原住民族的森林權*

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第 19 條：原住民得在原住民族地區依法從事下列非營利行為：
一、獵捕野生動物。
二、採集野生植物及菌類。
三、採取礦物、土石。
四、利用水資源。
前項各款，以傳統文化、祭儀或自用為限。

第 20 條：政府承認原住民族土地及自然資源權利。

第 21 條：政府或私人於原住民族土地內從事土地開發、資源利用、生態保育及學術研究，應諮詢並取得原住民族同意或參與，原住民得分享相關利益。
政府或法令限制原住民族利用原住民族之土地及自然資源時，應與原住民族或原住民諮商，並取得其同意。
前二項營利所得，應提撥一定比例納入原住民族綜合發展基金，作為回饋或補償經費。

第 22 條：政府於原住民族地區劃設國家公園、國家級風景特定區、林業區、生態保育區、遊樂區及其他資源治理機關時，應徵得當地原住民族同意，並與原住民族建立共同管理機制；其辦法，由中央目的事業主管機關會同中央原住民族主管機關定之。

『原住民族基本法』（2005）

前言

森林佔有地球表面的 9.4%、或是土地面積的 30%，同時含蓄 80%的碳匯（terrestrial carbon）（RRI, 2012: 3; Wikipedia, 2014）。對於以森林為棲息地的原住民族來說，森林不僅提供賴以維生的糧食、用水、以及野生動物，同時也是傳統知識的來源；然而，在經濟發展、以及環境保護的雙重壓力下，原住民族的山林家園往往面對破壞、甚至於被強迫遷徙，進而造成生活方式剝奪、傳統制度侵蝕、集體認同流失等困境（RRI, 2012: 3, 9; UNPFII, 2010）。在開發至上的典範下，森林砍伐（deforestation）主要來自於基礎設施（道路、水庫）、農業開

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發、礦產開採、原木砍伐、休閒旅遊；另外，在環境保育的目標下，原住民族又淪為國家設置自然保護區域的犧牲品[1]（Tresierra, 1999）。

從 1950 年代初期，聯合國就開始關心各國的「自然資源永久主權」（permanent sovereignty over natural resources），特別是針對開發中國家、以及被殖民的民族（peoples and nations），認為自然資源權是民族自決權的基本要素；隨後，自決權被適用到國家內部的民族，資源權／資源主權當然也被當作原住民屢行使自決權的諸多面向之一[2]，換句話說，作為擁有主權的政治個體，原住民族有權掌控、並管理其土地及傳統領域上的自然資源（Daes, 2004a: 5-8）。在這樣的脈絡下，森林權（forest rights）是被當作資源權的一種，我們希望能與開發及保育取得平衡（圖 1）（UNPFII, 2010; Larson, et al., 2010; Wiersum, 1996; Schoneveld, 2014）。

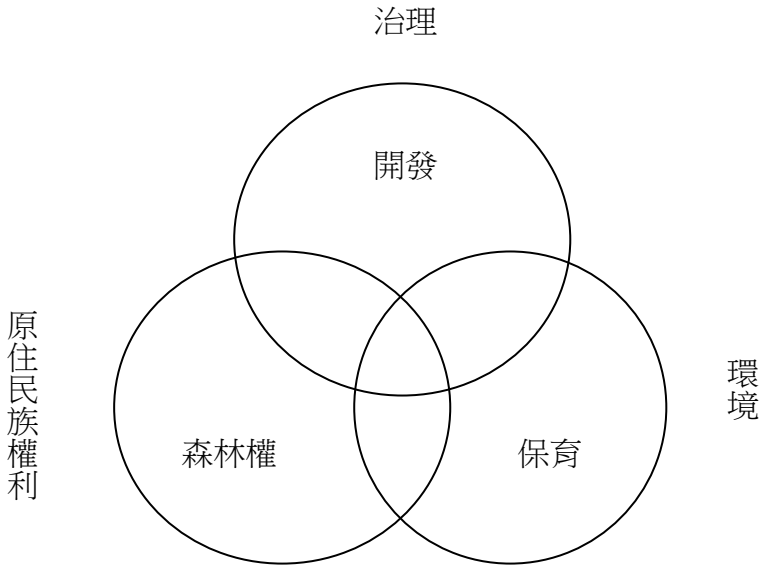

圖 1：原住民族森林政策的目標

本文的目的，是想要釐清原住民族森林權的來源、及內涵為何，並瞭解相關國際公約的規範、以及各國的作為。

[1] 台灣自然保護區域包括自然保留區、野生動物保護區及野生動物重要棲息環境、國家公園及國家自然公園、自然保護區四大類；總共約佔台灣陸域面積的 19%。

[2] 最常見的實踐自決權方式是自治權。

原住民族森林權的來源

我們先前依據 James Anaya（1999-2000: 6-9）的分類方式，援引生命權、文化權、財產權、以及自決權等四種規範，以光譜的方式呈現原住民族環境權的來源（圖 2）。當時的想法，是由實質權到程序權、由抽象到具體；然而回想起來，生命權、文化權、以及財產權是否有明顯的增減序列（ordinal）關係，未必那麼清楚，因此，我們改用類別（categorical）的方式來說明資源權（resource rights）、及森林權的來源，包括主權、自決權、以及文化權（圖 3）。

