cultural heritage "the strict territorial principle does not apply to tangible movable state property of great importance to the cultural heritage of one of the successor states and which originated from the territory of that state, such as works of art, manuscripts, books and other objects of artistic, historical or archaeological interest to that state,"[63] meaning that traditional medicine related works will not be succeeded as a cultural heritage. The strong emphasis on the protection of cultural heritage in the process of succession to movable property constitutes an important development of the regime of the 1983 Vienna Convention,[64] which provides for such protection only as regards archives.[65]

Traditional medicines are not state property. As non-state property, traditional medicines are not in the scope of inheritance according to the 1983 Vienna Convention.[66] It can only rely on the customary law of the said cross border ethnic groups to justify the legality of the source of traditional medicine. However, the existence of customary law as well as recognition of customary law will influence the determination of the source of traditional medicine.

F. Summary

The role that traditional medicines have played in maintenance of human

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[62] *The Vienna Convention of 1983*, art. 31.3.

[63] *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia,* art. 3(2).

[64] *The Vienna Convention of 1983*, art. 30(3): agreements concluded between the predecessor state and the successor state in regard to state archives of the predecessor state shall not infringe the right of the peoples of those states to development, to information about their history and to their cultural heritage.

[65] Carsten Stahn, *The Agreement of Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 Am. J. Int'l L. 379, 388 (2002).

[66] *The Vienna Convention of 1983* states in article 6 that the convention does not apply to natural or juridical persons, it states "Nothing in the present convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons."

being's health is not less than modern medicines. It is estimated by WHO that 80% of the population in some Asian and African countries depend on traditional medicines for primary health care.[67] Moreover, the market of medicines which are patented based on traditional medicines is expanding, which triggers conflicts not only between traditional medicine holders and patentees of new medicines, but also between cross border ethnic groups.

Naturally interlinked lands are the important basis for cross border ethnic groups to co-create and develop traditional medicines. However, the boundary builds up a barrier for the co-holding of traditional medicines. Even if the self-determination on the basis of land rights makes the co-holding of traditional medicines possible, it is doomed to be rejected by the home countries of the cross border ethnic groups for it infringes their benefits. The Vienna Convention of 1983 provides a legal ground for justifying the determination of the source of contested traditional medicines. But due to the ineffectiveness of the Convention and a lack of state practice, the application of this Convention to traditional medicines has been limited.

Principles of prior informed consent and benefit sharing established by CBD and the efforts of the inter-governmental committee on traditional knowledge of WIPO to refine the procedure and standard only increase the risk and cost of negotiation to the users of traditional medicines. Because of the separation between traditional medicine holders, the users have to acquire consent separately from both holders; or because of disputes between holders, users cannot obtain any consent at all. From the perspective of traditional medicine holders, separation of ownership may decrease their possibility or capacity to negotiate with the users. From the standpoint of the whole international community, there may be a loss of effective development and use of traditional medicines due to the disputes between cross border ethnic groups, which may impose a material obstacle on increasing human's health worldwide.

Therefore, how to establish a three-win's system (holder-holder-user) is the key to maintain the traditional medicine-related benefits of the cross border ethnic groups and to reduce users' risks and costs.

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[67] WHO, at http://www.who.int/mediacentre/factsheets/fs134/en/index.html (last visited May 20, 2010).

II. ESTABLISH A CO-MANAGEMENT MECHANISM BETWEEN THE CROSS BORDER ETHNIC GROUPS

The history of development of human society is one with bloody struggles, among individuals, groups or even states, for basic necessities to support reproduction and survival. However, with the development of society, such struggles gradually grew into battles for resources of traditional knowledge. For example, the bio-piracy dispute arising out of Indian Neem Tree may develop into a dispute over maintaining orthodoxy of their national history, which can be seen from cases of auction of Chinese cultural relics[68] and the dispute over declaration of world heritage between Ecuador and Peru.[69] These disputes implicated the trend of future dispute development, which is maintaining the orthodoxy of national culture and striving for the value of national culture. Conflicts hidden between cross border ethnic groups are disputes over the allotment of the value of traditional medicines between the same ethnic groups of different countries, which is driven by states' interests. However, as the United Nations Charter has pointed out, "promoting international cooperation" is the principle of international law "to resolve international issues on economy, society, culture and welfare of human being."[70] It is not only one of the United Nations goals, but also an indispensible measure to maintain international peace and security. Thus, to establish a three-win's system (holder-holder-user) is not only the key to

[68] In February 2008, a special auction was held by the French auction house Christie's. The items included bronze statues of rat and rabbit heads which are relics of China's royal garden Yuanmingyuan and looted in the Opium War by British and French troops and stay overseas for many years. This auction aroused a wide discussion in China about retrieving cultural relics.

