

墾殖國家與原住民族的條約*

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前言

條約 (treaty) 是指雙方或多方經過約定、或談判所達成的協定或是和解¹：狹義的條約是指國家與國家之間所簽訂的協議，用意是建立彼此具有國際法義務的關係；而廣義的條約有種形式，並沒有因為名稱、或是形式而有特別的效力，不管稱為條約、公約 (convention)、協定 (agreement)、議定書 (protocol)、法 (act)、宣言 (declaration)、約定 (arrangement)、協議 (accord)、公報 (communiqué)、合約 (compact)、臨時協定 (*modus vivendi*)、任擇條款 (optional clause)、以及守則 (regulation) 等等，並沒有因為名稱、或是形式而有特別的效力 (Dodson, 2006: 105; Myers, 1957: 576-77)。

從十三世紀開始，英國便使用條約來化解爭端，不過，當西班牙、荷蘭、以及葡萄牙在 500 年前到美洲殖民，而英國及法國又在百年之後接踵而至，不管與原住民族所簽訂的條約是互惠 (平等)、還是片面 (不平等)，用意是確認各自的地盤，也就是海外擴張的工具；在 1533-1789 年之間，英國與美洲原住民族簽訂約之際，基本上是站在對等民族的立場 (Langton, 2001: 16-17; Clinton, 2004: 3; de Costa, 2003: 2-4)。不管是當年的大國 (法、西、英)、還是小國 (荷、瑞典、俄)，這些歐洲國家涉足北美之際，不得不承認原住民族是具有捍衛領土的能力，唯有透過條約才能立足墾殖、劃定界線 (Schulte-Tenckhoff, 1998: 244-46; Alfred, 2000: 5)。唯獨在澳洲，當地的原住民族被當作「野人」 (savage)，英國因此視為「無主之地」 (*terra nullius*) 而沒有正式簽訂條約 (Tahvanainen, 2005: 399)。

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¹ 有關於條約的一般性介紹，見 Oppenheim (1961)、Toscano (1966)、von Glahn (1981)、Brownlie (1998)、以及 Dunoff 等人 (2006)。

大體而言，歐洲國家跟原住民族簽訂條約，不外為了友好和平、土地、商業、甚至於結盟²，尤其是前者彼此之間出現土地爭議之際，白紙黑字是最好的憑據；然而，隨著殖民國家的支配確定，形勢比人強，國際法由自然法（*natural law*）走向實證法（*positive law*），是否為「文明的民族」（*civilized nation*）成為簽訂國際條約的前提，原住民族被排除在國際法的適用（*Tahvanainen, 2005: 397-98; Anaya, 2004: 31*）。也因此，目前所謂「傳統」國際法的觀點³，只有國家才有能力（*capacity*）締結條約；然而，如果從人權法的角度，被殖民、或是領土被佔領的民族享有自決權，當然應該也就具有締約的能力（*Tahvanainen, 2005: 397-98*）。事實上，『維也納條約法公約』（*Vienna Convention on the Law of Treaties, 1969*）只規範國家與國家之間的關係，明白指出並未排除其他國際法主體的締約資格（第 3 條）：

The fact that the present Convention does not apply to international agreements concluded between the States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

聯合國在 1982 年設置原住人口工作小組（*Working Group on Indigenous Populations, WGIP*），致力於『原住民族權利宣言』（*United Nations Declaration on the Rights of Indigenous Peoples*）的草擬，而跨國的原住民族非政府組織「國際性印地安條約理事會」（*International Indian Treaty Council, IITC*）在次年就提出有關於條約及協議的建議文字。經過十年討論，終於在 1993 年定案（*Djerrkura, 1999:*

² 譬如英國早期與印第安人結盟，是擔心法國人侵入地盤，而美國獨立後與印第安人結盟，則是要對抗英國（*Clinton, 2004: 5-6; Craufurd-Lewis, 1995: 31-32*）。

³ 另外，*Clinton (2004: 4)* 也注意到，原本的條約是有機而動態的，到後來卻被釘死為靜態的紀念性文件。

8-10)。在 2007 年通過的『原住民族權利宣言』第 37 條規範⁴：

1. 原住民族有權要求與各國或其繼承國訂立的條約、協定和其他建設性安排得到承認、遵守和執行，有權要求各國履行和尊重這些條約、協定和其他建設性安排。
2. 本《宣言》的任何內容都不得解釋為削弱或取消這種條約、協定和其他建設性安排所規定的原住民族權利。

儘管如此，在宣言草案討論的過程，各國一直有南轅北轍的看法。譬如澳洲代表一開頭就表示會詳加審視再說，紐西蘭代表坦言很難接受對使用國際條約來解決國內議題，加拿大代表同樣地表示跟原住民族的條約是國內協議、主張在自己的國家內部處理就好，委內瑞拉代表也對於將國內協議訴諸國際有所保留，而美國代表雖然承認這些原住民族與美國政府簽的條約的法律效力，卻認定缺乏國際法上的強制性；相對地，巴西、哥倫比亞、及芬蘭的代表則發言支持 (Djerrkure, 1999: 11; Schulte-Tenckhoff, 1998: 242)。

在 1983 年，聯合國經社理事會特別報告人 José Martínez Cobo 在他有關原住民族被歧視的研究提出四項消除歧視的原則，認為不論是殖民政府或當代國家跟原住民族所簽訂的條約跟協定 (convention)，不管官方的定位、或是否被遵守，都對原住民族有相重要的影響，都有必要進一步深入探討，才能瞭解這些國際協議 (agreement) 當下的地位⁵。經社理事會在 1989 年任命 Miguel Alfonso Martínez

⁴ 聯合國的官方用字是「土著人民」。原文如下：

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

⁵ Study of Treaties Concluded with Indigenous Peoples:

388. During the preparation of this study, it became clear that, for indigenous peoples and nations in various countries and regions of the world, the treaties concluded with present nation-States, or with the countries acting as colonial administering Powers at the time in question, are of paramount importance.

389. A thorough and careful study should be made of areas covered by the provisions contained in such treaties and conventions, the official force of such provisions at present, the observance, or lack of effective observance, of such provisions and the consequences of all this for the indigenous peoples and nations concerned.

390. In so doing, account must necessarily be taken of the points of view of all parties directly involved in such treaties, which requires examination of a large volume of

特別報告人，賦予任務研究國家與原住民族所簽訂的條約、協議、或其他建設性約定（constructive arrangements），以期發展出保護原住民族條約權的規範；他在最後的報告特別強調⁶，透過條約簽訂來取得原住民族的同意，是化解彼此紛爭的最佳途徑（1999: para. 263）。

澳洲原住民族運動者在 1970 年代初期開始參與國際原住民族運動，看到其他國家如何透過談判、或是釋憲來重新分配權力，因此推動政府跟簽訂條約原住民族，希望藉此來處理懸而未決主權、自決權、以及土地權問題（Djerrkura, 1999: 4）。Dodson（2006: 105-106）引用 Martinez Cobo 的「國內化」（domesticating）概念，認為由條約的簽訂到否定，其實就是殖民過程的延續：殖民強權或其繼承者把原本具有主權的民族轉變為由國家所馴化的個體（state domesticated entity），聲東擊西，拒絕承認原住民族作為國際法主體的地位，處心積慮，就是要剝奪他們捍衛祖靈地（ancestral land）的利器；因此，簽訂條約是當下墾殖者（settler）與原住民族重新定義彼此關係的必要工作，同時也是用來恢復原住民族被壓抑的尊嚴（p. 107）；相對地，Dodson（2006: 108）認為條約對政府也有下列好處：雙方同意的標準、架構各級政府與原住民族的關係、承認原住民族既有的權利、改善政府的公共服務、以及明確⁷。

Schulte-Tenckhoff（1998: 242-44）將時下流行的論調稱為「國內化的典範」（paradigm of domestication），點出國家刻意採用溯及既往（*ex post facto*）的觀

documentation. For that reason, the Special Rapporteur considered that such an undertaking could not be satisfactorily carried out within the framework of this study.