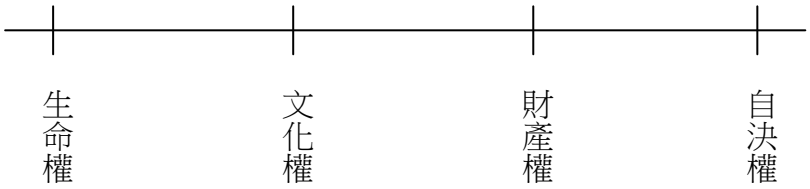

圖 2：原住民族環境權的來源

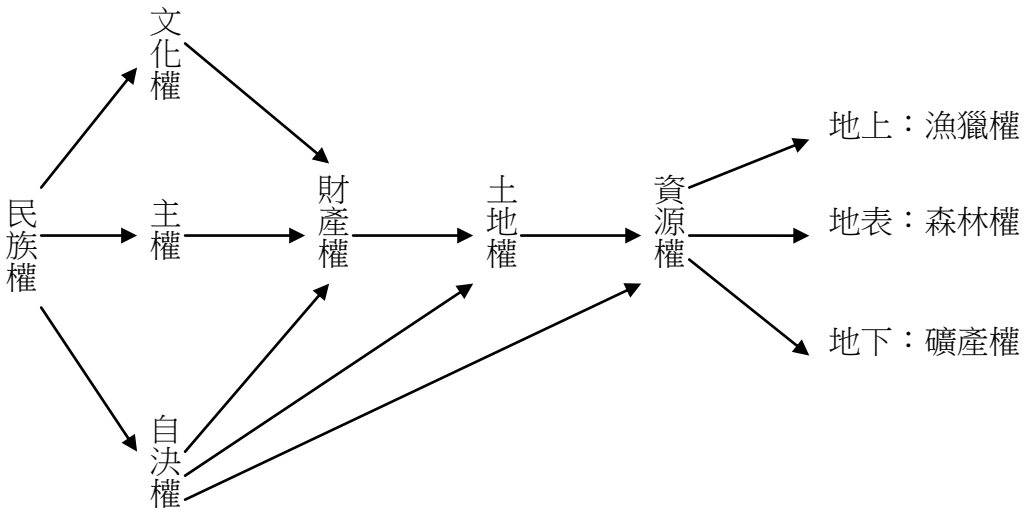

圖 3：原住民族森林權的來源

（一）主權

首先，原住民族的主權[3]（indigenous sovereignty）是一種實質權，是位階最

[3] 歷來國際法所關注的，就是國家主權（state sovereignty）與原住民族的主權之間的爭辯關係（施正鋒、吳珮瑛，2014）。當前，對於原住民族權利運動大致上依循 Las Casas、以及 Victoria 的

高的原住民族權利（indigenous rights），進而衍生各種資源權。原住民族的財產權是指原住民族先佔、並使用其土地、或是傳統領域，因此合理取得所有權（ownership）。原住民族的財產分為有形、以及無形[4]兩種，這裡關注的是前者，也就是土地權（land rights, land title, land tenure, tenure rights）。究竟土地權與資源權的位階如何，有三種主張：以權利的角度來看，廣義的土地權包含資源權；然而，對於資源經濟學者而言，資源應該保含狹義的土地；折衷之道是將土地與資源相提並論，視兩者為同義詞（Daes, 2004a; Anaya, 2005; Barry & Meinzen-Dick, 2008; Anderson, et al., 2008）。我們在這裡採取第一種觀點。接下來，資源權包含地上的漁獵權、地表的森林權、以及地下的礦產權；比較特別的是水權，包含地表、以及地下兩種。

（二）自決權

原住民族的自決權是程序權，是指原住民族有權決定自己的政治、經濟、社會、及文化安排，不管是財產、土地、資源、還是森林，也就是說，政府打算進行有關於自然資源的開採，必須事先徵詢原住民族的意見，而且必須讓原住民族自主參與決策。具體而言，自決權運用在資源權，可以有公共參與權、以及資訊接近權（access to information）兩個面向：首先，公共參與權是指可能受到政策