[69] Zápara people live in the Amazon rain forest located in both Ecuador and Peru. The Amazon Basin region is known for species diversity and the Zápara people have been living there for four centuries. They should be the authority on knowledge of tropical rain forests. Zápara people express their close relationship through language, ritual, myth, art and traditional medicine, which is of extraordinary global significance. Zápara culture was selected as the United Nations Human Oral and Intangible Heritage. Preservation plans were put on the agenda of the two governments of Ecuador and Peru. One of the plans decides to revive Zápara language, protect the cultural heritage of Zápara people, study and protect the original religion and traditional medicines of Zápara people, consolidate Zápara community, and enhance the exchange between Zápara people of Ecuador and Peru.

[70] *UN Charter*, art.1.

resolve disputes between cross border ethnic groups over traditional medicines but also a guarantee to maintain international peace and security.

Traditional knowledge-related IGC of WIPO has made a compelling progress in the protection of traditional knowledge, especially, the documents on the goal and principle of the protection of traditional knowledge compiled by the Secretariat after the amendments at the 19th and 21st Meeting.[71] Those documents emphasize reflecting both the existence of rights over traditional knowledge and the needs and hopes of holders of traditional knowledge. What is more, they attach great importance to supply, benefits sharing and free choice of use and transmission mode of traditional knowledge and recognize the specificity of traditional knowledge. This paper will combine the existing work of WIPO with relevant principles of international law to put forward some suggestions on the resolution of benefits sharing between cross border ethnic groups.

Firstly, state sovereignty over traditional medicines shall be clarified, which is developed from state sovereignty over genetic resources and the basis of resolving the disputes over traditional medicine between cross border ethnic groups.

As a knowledge that was accumulated and passed down from generation to generation by a group of residents in a special area using local plants, animals and mineral resources, traditional medicines have an indivisible relationship with lands. The natural character of land is the cornerstone to promote formation of a specific traditional medicine. The plants, animals and mineral resources preserved in the boundary area are the reliance of the cross border ethnic groups to create and continuously use traditional medicines. Clarification of state sovereignty over traditional medicines, which is based on state sovereignty over territory, natural resources and genetic resources, is not only in accordance with the United Nations Charter and Resolutions, but also in line with international customary laws. The Boundary Waters Treaty signed between the United States and the United Kingdom in 1909 for the boundary waters between the United States and Canada, presents the axiom that each signatory has sovereignty over the use of waters within its territory.[72] In the 1937 Meuse River case, the Permanent Court of International Justice

[71] WIPO Document, WIPO/GRTKF/IC/19/5 (Jul. 18, 2011) and WIPO/GRTKF/IC/21/4 (Jan. 18, 2012).

[72] *Boundary Waters Treaty*, art. 11, 36 Stat. at 2449.

(PCIJ) adjudicated that "each riparian state has sovereignty over the waters within its territory but should not impede other riparian states from exercising sovereignty over the river within their territory," which recognized the riparian states' sovereignty.[73] Affirming sovereign rights over traditional medicines means that a state has the power and jurisdiction to establish how the traditional medicine existing in its territory are distributed and used, and it will encourage the use and protection of traditional medicines.

Secondly, to construct a three-win's system. To protect the rights of holders of traditional medicine or knowledge, of course, is the main objective currently, but we should remember that protection and reservation of traditional medicines or knowledge is not the objective itself. To continuously research into and develop traditional medicines to enable more people to use them and finally to promote the whole human being's health is the further objective. And such a great project is going to be completed by users with knowledge of modern technology. Therefore, the balance of interests between holders and users of traditional medicines should be paid attention to by the IGC of WIPO.