391. It is felt, therefore, that only through a thorough study devoted exclusively to this subject can the present status of such international agreements be determined with the necessary accuracy.

392. It might be worthwhile conducting a study of these aspects, in the light of prevailing principles and norms, exercising the care and attention which such delicate matters require. This would entail examining the relevant documentation and obtaining opinions and data from the various sources concerned, primarily the Governments and indigenous nations and peoples which have signed and ratified such treaties.

⁶ 另外，Alfonso Martínez（1999: paras. 53-57）指出，人們不應該淪為現有術語的囚犯（prisoner of existing terminology），要是堅持對於條約這概念作最狹義的解釋，將有礙理解原住民族對於條約的看法；他意有所指，點出所謂「原住民族並不理解條約這個概念」的說法是錯的。

⁷ 具體而言，Dodson（2006: 109-15）建議條約可以採用四種方式來進行：由聯邦政府跟原住民族簽訂具有國際法效力的條約、入憲、立法、或是單純的協定。

點，用來掩飾片面毀約、或是使用法律來規範跟原住民族的歷史關係；換句話說，以國家為中心的國際體系未能處理墾殖國家（*settler state*）的殖民本質，而原住民族尚未擺脫被殖民的狀態，有待去殖民的努力。她以為問題不在於國家與原住民族對於詮釋條約的矛盾，癥結在於原住民族不能跟國家平起平坐，以致於自己的觀點不能被正視，因此，國家的唯我獨尊的看法被當作「規矩」（*custom*），而原住民族的論述則被打為「原始」（*primitivist*）而有問題的看法。事實上，歐洲國家當年跟原住民族簽訂約，明明知道對方是擁有主權的民族（*sovereign nation*）、而且具有當時運行國際法所具有的各種能力（Martínez, 1999: para. 110）。由此可見，這些由殖民地轉變而來的墾殖國家，不是健忘、裝傻、就是硬拗。

民進黨總統候選人陳水扁在 1999 年跟原住民族簽署『原住民族和台灣政府新的夥伴關係』，其中一條是「與台灣原住民族締結土地條約」，當選後無疾而終。接下來，我們將探討美國、加拿大、紐西蘭、以及澳洲，看他們如何處理與原住民族的條約，最後再做簡單的分析。

美國

在歐洲人踏足北美洲的初期，西班牙人、以及英國人跟印第安人就訂了不少條約。法國在 1763 年跟英國簽訂『巴黎條約』（*Treaty of Paris*），割讓其在北美洲大部分領土，英國為了安撫印第安人，公布『皇家宣言』（*Royal Proclamation, 1763*）禁止英國臣民私下向印第安人購賣土地，以遏止詐欺⁸、及其他弊端。美國在獨立後，締結條約的權力在聯邦，直到 1871 年為止，政府持續與部落簽訂超過 800 個條約（其中 372 個經過參議院核准），主要的目的是將東部的印第安人趕到密西西比河以西，軟硬兼施以取得土地，稱為「遷徙條約」（*removal treaty*）；經過蠶食鯨吞，由於已經沒有地方可以驅趕印第安人了，條約的重點轉為將他們集中到保留區，政府往往訴諸武力、衝突不斷，棄條約宛如敝屣（Tahvanainen,

⁸ 這樣的專買權（*monopoly purchase*），表面上是要保護原住民族，真正的用意是要消滅原住民族土地的市場，讓英國可以使用遠低於市價的成本加以徵收（Clinton, 2004: 6）。

2005: 403; HREQC, 2004: 194; Clinton, 2004: 8)。

儘管聯邦最高法院在 *Worcester v. Georgia* (1832: 520) 判例中表示⁹，印地安民族是獨特的政治共同體、他們亙古以來擁有土地上的自然權利無可爭議，而聯邦大法官 John McLean 在 *Worcester v. Georgia* (1832: 582-83) 判例的協同意見書中也義憤填膺地認為¹⁰，即使他們是不文明的民族，難道就因此降低了條約的責任嗎？當時的總統 Andrew Jackson 嗆聲說：「[既然] 約翰·馬歇爾 [首席大法官] 已經做出判決，現在就讓他去執行」(John Marshall has made his decision, now let him enforce it.)(Rosen, 2006)。事實上，當馬歇爾在 *Cherokee Nation v. Georgia* (1831: 20-21, 3)就表示過¹¹，雖然印地安部落被稱「外國民族」(foreign nation)，

⁹ 原文如下：

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.

The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed, and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among the powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

¹⁰ 原文如下：

By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts.
.....

We have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?

¹¹ 原文如下：

“Foreign nations” is a general term, the application of which to Indian tribes, when used in the American Constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the Constitution in this article does not comprehend Indian tribes in the general term “foreign nations,” not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term “foreign state” is introduced, we cannot impute to the convention the

然而，印地安部落、或民族並非憲法上的外國（foreign state），因為他們不能自外於美國（foreign to the United States），畢竟，他們是「國內的倚賴性民族」（domestic dependent nations）。由此可以看出司法途徑並不可靠，很有可能是抹壁雙面光。

在 1871 年，國會乾脆終止條約的簽訂¹²，政府將原先的隔離政策改弦更張為同化，而真正的意圖則是瓜分保留區的土地，透過協議的方式取得「同意」，將「多餘」的土地分配給墾殖者，原先在 1887 年還有 1 億 3,800 萬英畝的保留地，經過豪奪巧取，到了 1934 年竟然只剩下 5,200 萬英畝，儼然就像坑坑洞洞的瑞士乳酪理論（Swiss cheese）；由於土地的剝奪帶來貧窮，國會在 1934 年立法嘗試保護剩下來的土地，只不過，戰後的政策卻是削弱部落的自治、任其自生自滅，政府終於在 1961 年調整為強調自決，並在 1980 年代開始與部落進行協商、推動自我治理，以協定取代條約（HREQC, 2004: 195-99, 203）。

比較特別的是在阿拉斯加於 1958 年獲准建州，聯邦政府打算將 1 億英畝的土地轉移州政府、原住民族展開聲索又剛好阿拉斯加發現油田，談判的目的是取得州政府、原住民族、保育關懷、及石油公司的妥協；美國政府與原住民族在 1971 年達成判協定，並由國會通過的『阿拉斯加原住民族聲索協定法』（*Alaska Native Claims Settlement Act, 1971*）加以確認，本質上與過去的條約沒有不同，日後，加拿大魁北克省 James Bay Cree 原住民族的自治談判就是仿效阿拉斯加模式。阿拉斯加原住民終究取得 4,400 萬英畝土地、並獲得美金 9 億 6,200 萬補

intention to desert its former meaning and to comprehend Indian tribes within it unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it. The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or Nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.