自然法途徑，認為當年的原住民社會絕非無主之地，駁斥墾殖國家以征服、或是發現及佔有來取得主權（Slattery, 1991; Tully, 2000; Macklem, 2001）。原住民族的主權訴求可以分為絕對主權（absolute sovereignty）、共享主權（shared sovereignty）、功能主權（functional sovereignty）、以及名目主權（nominal sovereignty）；後三者是限制性主權，也就是不分離的主權（Fleras & Spoonley, 1999: 54-56; Maaka & Fleras, 2000: 93-94; Sanders, 1991: 192）。對於美國、澳洲、紐西蘭、以及加拿大等墾殖國家來說，只要不涉及外部自決、或是政治分離，其他形式的限制性主權是可以接受的。以美國為例，政府所承認的原住民族主權是指部落主權（tribal sovereignty），特別是原住民族在保留區的資源管理權利，包括用水權、漁獵權、礦產權、以及森林權澳洲聯邦最高法院在 *Mabo vs. Queensland (2)*（1992）確認原住民的土地權，迫使政府加緊立法來處理原住民取回土地所有權的要求。在紐西蘭，儘管當年英國王室與毛利人簽定了 *Treaty of Waitangi*（1840），彼此對於是否讓渡主權有不同的詮釋。加拿大聯邦最高法院在 *Calder v. Attorney-General of British Columbia*（1973），承認原住民族的土地權繼續存在，並判定原住民族有權利要求政府歸還土地、或是傳統領域，政府被迫透過談判與原住民族處理土地問題。

[4] 譬如智慧財產、以及基因資源。

影響的人，有權利參與資源運用的決策，包含被傾聽的權利（right to be heard）、以及影響決策的權利（right to affect decision）；資訊接近權是指人們為了維持生活品質，有權獲得相關環境風險的資訊，特別是政府的作為可能破壞環境之際（Shelton, 2001: 199-204; Acevedo, 2000: 457）。

（三）文化權

『公民政治權利國際公約』（*International Covenant on Civil and Political Rights, 1966*）第 27 條強調少數族群的文化權不可被剝奪：

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

在這裡，文化權往往與少數族群的資源權相提並論。根據聯合國人權委員會（Human Rights Committee）所作的『第 23 號一般性解釋』（*General Comment 23, 1994*），文化的表現有多種形式，包括與土地資源使用相關的特別生活方式，尤其是對於原住民族而言：

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

由於原住民族有權保有其文化特色，而自然環境、以及土地資源又是維繫其獨特的文化所必須，因此，在保障原住民族文化權的脈絡下，自然環境的保護是必要的條件，特別是土地（Cohan, 2001-2002: 155）。

森林權的內涵

Schlager 與 Ostrom（1992）運用財產權的「一束權利」（bundle of rights）概念，將自然資源的共同所有權解析為進入（access）、採集（withdrawal）、管理、排除（exclusion）、以及讓渡（alienation）等五類；他們將前二者稱為操作層次，後三者為集體選擇層次。同樣地，Barry 與 Meinzen-Dick（2008）將財產權所蘊含的五大面向分為三大類：使用權（進入、採集）、掌控／決策權（管理、排除）、以及讓渡權[5]。另外，Rights and Resources Initiative（2012）將上述構思作了一些增補，用來分析原住民族的森林產權（forest tenure rights），分為範圍（scope）、期限（duration）、以及完備（completeness）等三個層面；所謂的完備是指政府是否可以徵收（eminent domain），以及如果可以徵收的話，過程是否合乎正當程序、補償是否合理（圖 4）。我們加上權利所有者（owner, holder），綜合整理如下：

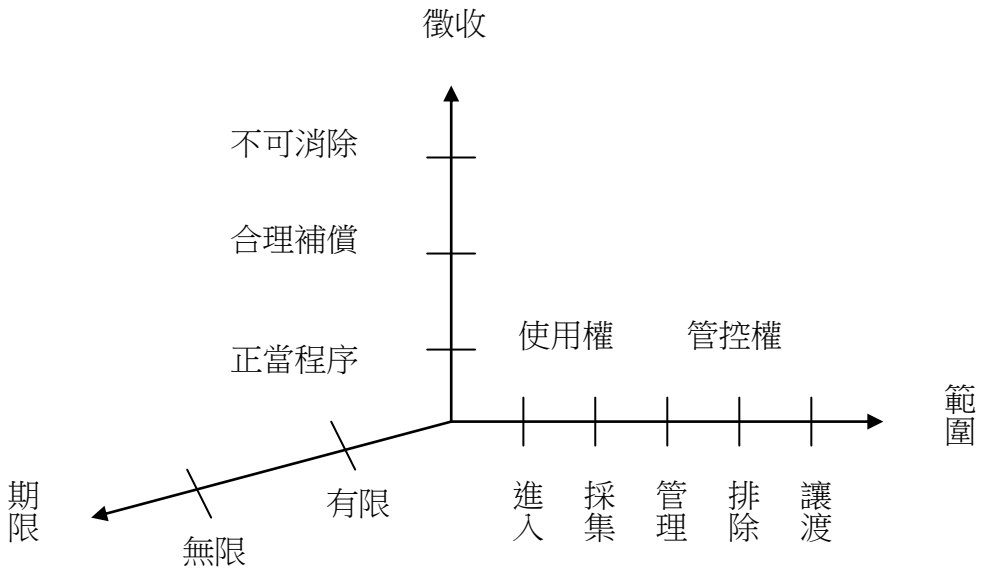

圖 4：森林權的面向

[5] 另外，他們依據財產的所有者，分為政府（公有）、社群／社區（共有）、以及個人等三種（Barry & Meinzen-Dick, 2008）。

（一）範圍

進入：進入及通過族人的土地或是傳統領域，這是原住民族最基本的森林權，如果這個門檻都無法突破，其他面向更不說。原住民面對的挑戰是當政府把土地相關權利特許、或是承租給第三者，譬如政府單位、保育機構、或是私人，而他們往往會禁止他人進入；這時候，作為土地原來所有者的原住民如果嘗試著要返回，通常不是會被驅離、就是被控非法侵入。