In addition, the existence of borders makes possible for traditional medicines to be held by a number of holders and it is also the fuse leading to disputes over traditional medicines between cross border ethnic groups. Because as the result of the investigation of Peru Project of the International Cooperative Biodiversity Group Program shows,[74] when a dispute arises over traditional medicines among a group of communities, indigenous groups' customary laws and rules will provide the solution as a judge hammer. But customary laws and rules cannot act when disputes arise between cross border ethnic groups because the ethnic groups are located in two countries. Cross border ethnic groups and their respective countries should remember, however, that unity as one group will make a cake bigger than separation as sand.

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[73] Diversion of Water from the Meuse Case (*The Netherlands v. Belgium*, 1937) P.C.I.J. (Ser. A/B).

[74] The International Cooperative Biodiversity Group Program-Peru Project reflects precisely this scenario: A group of one community is in favor of participating in a bio-prospecting project and another opposes to it. In this case, it is essential to uphold the central role of a community's customary rules and traditional practices in their decision-making process (including the grant of prior informed consent). Manuel Ruiz et al., *The Protection of Traditional Knowledge in Peru: A Comparative Perspective*, 3 Wash. U. Global Stud. L. Rev. 755, 794–95 (2004).

What is the best solution and process to establish a three-win's system to make the cake the biggest? To ensure free research into environment for users, especially for the development of technology of drug scientists, would be the key point of the solution. Principles of prior informed consent should not be the barrier which prevents world drug companies or research institutes from accessing traditional medicines. A notification to any part of the holders or a co-management institution which is established by the countries of the cross border ethnic groups, which meets the legal requirement, would be full of effect. There is no need to construct a strict system of prior informed consent under WIPO on the protection of traditional knowledge. And then, establishing a mechanism or platform, under which holders can monitor the process of developing new drugs on the basis of traditional medicines. For example, users should report on the process and achievements of research at the end of every year. Or the representative of holders can join the board of supervisors of a drug company. This would make the three-win's system more transparent. Consolidating a percentage of benefit sharing between holders and users by an international regime, for example, 10% or 15% margin of new product would be the simple but most effective solution. This kind of international regime will not only reduce the arguments over per traditional medicines, but also save the time so as to develop new drugs for improving world human welfare.

Thirdly, to establish a co-management commission based on international law. There are several international treaties on trans-boundary rivers, such as the Convention Regarding the Regime of Navigation on the Danube, which established a Danube Commission consisting of each Danubian state, may provide legal principles and experiences on establishing a co-management institution. As the equal status of all sovereign states in international organization is universally accepted as a general principle of international law, the countries of cross border ethnic groups shall negotiate equally to set up an international commission on the basis of this principle. How will the commission make a co-management decision, like a decision on authorizing the research in and developing new drugs on traditional medicines if several companies are bidding for traditional medicines? We can draw reference from the practice of other international organizations. For example, the voting right of executive BOD of International Monetary Fund (IMF) is determined

according to their shares in IMF.[75] Because each country's share in IMF is determined by the amount they subscribed by the time they accessed to IMF, which is mainly determined by the economic position among the members. As regards the issue of traditional medicines, place of origin, number of the population of the cross border ethnic groups or the distribution of actual users of traditional medicines in the groups and other factors can be taken into consideration to determine the voting right and final distribution of interests of each member of the co-management institution. Meanwhile, the functions of co-management commission should be consolidated by the conference of all parties, which may consider the following elements, such as the jurisdiction of the commission, consultation mechanism between parties, the budget of the commission, and the fund for sustainable use of traditional medicines.

CONCLUSION

Cross border ethnic groups separated by the boundaries into two different states not only co-created traditional medicines but also co-promoted the evolvement of history. Therefore, they should be co-holders of traditional medicines. But sovereignty triggers conflicts of interests regarding traditional medicines between cross-border ethnic groups. Research on self-determination demonstrates that there is a possibility for cross border ethnic groups to co-hold traditional medicines. But the limitation of self-determination in international practices, namely, self-determination should not infringe state interests and sovereignty, will finally lead to separate ownership of traditional medicines by cross border ethnic groups. Such separation not only brings about risks of obtaining no consent by the users, but also increases the cost of obtaining consent.

Thus, to establish a co-management system based on territory sovereignty and three-win's principle can not only resolve the conflicts of interests regarding traditional medicines between cross border ethnic groups but also raise the efficiency of use of traditional medicines to enhance the health of human being and maintain regional peace and stability.

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[75] Each member shall have two hundred and fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights. Article XII, Section 5(a), Agreement of the International Monetary Fund.