¹² 國會透過 *Indian Appropriation Act*（1871）所做的附加條款，從此不再視印地安民族或部落為美國可以締約的獨立民族（25 U.S. Code § 71）：

That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

償，不過，結果並非十全十美，包括談判代表的經驗不夠、未能充分諮詢部落的族人等等，後來還是必須透過修法來加以彌補（HREQC, 2004: 203-204）。

究竟美國原住民族條約權被尊重的程度如何，我們可以由太平洋岸美國西北地區印第安人保留區外的漁獲權來看。在十九世紀中葉，這裡的原住民開始與聯邦政府協商條約，他們最關心的不是陸地領域的劃分，而是能否自由前往沿海、以及河岸，以確保傳統的漁獲場。終究，他們讓渡了大約 6,400 萬英畝的土地，用來交換現金補償、政府援助、及漁獲權的保障；以華盛頓州為例，美國聯邦政府分別與 26 個原住民族簽訂條約，保證他們可以保有自由捕魚的權利，特別是在保留區以外的傳統領域¹³（Institute for Natural Progress, 1992; Ott, 1987; O'Neill, 2007; Shutler, 2011）。不過，隨著漁業在十九世紀末開始發展，原住民的漁獲權開始被蠶食鯨吞。西北地區的州政府以河流品質被破壞、影響鮭魚的產量等理由，限制、甚至於禁止的原住民撈捕（Woods, 2005; Royster & Fausett, 1989）。

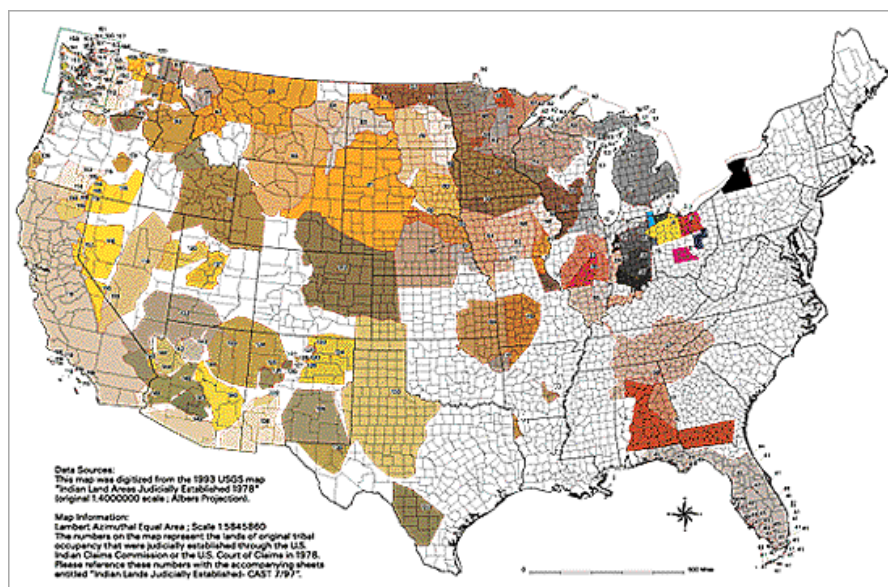
儘管美國聯邦最高法院早在 *United States v. Winans*（1905）確認西北地區原住民族的漁獲權，不過，州政府還是我行我素，違背聯邦政府當年的承諾。面對這樣的困境，華盛頓州的印地安人從 1964 年起開始進行抗議（fish-in），特別是耆老故意選擇在州政府禁止的季節、以及地點從事撈捕，提醒政府不要食言而肥（McCloud & Casey, 1967; Shreve, 2009）。聯邦政府原本視若無睹，不過，隨著原住民領袖紛紛入獄、漁具充公、甚至於肢體暴力，終於引起全國的老百姓的注意，聯邦政府官員感到不安，不得不介入，代表原住民向州政府提告；在這樣的脈絡下，聯邦最高法院開始接受有關原住民漁獲權的案子¹⁴。大體而言，美國

¹³ 至於在保留區內，美國印地安人根據既有的主權，部落有相當的權力來管理自己的資源，包括水權、漁獵權（漁獲權、狩獵權）、礦權、以及木材資源。大體而言，美國對於漁獲權的做法算是比較開放，認為漁獲權僅次於保育上的需要、不反對商業上的用途（Tsamenyi & Mfodwo, 2001）。就漁獲權而言，美國的原住民族已經享有近用、保育參與、以及合理分配（Blumm & Steadman, 2009）。

¹⁴ 在 *Puyallup Tribe v. Department of Game of Washington*（1968）、以及 *Department of Game of Washington v. Puyallup Tribe*（1973），聯邦最高法院確認原住民的漁獲權，不過，把漁具的規定權限交給州政府；華盛頓地區法院在 *United States v. Washington*（1974），判定西北地區的原住民最高可以獲得 50% 的漁獲權，後來並且獲得最高法院的確認；法院大體承認原住民的漁獲權，不過，附帶意見卻讓州政府有「合理管制」的裁量空間（Reynolds, 1984; Belsky, 1996; Schartz, 2007; Morisset & Summers, 2009）。

的法院確認原住民族的條約權，包括財產、以及資源，受到憲法有關於徵收條款的保障，也就是必須有合理的補償（Clinton, 2004: 16）。

政府在 1946 年，成立「印地安聲索委員會」(Indian Claims Commission, ICC)，主要是針對政府違背條約所做的承諾，特別是傳統領域的流失。這是一個可以上訴的特別司法機構，讓印第安人可以針對政府的歷史不義作為提出訴願，訴願可以回溯到獨立建國之際（1776），還包括「道德上的聲索」(moral claim)，然而，必須在五年內提出來，而且必須同意一勞永逸、不再另外打官司；在原先預定的五年期限內，ICC 總共獲得 370 份訴願，包括幾乎所有 176 個聯邦政府所承認的部落、以及其他未承認的部落，其中有 341 件（62%）獲理；大體而言，政府採取金錢賠償的方式、儘量不歸還土地¹⁵，問題是，並不是所有原住民族都是要求補償金¹⁶（Thompson & Thompson, 2001: 4-14; USICC, c. 1978; Wikipedia, 2017: Indian Claims Commission）（圖 1）。



來源：National Park Service (n.d.)