採集：資源的採集是原住民族森林權最重要的面向，尤其是仰賴森林資源為生的原住民而言。採集權又稱為「利益權」（right to benefit），一般分為維生、以及商業兩大類；在林區，採集權又可分伐木、以及非木材森林產物（non-timber forests product, NTFPs）的採集（圖 5）。大體而言，政府對於地表、及地上資源的採集[6]，通常會考慮保育而有不同程度的規範，特別是商業性的伐木；有時後，連傳統的漁獵、食物、藥材的採集都會被限制，原住民不免面對被逮捕、或是採集物被沒入的騷擾。這時候，因為正常的市場機制受阻，如果不肖的執法人員、剝削的中間人、以及黑道沆瀣一氣，只會延續原住民的貧窮。

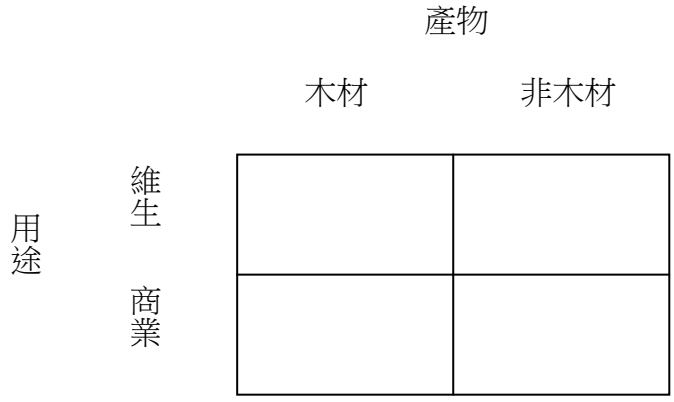

圖 5：森林採集權的性質

妥適定義原住民族的採集權，一方面可以保障部落的傳統生活方式，另一方

[6] 儘管原住民族資源權的最終來源是主權，然而，政府多半會保留地下的礦產權，包括石油、天然氣、以及其他礦產。

面也可以避免合法的市場管道受到威脅。最常見的障礙是林務單位的管理計畫、或是保育機構的許可辦法，往往不尊重原住民族的傳統資源保育方式，還限制原住民的維生採集習慣，更不用說商業性的伐木權。因此，過度的管制、或是權利剝奪，只會把原住民族的採集逼向地下化；終究，體制外的生產方式將無法與永續發展的相輔相成。

管理：管理權涉及森林進入、及資源採集的規定，也賦予原住民族決定排除、及讓渡的權利；具體而言，管理權包括目標[7]（outcome）、以及手段[8]（practice）兩大決策。傳統的資源管理是「以政府為基礎的管理」方式（government-based management），而位於光譜的另一個極端則是「以社區為基礎的管理」方式（community-based management），前者的管理由上而下進行，屬於父權式的，後者由下而上，比較能讓部落有效地發揮治理功能；而共同管理介於兩者，兼顧政府、以及社區對於管理的參與，可以說走向自治的過渡時期安排（圖 6）。

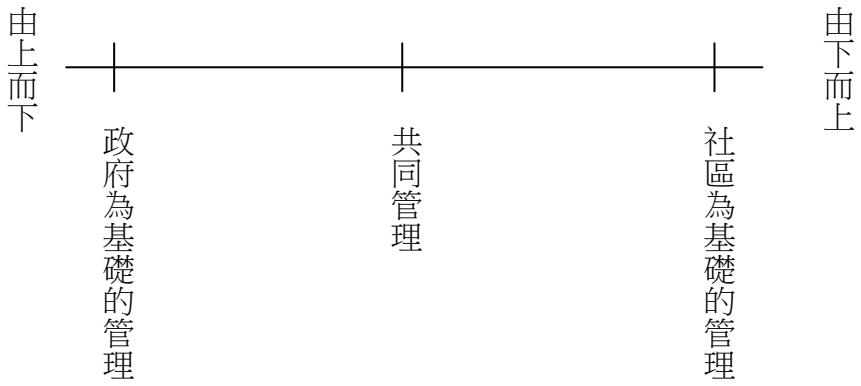

圖 6：共同管理的定位

排除：排除權是進入權的相對，可以說財產權的最明顯指標。排除權可以是防衛性的，用來捍衛原住民族的土地、水域、漁獵、或是森林，防止外人的佔有、或是濫採；排除權也可以是具有攻擊性的，是強者用來驅離弱者進入有爭議的土