圖 1：印地安土地聲索的範圍

¹⁵ 最特別的是新墨西哥州 Blue Lake 集水區的 Taos Pueblo 族人，經過 64 年的努力，終於在 1970 年取回由於被政府搶走的土地（Rico, n.d.）。

¹⁶ 譬如南達柯達州 Black Hills 的 Lakota 族人，他們堅持取回的聖山。經過 50 年的努力，聯邦最高法院在 *United States v. Sioux Nation of Indians*（1980）判決當年的無償徵收違憲，要求賠償 1 億 600 萬，部落會議投票反對接受（Clinton, 2004: 18-19; Wikipedia, 2017: Black Hill Land Claim）。聯合國特別報告人 Anaya（2012）經過考察，建議美國政府將土地歸還給幾個部落。折衷之道是使用補償金去購買集體擁有的土地，尤其是東部完全失去土地的部落（Wikipedia, 2017: Indian Claims Commission）。

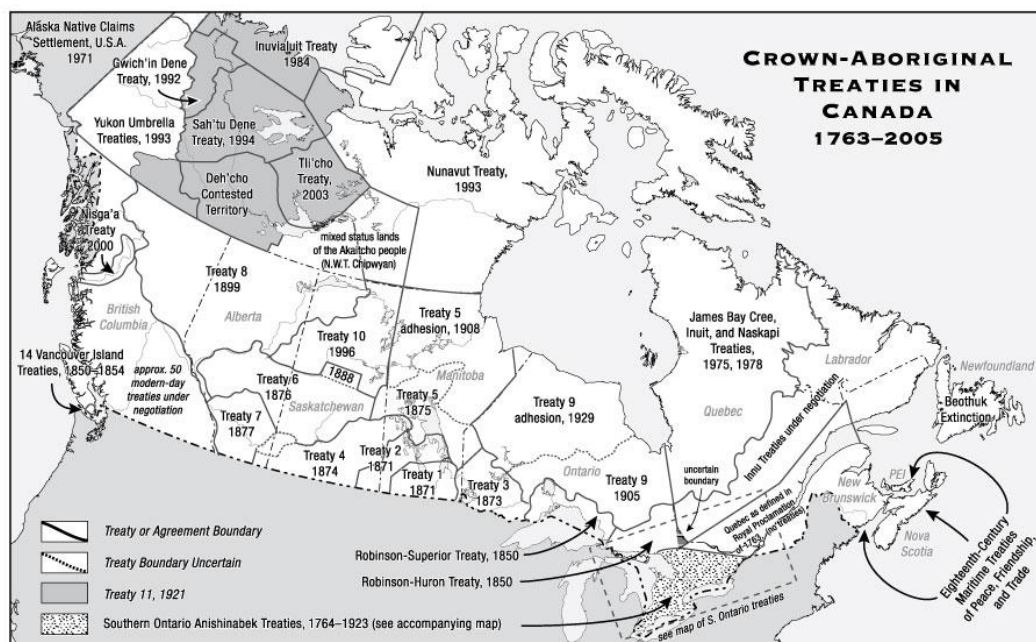
加拿大

加拿大原本是英國的殖民地，『皇家宣言』（1763）除了禁止墾殖者侵犯殖民地以西的「印地安領域」（Indian Territories），並禁止各殖民政府頒發開墾的執照或接收土地，同時建立英國政府如何購買土地的規定及程序，換句話說，必須先由政府跟印第安人簽訂條約、由對方自願讓渡、經過國家明確「消除」（extinguish）其土地權，白人才可以進行墾殖（Roth, 2002: 144）。這份宣言是首度正式承認原住民族土地權的官方文件，後來，「原住民族現有的原住民族權利暨條約權利」進一步獲得『1982年憲政法』（*Constitutional Act, 1982*）第35條第1款的明文確認（The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.），而第3款更明文條約權包含土地聲索協定而來的權利。

歐洲墾殖者與加拿大原住民族所簽訂的條約，大致上可以分為三個階段。首先，英國政府於1693-1862在東岸所簽訂將近40個條約，屬於和平友好性質；第二階段是加拿大政府在1871-1921期間往中、西、北部擴張，與原住民族所簽的十一個條約，主要是使用政府的照顧來交換土地的取得，前提是原住民必須放棄大片土地；此後50年，加拿大不再跟原住民族簽訂條約，直到1975年開始簽訂所謂的「現代條約」（modern treaty）¹⁷（Fleras & Elliott, 1992: 31-32; Foster, 1999: 359-63; Miller, 2009; Langton, 2001: 17-18; Tahvanainen, 2005: 401-402; Pratt, 2004: 48-49）。加拿大最早信誓旦旦尊重原住民族的權利，也就是把原住民族「既有的權利」（inherent rights）轉換為「條約權」（treaty rights），然而，當加拿大政權確立之後，認為原住民族已經不足為懼，早先對於原住民族的承諾已經成為具文，聯邦政府與省政府相互推諉；到了1920年代，加拿大政府甚至於認為早在1867年已經脫離英國，就不用再接受當年英國的『皇家宣言』約束，從此停

¹⁷ 這些協定經過立法確認，包括 *Cree-Naskapi (of Quebec) Act* (1984)、*Sechelt Indian Band Self-Government Act* (1986)、*Alberta Métis Settlements Act* (1990)、*Yukon First Nations Self-Government Act* (1994)、*Nunavut Act* (1993)、以及 *Nisga'a Final Agreement Act* (2000)。

止條約的協商 (Mainville, 2001; Légaré, 2008: 344)。尚未簽訂條約的地方包括英屬哥倫比亞¹⁸ (BC)、魁北克、西北領地、以及育空 (Yukon) (圖 2)。



來源：INAC (2013)。

圖 2：及拿大政府與原住民族簽訂的條約

原住民族早在 1920 年代就開始推動土地歸還 (land claims) 運動，政府則盡辦法阻撓原住民族尋求解決之道，譬如說在 1927 年修訂『印地安法』(Indian Act) 禁止原住民族委託律師進行土地歸還的訴訟、甚至於蠻橫不准他們公然集會 (Cassidy & Dale, 1988: 7)。在 1960 年代末期，加拿大原住民族權利運動漸呈氣候，自由黨的杜魯道 (Pierre Elliot Trudeau, 1968-79, 1980-84) 悍然公佈『印地安政策白皮書』(White Paper on Indian Policy, 1969)、堅持同化政策，對他來說，跟原住民族簽訂條約是不可思議的 (Head, 2012)¹⁹。

¹⁸ 儘管加拿大政府在 1850-54 年期間，為了跟溫哥華島 (Vancouver Island) 上的原住民族購買土地而簽了十四個條約、以及涵蓋該 BC 省東北角的 Treaty 8 (1899)，並未真正在該省簽訂任何條約 (Harris, 2008a, 2008b)。BC 省認為原住民族是聯邦政府的責任，事不關己，這就是爭議所在。

¹⁹ 原文如下：

We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must be all equal under the laws and we must not sign treaties among ourselves. And many of these treaties, indeed, would have less and less significance in the future anyhow, but things that in the past were covered by the treaties... things like so much twine, or so much gun powder and which haven't been paid, this must be paid. But I don't think

聯邦最高法院在 1973 年通過判例 *Calder v. Attorney-General of British Columbia*，承認原住民族的土地權繼續存在、判定原住民族有權利要求政府歸還土地或傳統領域；由於 BC 省原住民族大多未跟政府簽訂條約，要是條約被解釋為原住民族土地權被消除的依據，原住民族自然還保有自己的土地權，杜魯道政府擔心會有更多的案子敗訴，被迫推動「通盤土地償還」(comprehensive land claims, CLC) 政策，只好與各省政府取得共識，願意針對各族的不同要求分別展開自治協定的談判，尤其是鼓勵原住民族以談判的方式來處理懸而未解的土地問題，視之為社會和解、民族建構 (nation-building) 所必須進行的工作 (Penikett, 2006; McKee, 2009; Alcantara, 2013; Tahvanainen, 2005: 42)。