[7] 譬如木材生產、物種保育、碳儲存、藥材或是其他 NTFPs 的生產（RRI, 2012: 17）。
[8] 也就是決定何處（where）、何時（when）、以及如何（how）植樹、伐木、放牧、或是狩獵（Barry & Meinzen-Dick, 2008: 22）。

地，特別是政府採用公權力禁止原住民族回到傳統領域，不管是被恣意劃為水資源用地（集水區、水源水質水量保護區）、森林用地（國有林班地之中的保安林）、或是自然生態保護區裡頭的國家公園。

相對於他者（不管是公家機關、民間企業、還是鄰近的社群），原住民族的排除權利是一種「權力」（power）；只不過，在缺乏有效執行機制之下，特別是沒有自治體制作後盾，就看政府的行政、立法、或是司法部門是否願意出面加以維護。問題是，排除權往往不是受制於政府、或是企業，再不就是操控在族人的少數菁英手上；更嚴重的是，林地往往被劃設為公共土地，族人對於森林的排除權並沒有置喙的餘地。

讓渡：讓渡權是指把財產租賃（lease rights）、或是出售（rights to sale）給其他個體，可以說最有爭議性，而且也是對於原住民族最具有殺傷力，因此，又被視為是否真正擁有財產的試金石。其實，對於一些原住民族而言，他們與土地具有心靈上的關係、代代相傳，與非原住民的所有權概念迥然不同，因此是不可讓渡的（inalienable）；此外，即使原住民族的土地可以明白辨識隸屬某個社群（族群、或是部落），卻未必可以為特定個人所擁有，不能私相授受。

由於讓渡權是土地市場的基石，發展經濟學家一向倡議將傳統、或是非正式的產權讓渡而納入體制[9]，希望能解除土地所蘊含的資源，以便改善貧者的生活；換句話說，他們的立論是透過土地市場的開放，讓原住民族有機會取得創業資金。或許這些建議的出發點是善意的，然而，由於資訊、及權力的高度不對稱[10]，儘管也透過「自由、事先、及知情下的同意」（free, prior and informed consent, FPIC），讓渡權卻是一把兩刃的劍，很可能會造成原住民族傳統社會的解體、以及集體認同的瓦解，因此必須審度情勢而與時俱進，同時又要看族人擺脫寡頭壟斷的可能，謹慎行使。

[9] 譬如紐西蘭將毛利人得漁獲權轉換為商業性的漁獲配額（施正鋒、吳珮瑛，2014）。
[10] 包括相關法規、資源價值、資金運用、出價開放、甚至於訴諸暴力（RRI, 2012: 20）。

（二）期限

不管是財產權、土地權、資源權、還是森林權，保有權利的期限分為永遠、以及有限兩種。一般而言，當森林權的期限越短，相關的決策越會是急功近利；相對地，如果部落可以擁有較長、甚至於永久的森林權，就越有誘因去從事長期的資源利用。如果國家願意承認原住民族的永久土地權，通常意味著政府不會貿然進行徵收，除非是為了公共利益的特殊情況下；畢竟，原住民族的土地權來自原住民族主權、也攸關著原住民族自治權的行使，因為被限制的土地權將使自治權殘缺不全。

（三）徵收

徵收是指政府機構基於「公共利益」（public interests），強制取得老百姓的財產，特別是土地的使用，因此，這是一種政府可以動用的權力（power），而財產權是基本權利（right），人民希望能自由處理；當議價買賣的市場機制無法取得私產之際、或是物主因為感情因素不願意出讓，這時候，政府只好行使徵收權（施正鋒、吳珮瑛，2013）。其實，原住民族的土地是否可以徵收，涉及原住民族的傳統土地權是的消除（extinguishment），也就是國家主權侵犯原住民族主權，這是相當嚴肅的憲法、及國際法課題[11]。

當國家不願意放棄原住民族的土地，政府通常會保留取回、讓渡、或是消除的權利，也就是在必要的時候加以徵收；因此，不管是否強制、還是事先是否進行磋商，予取予求，原住民族在現有的體制下，只能企盼徵收的過程能有正當的程序、以及合理的補償。不過，即使相關法律明文規定，過程往往繁瑣而冗長，讓原住民知難而退；另外，補償通常忽略到原住民族所珍惜的歷史、心靈、或其他非物質的價值。

[11] 見 McNeil,（1989, 2001, 2014）、以及 McHugh（2011）。

（四）擁有者

Barry 與 Meinzen-Dick（2008）依據財產權的所有者，分為政府（公有財）、集體／社群／社區（共有財）、以及個人／公司（私產）等三種；同樣地 RRI（2012: 22）將權利的所有者分為國家、原住民族、以及其他三類，其中，原住民族又分為個人、以及集體權。Schlager 與 Ostrom（1992: 242-54）則根據權利束的多寡，依序分為甚麼都沒有的擅自佔用者（squatter）、授權使用者（authorized user，進入權＋開採權）、申索者（claimant，＋管理權）、業主（proprietor，＋排除權）、所有者（owner，＋讓渡權）。

國際公約的規範

聯合國『世界人權宣言』（*Universal Declaration of Human Rights, 1948*）揭示，所有的人都可以擁有財產，不容恣意剝奪：

> Art. 17.1. Everyone has the right to own property alone as well as in association with others.
>
> Art. 17.2. No one shall be arbitrarily deprived of his property.

另外，『美洲人權及義務宣言』（*American Declaration on the Rights and Duties of Men, 1948*）也有財產權的條文：

> Art. 23. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

聯合國大會在 1958 年成立「自然資源永久主權委員會」（Commission on Permanent Sovereignty over Natural Resources），通盤清查自然資源永久主權（資源權）的地位；大會進而在 1962 年通過『第 1803 號決議』，宣布所有的民族擁有其自然資源的永久主權，此外，如果成員國侵犯這項權利，將阻礙國際合作、

以及和平的維繫（Daes, 2004a: 5-6）。

『公民政治權利國際公約』及『經濟社會文化權利國際公約』（*International Covenant on Economic, Social and Cultural Rights, 1966*）的第 1 條第 1 款都揭櫫民族自決權，也就是所有民族都有權利決定自己的政治地位，並且自由追求本身的社會、經濟、及文化發展。在接下來的第 2 款，兩公約進一步以國際法來規範，所有民族可以自由處理自己的天然資源，國家不可以被剝奪其維生的工具：

> Art.1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Art. 1.2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

值得注意的是，兩公約分別在第 47 條、及第 25 條有下列的醒文，國家不可藉口履行其他條款而侵犯到民族的資源權：

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

『美洲人權公約』（*American Convention on Human Rights, 1969*）保障每個人使用自己的財產的權利；當然，為了公共設施、或是社會公益，國家可以立法加以限制或是剝奪，這時候，政府必須有公正的補償：

> Art. 21.1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> Art. 21.2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

『非洲人權憲章』（*African Charter on Human and Peoples' Rights, 1981*）除了保障財產權，還規定所有人都可以自由處理自己的天然資源，國家不得加以剝奪；萬一天然資源被破壞，國家應該加以恢復、並且予以充分的補償：

> Art. 14. The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.
>
> Art. 21.1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it
>
> Art. 21.2. In case of spoilation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
>
> Art. 21.3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
>
> Art. 21.4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.
>
> Art. 21.5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

國際勞工組織的『原住暨部落民族公約[12]』(*Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989*）的土地資源規範相當詳細（參見附錄 1），特別是原住民族參與利用、管理、以及保育的權利，是目前唯一規範原住民族權利的國際公約。該公約規定，如果國家有必要保有地下礦產、或是

[12] 又稱『國際勞工組織第 169 號公約』(*ILO Convention No. 169*)。另外，國際勞工組織早先通過的『原住暨部落人口公約』(*Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Peoples in Independent Countries, 1959*，又稱『國際勞工組織第 107 號公約』*ILO Convention No. 107*)，誰然有承認原住民族的土地權（第 11-14 條），並未特別及資源權。

其他土地資源的所有權，必須建立機制進行諮詢，才可以從事開採、或是核發任何計畫的許可；同時，原住民族必須儘可能參與這些活動，而且獲得公平的補償：

> Art. 15.1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> Art. 15.2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

儘管『消除各種形式種族歧視國際公約』（*International Convention on the Elimination of All Forms of Racial Discrimination, 1965*）（Art. 5.v）與『世界人權宣言』的財產權文字幾乎雷同，並未提及原住民族，不過，聯合國消除種族歧視委員會（Committee on the Elimination of Racial Discrimination）在『第 23 號一般性意見』（*General Recommendation 23, 1997*）特別要求各國承認並保障原住民族擁有、開發、掌控、及使用其土地、領用、及資源的權利：

> The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

『聯合國原住民族權利宣言』（*United Nations Declaration on the Rights of*

Indigenous Peoples, 2007）的資源相關條款鉅細靡遺（參見附錄 2），特別是原住民族的土地、傳統領域、及資源權，有權擁有、使用、發展、以及掌控，國家必須以法律加以承認、而且予以保護，特別是尊重原住民族的慣俗、或是傳統土地所有權制度：

> Art. 26.1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> Art. 26.2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> Art. 26.3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

草擬中的『美洲原住民族權利宣言』（*American Declaration on the Rights of Indigenous Peoples, 2007*）也有類似的條款（附錄 3）。

聯合國開發計劃署（UNDP）、世界銀行（World Bank）、以及亞洲開發銀行（Asian Development Bank）對原住民族的資源權也有相當的關注（Daes, 2004b: 15; Griffiths & Colchester, 2000; Griffiths, 2001）[13]。。最後，美洲國家組織（Organization of American States）的美洲人權法庭（Inter-American Court of Human Rights）、以及美洲人權委員會（Inter-American Commission of Human Rights）在進入千禧年之後，相繼作了對原住民族資源權相當有利的判決：前者有 *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*（2001），後者有 *Mary*