到了 1997 年，聯邦最高法院在 *Delgamuukw v. British Columbia* 判決建議雙方，解決之道是從事政治協商 (para. 207)。BC 省在 1990 年正式宣佈願意談判，聯邦政府也在 1993 年成立 British Columbia Treaty Commission (BCTC) 來推動協商；當下，BC 省總共有 65 個民族 (代表聯邦所承認該省 203 社中的 104 社) 跟政府進行談判 (BC Treaty Commission, 2017a; Pratt, 2004: 51)。透過談判協商，加拿大目前已經達成將近上百項協議²⁰，順利成立好幾個原住民自治政府。原住民族也多半認為談判的成本及風險遠比司法過程低，只不過，原住民族必須放棄大部分的 land，來交換部分傳統領域的取回 (Roth, 2002: 148-49)。

that we should encourage the Indians to feel that their treaties should last forever within Canada so that they be able to receive their twine or their gun powder. They should become Canadians as all other Canadians and if they were prosperous and wealthy, they will be treated like prosperous and wealthy and they will be paying taxes for the other Canadians, who are not so prosperous and not so wealthy, whether they be Indians or English Canadians or French or Maritimers. (This) is the only basis on which I see our society can develop as equals. But aboriginal rights, this really means saying, "We were here before you. You came and took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and to restore them to us." And our answer — it may not be the right one and may not be one which is accepted, but it will be up to all you people to make your minds up and to choose for or against it and to discuss with the Indians — our answer is "no." (Head, 2012)

²⁰ 包括通盤土地協定 (36)、自治協定 (20)、最後協定 (11)、及原則合意書 (10) (Indigenous Studies Program, 2011a)。談判過程通常包含六個步驟：提出談判意向聲明、準備談判、談判架構協定 (framework agreement)、談判原則性協議 (agreement-in-principle)、確認最終條約、及執行條約 (BC Treaty Commission, 2017b)。當然，政治談判的協議還必須進一步透過立法來確認。

紐西蘭

英國在 1840 年與 500 名酋長簽訂『外坦及條約』(*Treaty of Waitangi*)，確認毛利人的土地、森林、及漁獲等權利，當紐西蘭確立獨立後，自然概括承受條約義務。然而，由於有英文、及毛利文兩種版本，雙方對於條文往往有南轅北轍的解釋，英文版往往優於毛利文版。最大的爭議在於毛利人認為只是同意以統治權 (*kawanatanga, governorship*) (第一條) 來交換英國保護自己 (*tinō rangatiratanga, chieftainship*) (第二條)；相對之下，英國堅持已經毛利人同意放棄自己的主權 (*sovereignty*)，來交換英國對於土地、森林、及漁獲等權利 (*possession*) (見附錄 1) (Clinton, 2004: 7; Craufurd-Lewis, 1995: 23; Wikipedia, 2017: Treaty of Waitangi; Wishart, 2005: 785)。

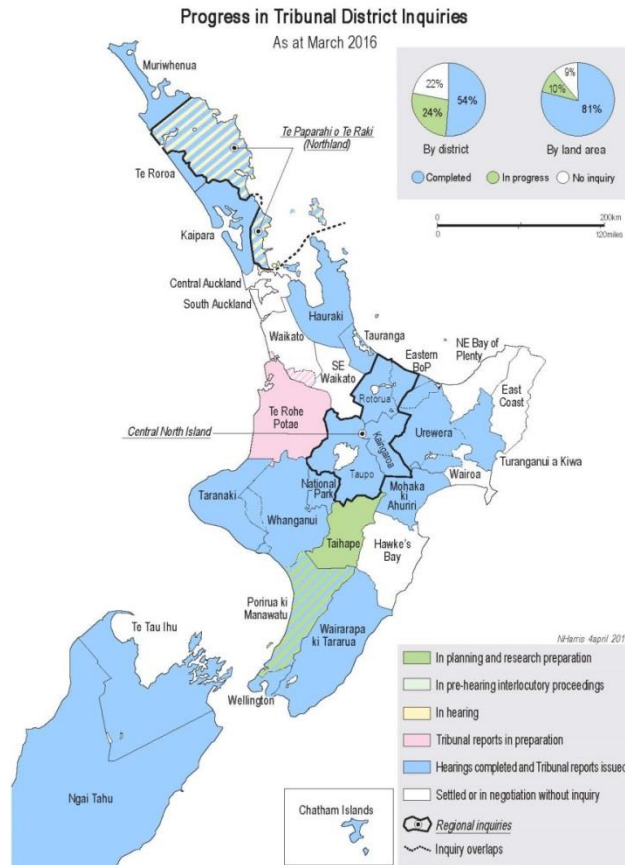
自來，白人認為『外坦及條約』只不過是用來恭維野蠻人的權宜之計，等到白人的人數在 1858 年壓倒毛利人，變迫不及待立法巧取豪奪土地，如有不從即採取武力鎮壓討伐²¹ (Craufurd-Lewis, 1995: 24-25)。儘管法院在 *R. v. Symonds* (1847) 判定『外坦及條約』具有約束力，然而，30 年後的 *Wi Parata v. Bishop of Wellington* (1878) 判決卻否定『外坦及條約』的法律效力，此後，法院所持的立場是除非經過國會立法、該條約並不會自動生效²² (*self-enforcing*) (Tahvanainen, 2005: 403-4-4; Clinton, 2004: 12, 15-16)。經過原住民族運動者多年的努力，透過抗爭、訴訟、以及談判，政府才在 1975 年通過 *Treaty of Waitangi Act*、設立了「外坦吉法庭²³」(*Waitangi Tribunal*)，接受毛利人針對土地權、及資源所提出的訴願，進行調查、建議、或調解²⁴ (Durie, 1998: 121-22) (圖 3)。

²¹ 在 1863 年通過 *New Zealand Settlements Act*、以及 *Suppression of Rebellion Act*。

²² 就這點而言，Clinton (2004: 16-18) 認為紐西蘭位於條約的尊重、以及條約權的保護比不上加拿大、或是美國。

²³ 取代為人詬病的毛利土地法庭 (*Maori Land Court*) (Wishart, 2005: 780-81)。外坦吉法庭原本只能調查 1975 年以後發生的事，國會後來在 1985 年修法 (*Treaty of Waitangi Amendment Act*)，將適用年限往前推到 1830 年。法務部在 1988 年設置外坦吉條約政策單位 (*Waitangi Treaty Policy Unit*) 幫忙，後來改名為條約調停辦公室 (*Office of Treaty Settlements*)，特別是針對歷史性的索還跟求償。

²⁴ 比較重要的報告有 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988)、*The Ngai Tahu Report 1991*、*The Ngai Tahu Sea Fisheries Report 1992*、以及 *The Te Arawa Settlement*



來源：Waitangi Tribunal (c. 2016)。

圖 3：外坦吉法庭的進度

從 1980 年起，由於法院做出一些有利於毛利人的判決，行政部門不得不讓步 (Craufurd-Lewis, 1995: 26-27)；不過，一直要到在『毛利土地法』(Maori Land Act, 1993) 通過以後，『外坦及條約』所保障的原住民土地權才被正式承認 (Durie, 1998: 115-38, 196)。迄今，政府透過談判已經跟毛利部落 (iwi)、或氏族 (hapu) 的簽訂了 31 項契約 (deed of settlement) (Indigenous Studies Program, 201a)。譬如在 1995 年的 *Waikato-Tainui Deed of Settlement*，政府除了道歉、及同意歸還 29,803 英畝土地以外，還賠償 1 億 7,000 萬元，國會最後通過 *Waikato Raupatu Claims Settlement Act* (1995) 加以確認；同樣地，政府在 1998 年的 *Ngai Tahu Deed of Settlement*，除了向族人道歉食言而肥，也同意針對 150 年前的低價徵收賠償 1 億 7,000 萬元，經過國會立法 *Ngai Tahu Claims Settlement Act* (1998) 確認 (Indigenous Studies Program, 2011b, 2011c; Wishart, 2005: 787)。