[13] 至於聯合國在 1992 年於里約熱內盧舉行的「環境暨發展會議」（United Nations Conference on Environment and Development）所提出的『里約熱內盧環境暨發展宣言』（*Rio Declaration on Environment and Development*），主要是在陳述原住民族對於環境管理與發展的重要角色。在同時間通過的行動綱領『二十一世紀議程』（*Agenda 21*），雖然強調原住民族與土地的歷史關係，不過，主要還是在說明原住民族如何參與自然環境與永續發展之間的關係。

and Carrie Dann v. United States（2002）、以及 *Mayan Indigenous Communities of the Toledo District v. Belize*（2004）（Anaya & Crossman, 1996; Anaya, 1998; Schaaf & Fishel, 2002）。

各國的作為

在 2002 年，世界上的 77%林地由政府管理，3.52%位於原住民族保留地，6.79%是原住民族的私有地，另外 12.22%屬於私人公司或是個人（表 1）；合計公有的原住民保留地、以及原住民的私有林，原住民族控制 10%左右的世界林地（White & Martin, 2002: Table 1）。到了 2008 年，原住民族所能掌控的林地略有增加，特別是巴西、印度、玻利維亞、秘魯、澳洲、及美國，特別是秘魯、以及澳洲，政府將不少原住民族保留地的森林轉為原住民的私有林（Sunderlin, et al., 2008: Table 1）。如果只觀察開發中國家，由 2002 年到 2012 年，公有林地由 72%降為 60%，原住民保留地由 3%倍增為 6%，原住民私有林由 18%成長為 25%，私人林地由 7%小幅成長為 9%，可以看到原住民族已經可以掌管三成的世界林地（RRI, 2012: 10）。

根據 RRI（2012）的考察，在 59 個開發國家中，九成左右國家的原住民族擁有森林權中的進入權、採集權、以及管理權；約有七成的國家，如果政府進行徵收，會採取正當程序、並進行補償；約有六成國家的原住民族森林權包括排除權、以及沒有期限的森林權；最低的是讓渡權，只有四分之一的國家允許（表 2）。我們進一步檢視採集權的內容，將採集的項目（伐木及 NTFPs）與採集的用途（維生及商業）交叉分析，發現有 83%的國家允許原住民族從事商業性伐木，89%的國家允許商業性 NTFPs（圖 7），可見，將原住民族的森林權限於非商業性的維生用途，並非國際上的普遍現象。

表 1：世界林地的所有權

	公有		私有	
	公有林地	原住民保留地	原住民私有林	私人林地
巴西	423.7 (77.0)	74.5 (13.0)	0.0 (0.0)	57.3 (10.0)
加拿大	388.9 (93.2)	1.4 (0.3)	0.0 (0.0)	27.2 (6.5)
美國	110.0 (37.8)	17.1 (5.9)	0.0 (0.0)	164.1 (56.3)
澳洲	410.3 (70.9)	0.0 (0.0)	53.5 (9.3)	114.6 (19.8)
印尼	104.0 (99.4)	0.6 (0.6)	0.0 (0.0)	0.0 (0.0)
秘魯	n.d.	8.4 (1.2)	22.5 (33.0)	n.d.
印度	53.6 (76.1)	11.6 (16.5)	0.0 (0.0)	5.2 (7.4)
蘇丹	40.6 (98.0)	0.8 (2.0)	0.0 (0.0)	0.0 (0.0
墨西哥	2.75 (5.0)	0.0 (0.0)	44.0 (80.0)	8.3 (15.0)
玻利維亞	28.2 (53.2)	16.6 (31.3)	2.8 (5.3)	(10.2)35
哥倫比亞	n.d.	n.d.	24.5 (46.0)	n.d.
坦桑尼亞	38.5 (99.1)	0.4 (0.9)	0.0 (0.0)	0.0 (0.0)
巴紐	0.8 (3.0)	0.0 (0.0)	25.9 (97.0)	0.0 (0.0)
蓋亞那	30.9 (91.7)	0.0 (0.0)	2.8 (8.3)	0.0 (0.0)
總計	77.35%	3.62%	6.79%	12.22%

來源：White 與 Martin（2002: Table 1）。

說明：原表盧列 24 大林地國家的資料，我們只列出有原住民族林地的國家。單位為百萬公頃，括號內為百分比。n.d.是指沒有資料。

表 2：開發中國家原住民族的森林權

森林權類別	有／是（%）	無／否	不確定	看個案	無資料
進入權	55（93%）	1	2	1	0
採集權：伐木	52（88%）	1	3	2	1

採集權：NTFPs	53（90%）	1	3	2	0
管理權	51（87%）	5	2	1	0
排除權	34（58%）	21	3	1	0
讓渡權	14（24%）	40	2	1	2
沒有期限	34（58%）	23	2	0	0
徵收（正當程序、補償）	40（68%）	17	2	0	0

來源：整理自 RRI（2012: Fig. 4.1-4-7）。
說明：考察的國家包含拉丁美洲 25 國、亞洲 17 國、非洲 17 國。

項目	用途：維生	用途：商業	
伐木	9（17%）	43（83%）	52
NTFPs	6（11%）	47（89%）	53

來源：整理自 RRI（2012: Fig. 4.2）。

圖 7：原住民族森林採集權的用途

結語

經過二十多年來的努力，原住民族的權利意識越來越強，然而，政府部門似乎並未與時俱進，特別是有關於土地、以及自然資源的運用。儘管高等法院在 2010 年援引用『原住民族基本法』（2005）的精神，終於宣判三名被控違反『森林法』的泰雅族人無罪，然而，從司馬庫斯風倒櫸木事件（2005）、銅門部落護樹事件（2013）、到台大實驗林千年檜木事件（2014），公家機構與原住民族的爭議依然時有所聞。『原住民族基本法』雖然承認「原住民族土地及自然資源權利」（第 20 條），然而，卻只規範「非營利行為」（第 19 條），並未提及商業性的行為，與國際的潮流有相當大的差距；即使是諮詢、或是共管機制，也是應付了事。

附錄 1：國際勞工組織『原住暨部落民族條約』土地資源條款

Art. 2.1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Art. 4.1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Art. 5. 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 co-operation of the peoples affected.

Art. 6.1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Art. 6.2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Art. 7.1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Art. 13.1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Art. 26.2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Art. 14.1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Art. 14.2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

Art. 14.3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Art. 16.1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

Art. 16.2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public

inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

Art. 16.3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

Art. 16.4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

Art. 16.5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Art. 17.1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

Art. 16.2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

Art. 16.3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Art. 18. Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Art. 19. National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these peoples already possess.

附錄 2：『聯合國原住民族權利宣言』資源相關條款

Art. 8.2. States shall provide effective mechanisms for prevention of, and redress for: (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Art. 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Art. 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Art. 27. States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Art. 28.1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent

Art. 28.2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Art. 29.1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

Art. 32.1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Art. 32.2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Art. 32.3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

附錄 3：『美洲原住民族權利宣言』資源相關條款

Art. 13.3. Indigenous peoples shall have the right to conserve restore and protect their environment and the productive capacity of their lands, territories and resources.

Art. 13.4. Indigenous peoples shall participate fully in formulating and applying government programmes of conservation of their lands and resources.

Art. 18.

Art. 18.1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property by indigenous peoples.

Art. 18.2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect t to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

Art. 18.3. Where property and user rights of indigenous peoples arise e from rights existing prior to the creation of those States the States shall recognize the titles of indigenous peoples relative thereto as permanent exclusive inalienable imprescriptible and indefeasible. This shall not limit the right of indigenous peoples to attribute ownership within the community in accordance with their customs traditions uses and traditional practices nor shall affect any collective community rights over them. Such titles may only be changed by mutual consent between the States and respective indigenous people when they have full knowledge and appreciation of the nature or attributes of such property.

Art. 18.4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use management and conservation of such resources.

Art. 18.5. In the event that ownership of the minerals or resources of the subsoil pertains to the State so that the State has rights over other resources on the lands the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent before undertaking or authorizing any program for tapping of exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation in accordance with international law, for any damages which they may sustain as a result of such activities.

Art. 18.6. The States shall not transfer or relocate indigenous peoples except in exceptional cases, and in those cases with the free, genuine and informed consent of those populations, with full and prior indemnity and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.

Art. 18.7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated occupied, used or damaged, or the right to compensation in accordance with international law when restitution is not possible.

Art. 18.8. The Stales shall take all measures, including the use of law enforcement personnel to avert prevent and punish if applicable any intrusion or use of those lands by unauthorized persons or by persons who take advantage of indigenous peoples or their lack of understanding of the laws, to take possession or make use of them. The States shall give maximum priority to the demarcation of properties and areas of indigenous use.

附錄 4：相關國際公約、條約、宣言、判例、及法律

『森林法』（2004）

『原住民族基本法』（2005）

*Treaty of Waitang*i, 1840

Universal Declaration of Human Rights, 1948

American Declaration on the Rights and Duties of Men, 1948

Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Peoples in Independent Countries, 1959

United Nations General Assembly, Resolution 1803, 1962

International Convention on the Elimination of All Forms of Racial Discrimination, 1965

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

American Convention on Human Rights, 1969

Calder v. Attorney-General of British Columbia, 1973

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989

African Charter on Human and Peoples' Rights, 1981

Mabo vs. Queensland (2), 1992

Rio Declaration on Environment and Development, 1992

Agenda 21, 1992

United Nations Human Rights Committee, General Comment 23, 1994

United Nations Committee on the Elimination of Racial Discrimination, General Recommendation 23, 1997

Mayagna (Sumo) Community of Awas Tingni v. Nicaragua, 2001

Mary and Carrie Dann v. United States, 2002

Mayan Indigenous Communities of the Toledo District v. Belize, 2004

United Nations Declaration on the Rights of Indigenous Peoples, 2007

American Declaration on the Rights of Indigenous Peoples, 2007

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