Process Reports (2007) (Waitangi Tribunal, 2017a)。

儘管『外坦及條約』明文保證毛利人「完全獨有不受干擾的」(full, exclusive and undisturbed) 漁獲權，然而，長期以來一直被政府侷限於非商業的維生所需。在 1980 年代，政府著手商業漁獲權的「私有化」(privatisation)，針對特定海域的魚種採取「配額管理體系」(quota management system、QMS) 管制，實際上就是將漁獲權出售給非毛利人，罔顧毛利人的漁獲權，族人只好以戰逼和。幸好，高等法院在 *Te Weehi v. Regional Fisheries Officer* (1986) 判例確認毛利人的漁獲權，政府不得不在 1989 年跟毛利人達成臨時協議，透過『毛利漁獲法』(*Maori Fisheries Act, 1989*) 中，同意將 10% 的 QMS 配給毛利人 (約 6 萬噸)、及 5,000 現金；雙方在 1992 年達成最終協定 *Treaty of Waitangi Fisheries Settlement* (又稱為 *Sealord Deal*)，毛利人獲得 50% 的商業漁獲量配額、及賠償 1 億 7,000 萬元，交換毛利人放棄商業漁獲權，並以『外坦吉條約漁獲權法』(*Treaty of Waitangi (Fisheries Claim) Settlement Act, 1992*) 來確認 (Davison, 1994; Wikipedia, 2017: Treaty of Waitangi Claims and Settlements; Indigenous Studies Program, 2011d; Wishart, 2005: 787)。²⁵

在 1989 年，政府宣布打算出售一些商業森林地區，毛利人認為此舉違『外坦及條約』所保障森林權，經過談判，雙方達成協議 (*Crown Forests Agreement, 1989*)，同意政府可以賣木材、不可以賣土地，並經過立法確認 (*Crown Forest Assets Act, 1989*)；在 2006 年，政府跟 11 個毛利部落／氏族達成 *Affiliate Te Arawa Deed of Settlement*，被告違反前述協議及違法，而外坦吉法庭的調查報告也認為政府的作法不利其他部落正在進行的聲索；經過談判，大家終究在 2008 年達成 *Treaty of Waitangi Claims and Settlements* (又稱為 *Treelord Deal*)，毛利人獲得價值 1 億 9,560 萬的資產補償(土地)、以及 2 億 2,300 萬的租金，並以 *Central North Island Forests Land Collective Settlement Act* (2008) 確認 (Wikipedia, 2017: Treaty of Waitangi Claims and Settlements; Indigenous Studies Program, 2011e, 2011f)。

²⁵ 經過多年的談判，政府通過新版的『毛利漁獲法』(*Maori Fisheries Act, 2004*)，設立「毛利人漁獲基金」(*Maori Fisheries Fund*)，逐步把新成立的「毛利人漁獲公司」(*Maori Fisheries Settlement*) 的資產轉移給毛利人部落 (Mahuika, 2006)。

澳洲

當年英王訓令海外取得土地進行墾殖之前必須獲得當地人的同意，然而，James Cook 艦長以當地是無人荒地為由而沒有簽訂條約²⁶；陰錯陽差，由於澳洲的原住民族從未讓渡主權，以致於讓澳洲國家存在的正當性一直未能獲得確定。在 1970-80 年代，澳洲原住民族運動的重心在土地權、自決權、以及主權，尤其是要求跟政府簽訂條約；從 1980 年代末期到 1990 年代，原民的訴求轉為比較廣泛的和解，大體是對政府表達的善意暫且停聽看；進入二十一世紀，又回到比較明確的權利保障主軸。澳洲政府長期以來的原住民族政策是同化，一直到 1970 年代才調整為帶有福利殖民主義的整合，進入 1990 年代，政府開始採取含混的和解政策來轉移焦點。

在 1979 年，一些白人知識份子組成「原住民族條約委員會」(Aboriginal Treaty Committee, ATC)，致力遊說工黨 Malcolm Fraser 政府在澳洲開發兩百年之際（1988）與原住民族簽訂條約，理由是國會的立法隨時可以被修訂、原住民族不會有安全感，因此希望作為進一步以憲法確立彼此關係的基礎；對於 ATC 的主事者來說，困難不在原住民族，並竟他們已經要求 40 多年了，問題在於主流社會的態度、偏見、以及冷漠，因此，他們把精力集中在教育非原住民族 (Malcolm, 2006: 124; Langton, 2001: 21-22)。

此時，政府成立民選諮詢機構「全國原住民族會議」(National Aboriginal Conference, NAC) 受到鼓舞，不過，他們想出一個比較不敏感的字眼 *makarrata*，也就是「終結紛爭、恢復正常關係」的意思；工黨的 Bob Hawke (1983-91) 原先支持條約，在上台後因為受到礦業公司所在有錢省份的壓力開始退卻，ATC 也因為政府及原民團體都有兩極化的看法，意興闌珊之餘，以功成身退為由在 1984 年解散，而 NAC 本身更在 1985 年因為兔死狗烹被政府廢掉 (Langton, 2001: 22; Malcolm, 2006: 124)。儘管 Hawke 在 1988 年在慶祝澳洲開發兩百年的文化節

²⁶ 事實上，最早到塔斯馬尼亞的墾殖者曾經跟當地部落簽訂條約，白人後來食言而肥；同樣地，與當今墨爾本的部落也有條約，卻被州長否決 (Langton, 2001: 19-20)。

上接受 *Barunga Statement*、重申條約或協定 (compact) 的承諾²⁷，卻加上一句「名稱沒有感性那麼重要、重要的是老百姓的態度，也就是非原住民族及原住民族是否有和解的感覺」，不久就傳出「一般百姓對於這個問題還需要教育」的說法，政府虛晃一招、而輿論連協定也不談，條約運動逐漸衰退 (Burridge, 2009: 113; Short, 2003: 494; Brennan, 2004: 149-50; Short, 2012: 294; Langton, 2001: 23; Craufurd-Lewis, 1995: 16; Pratt, 2004: 57)。

進入 1990 年代，澳洲政府把重心放在所謂的和解，臨去秋波的 Hawke 在 1991 年立法設置「原住民族和解理事會」(Council for Aboriginal Reconciliation, CAR)，推動原住民族與主流社會的和解，特別要求理事會是否在十年內能達成和解的正式文件，讓人有條約、或協定的玄思 (Brennan, 2004: 151; Malcolm, 2006: 125)。工黨的 Paul Keating (1991-96) 接任沒多久，高等法院在 1992 年作成『瑪莫案第二號』判例 (*Mabo No. 2*)，立即的因應是『原住民土地權法』(*Native Title Act, 1993 (Cth)*)，並由民選的諮詢機構「原住民暨托雷斯海峽島民委員會」(Aboriginal and Torres Strait Islander Commission, ATSIC) 提出『社會正義方案』(*Social Justice Package, 1995*)，建議政府跟原住民族協商條約、或類似的文件²⁸。

接下來的自由黨 John Howard (1996-2007) 政府採取所謂的「務實和解」(practical reconciliation)，堅決反對條約²⁹；其實，Howard 早在擔任反對黨領袖

²⁷ Hawke (1988) 的回應如下：

1. The government affirms that it is committed to work for a negotiated Treaty with Aboriginal people.
2. The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.
3. The Government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations: this could include the formation of a Committee of seven senior Aborigines to oversee the process and to call an Australia wide meeting or Convention.
4. When the Aborigines present their proposals the Government stands ready to negotiate about them.
5. The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed Treaty in the life of this Parliament.

²⁸ 參見 Gilbert (1987: 113-40) 的條約草案，相當詳細。

²⁹ Howard 強硬地表示 (Howard & Beazley, 1998)：

I hope we do, not a treaty, but I hope we have some kind of written understanding. I don't like the idea of a treaty because it implies that we are two nations. We are not, we are one nation. We are all Australians before anything else, one indivisible nation. But I would certainly be in favour of a document that recognises the prior occupation of this country by

之際（1988），就認為條約之議相當荒謬³⁰。CAR 在 1999 年提出和解文件草案，由於避談主權、以及條約，原住民相當不滿（Gunstone, 2009: 38-40）。CAR 在 2000 年向國會遞交最終報告《和解——澳洲的挑戰》（*Reconciliation: Australia's Challenge*）（CAR, 2000a），建議國會立法來規範如何透過協定或是條約來進行和解的課題，但大家望穿秋水所期待的「全國和解文件³¹」（National Reconciliation Documents）把和解的目標放在教育一般大眾，並未針對和解的過程提出具體的建議絕口不提協定、或條約³²；CAR 主席 Patrick Dodson 帶領原住民族領袖遊說總理 Howard，希望政府能先談判「架構協定」，再來通盤討論如何處理不平等的關係，可惜總理不為所動（Short, 2012: 294; Langton, 2001: 23）。

總理 Howard 等了兩年才針對報告向社會做出回應，他嗤之以鼻，雖然表示支持諸如「原住民族土地使用協議」（Indigenous Land Use Agreement, ILUA）般的協定³³，卻認為條約的說法會造成國家的嚴重分裂、會破壞澳洲是單一民族的概念，畢竟，國家是不可以分割的、怎麼可以自己跟自己簽條約（Gunstone, 2009: 45, 47）？

the indigenous people, recognising their place as part of the Australian community and their right to preserve their distinctive culture. But within the notion of one undivided united Australian community where our first and foremost allegiance is to Australia and nothing else.

³⁰ 他是這樣說的（Howard, 1988）：

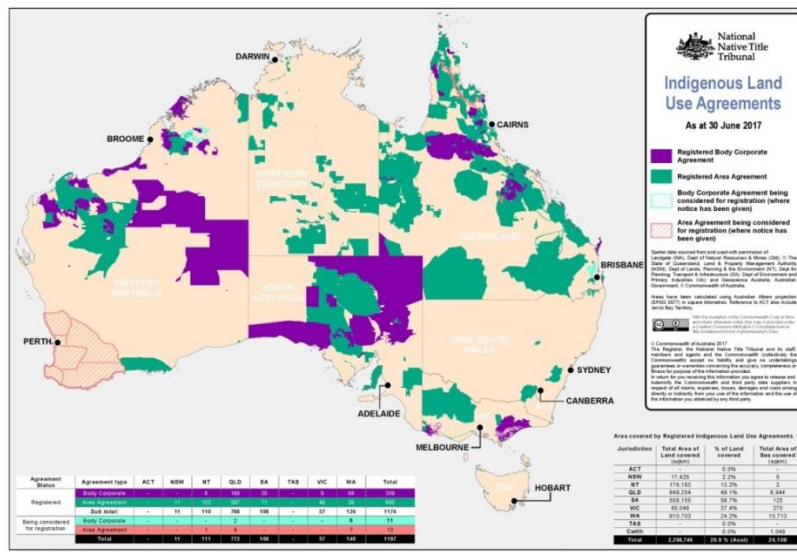
The Liberal and National Parties remain committed to achieving policies which bring Aboriginal people into the mainstream of Australian society and give them equal opportunity to share fully in a common future with all other Australians. Consequently, we are utterly opposed to the idea of an Aboriginal treaty, partly because it will do nothing to assist these aims. It is an absurd proposition that a nation should make a treaty with some of its own citizens. It also denies the fact that Aboriginal people have full citizenship rights now.

³¹ 包含一份『澳洲走向和解宣言』（*Australian Declaration towards Reconciliation*）（CAR, 2000b）、以及『和解路徑圖』（*Roadmap for Reconciliation*）（CAR, 2000c）。

³² Howard 所任命的原住民族和解理事會第二任主席 Evelyn Scott（1997-2000）表示，當下討論條約是歧路亡羊、反而會給原住民族造成更大的傷害，主張應該繼續加強對於社會的教育（Gunstone, 2009: 44）。移民暨多元文化事務部長 Phillip Ruddock 也同意應該要團結澳洲、而不是使用條約來裂解；北領地的首席部長 Denis Burke 甚至於用「丟臉」來描述締約之議（Pratt, 2004: 57）。

³³ 根據 Altman（2014: 5）：有關於原住民族土地總共有 250 萬平方公里（佔了澳洲土地 33%），可以分為三大類，92 塊專屬（75 萬 2,000 平方公里）、142 塊非專屬（82 萬 5,000 平方公里）、以及 300 個已經登錄的聲索（96 萬 9,000 平方公里）；另外，目前已經簽訂的 ILUA 將近 700 個，涵蓋 160 萬平方公里土地，再加上聲索中的（可能與 ILU 重疊），可能高達 320 萬平方公里有；只不過，原住民族在非專屬區的權利相當有限。

自從澳洲聯邦政府在 1976 年通過『北領地原住民土地權法』(*Aboriginal Land Rights (Northern Territory) Act*)，承認原住民的土地權，各省只好相繼通過相關的行政程序法案³⁴；在 1992 年，高等法院『瑪莫案第二號』判例 (*Mabo No. 2*) 確認原住民族的土地權，政府加緊通過『原住民土地權法』(1993)，除了設立「原住民土地權法庭」(*National Native Title Tribunal*) 來處理原住民對於取回土地權所作的訴訟，並鼓勵原住民族與公家機構、礦業公司、或是牧場談判有關於傳統領域的協定 (*Behrendt, 2000; Magallanes, 1999: 249*)。從 1979 年到目前為止，原住民族與各方簽訂了各式各樣的協議³⁵，包含資源開採、鐵路、由油管及基礎建設、各級政府或議會、農場及牧場、大學、以及其他單位會機構 (圖 4)；表面上看來，這些多元的安排相當有創意，然而，最令人詬病的是政府不妥協的態度，似乎是刻意讓原住民族有不確定的感覺而卻步 (*Langton, 2001: 24*)。



來源：National Native Title Tribunal (2017)。

圖 4：澳洲的原住民族土地使用協議

³⁴ 包括南澳的 *Pitjantjatjara Land Rights Act 1981 (SA)* 及 *Maralinga Tjarutja Land Rights Act 1984 (SA)*、新南威爾斯的 *Aboriginal Land Rights Act 1983 (NSW)*、昆士蘭的 *Aboriginal Land Act 1991 (Qld)* 及 *Torres Strait Islander Land Act 1991 (Qld)*、以及塔斯馬尼亞的 *Aboriginal Lands Act 1995 (Tas)*。

³⁵ 根據墨爾本大學的 Indigenous Studies Program (2011a)，至少已經有 2076 個協議，其中以 Shared Responsibility Agreement (SRA) 最多，有 284 個，其次是依據『原住民土地權法』(1993) 所簽訂的 Consent Determination，有 249 個。Llewellyn 與 Teahan (2004) 將這些協議的形式分為商業合同 (commercial contact)、備忘錄 (memorandum of understanding)、架構協定、承諾聲明 (statement of commitment)、土地使用協議、以及法案。

爭議

從 1970 年代末期起，澳洲原住民族開始積極推動跟政府簽訂條約，希望能藉此定位彼此的關係，特別是確認自己的主權、以及土地權，相當程度是受到美國、以及加拿大原住民族運動的啟發，特別是美國國會通過的 *Alaska Native Claims Settlement Act* (1971)、及加拿大國會通過的 *Cree-Naskapi (of Quebec) Act* (1984)，都是先由政府跟原住民族達成協定、再由國會立法確認。加拿大 BC 省的絕大多數土地未經條約締結讓渡，隨著資源的開發，與原住民族的衝突不斷，終於在聯邦政府的曉以大義下同意談判，津津樂道的是 *Nisga'a Final Agreement Act* (2000)，其最後協定 (*Nisga'a Final Agreement, 1998*) 號稱為 BC 省的第一個現代條約 (*Nisga'a Treaty*)，政府大肆宣傳政績，視之為樣版 (prototype, model, template) (Haythornthwaite, 2000: 2)。

儘管如此，加拿大原住民族未必都有正面的評價，甚至於視為負面教材而卻步 (Roth, 2002: 151)³⁶。Walkem (2000) 歸納這些現代條約有三大特色：以既有的自決權交換被授與的有限自治權、承認加拿大的法律優於自己的法律、以及大幅放棄傳統領域來取得協定所劃設的土地³⁷；換句話說，這些協定不再使用令人觸目驚心的 *extinguish*、*cede*、*release*、或是 *surrender* 等字眼，轉而委婉地透過修飾 (*modified*) 來加以定義、限制、縮減、或是轉換，宛如諾亞的方舟，沒有放進協定的權利等於就喪失了；一言以蔽之，就是「土地換現金」(*land-for-cash*)³⁸，終究還是回到早期簽訂條約買賣土地的老路子。

對於主流社會來說，加拿大的自由派認為現代條約看來公平，而右派以為太超過了、甚至於是出賣非原住民族的利益，相對地，那些反對談判的原住民族則相信談判並不公平。就過程來看，由於彼此的權力關係、以及資源不對等，表面

³⁶ 譬如 Sechelt 族在 1999 年跟政府達成原則性協議，卻在 2000 年因為族人反對而退出談判 (Willcocks, 2011)。

³⁷ Nisga'a 取 8% 的傳統領域，被當作高水位標誌，算是比較幸運，Sechelt、Sliammon、或是 Snuneymuxw 分不到 1% (Walkem, 2000: 2; Haythornthwaite, 2000: 2)。

³⁸ 雖然政府同意賠償族人 1 億 9,000 萬，族人卻必須償還在談判過程中先跟政府借貸的開銷 1,200 萬、加利息 (Walkem, 2000: 3)。

上政府表示什麼都可以談，實際上是限制什麼可以上談判桌、避談主權；實質而言，談判的前提是原住民族必須棄絕未來對於土地、或資源的聲索，儘管保留區的範圍有擴大，所謂的民族自治也不過是地方自治罷了，就是進一步鞏固加拿大政府的統治（Pratt, 2004: 53-56; Haythornthwaite, 2000: 2; Walkem, 2000: 3）。難怪任教於應屬哥倫比亞大學的原住民族律師 Ardith Walkem（2000）嘲諷說，這是在主人的地下室談判空間，強調在既有的憲政體制下如何和諧相處，並不會改變現有的結構；許多原住民族甚至於認為，條約就是簽署「征服的證書」(certificate of conquest)，國家只會拿走權利、不會歸還（Roth, 2002: 151）。

任教於維多利亞大學的 Mohawk 學者 Taiaiake Alfred（2000）直言，BC 省的條約談判過程不止失敗、更是道德淪喪，因為政府根本缺乏誠意跟決心，甚至於自始就是存心不良、毫無公信力可言。照說，協商條約的目標是尋求政治及社會和解，然而，政府卻把和解當作殖民統治的正常化、拿條約來合理化殖民體制，逼迫原住民族就範，因此堅持原住民族必須放棄土地權，刻意忽視原住民族追求的是權利跟地位；換句話說，這些協議只不過是墾殖國家信心十足下用來馴化原住民族、清理法理戰場的工具，頂多只是「不是條約的條約」(non-treaty treaty)，一切行禮如儀，追根究底，就是要透過條約來延續銅牆鐵壁般的殖民框架。

在 2000 年，一向與原住民族交好的政治哲學家 James Tully 接受政府(BCTC)邀請，擔任「向權力說真話條約論壇」大會主題報告人，他語重心長地指出，政府在 BC 省自來的作法是透過保留區、以及『印地安法』(*Indian Act*)，恬不知恥地片面建立不公平的關係，而締結條約的目的就是國家想要跟原住民族建立可久可長的公平關係，特別是在聯邦最高法院的 *Calder*（1973）判決後，聯邦及省政府都有道德及憲法上的義務去努力實踐（pp. 5-6）。他認為問題出在雙方在協商過程有三大南轅北轍的看法。

首先是對於新關係的不同詮釋，政府假設談判的對象是少數族群、必須臣服於國家，因而這是支配者與被支配者的關係；相對地，原住民族預期的是「民族對民族」(nation-to-nation) 的對等關係，希望能因此進行去殖民，當然無法接受

既有的結構轉換為如假包換的殖民、或是馴服 (Tully, 2000: 8)。再來是談判的過程原本是用來釐清、並且定義原住民族迄今未被尊重的權利，然而，政府所著眼的是如何經過改頭換面來加以消弭，是可忍、孰不可忍；事實上，原住民族相信權利是可以分享、利益是可以共享，特別是原住民族的土地權 (title) 與政府管轄權 (power) 可以重疊，不應該強迫原住民族放棄土地 (pp. 9-11)。最後是對於和解這個理念的理解，政府要的是「通盤終結」(full and final settlement)，快刀斬亂麻、一勞永逸；相對地，原住民族以為，「過程就是關係」，這是沒有止境持續的過程，必須不斷地進行跨文化對話 (pp. 13-14)。

結語

從加拿大、美國、以及紐西蘭原住民族的歷史經驗來看，跟國家簽訂條約結果就是欺騙，白人往往在墨水還沒有乾就反悔，即使現在的墾殖政府有善意，如果只是改頭換面，也不過是換湯不換藥的後殖民模仿 (mimicry) (Borrows, 2002; Allen, 2000: 62)。儘管如此，Alfred (2000: 4-5) 還是相信條約是值得嘗試，畢竟，墾殖國家唯有透過條約才能取得統治原住民族的正當性，否則，殖民與抗爭就沒完沒了。澳洲原住民族與國家締結條約是放在和解的框架下，也就是承認原住民族的主權為前提，要是被官僚以繁瑣的談判技術牽著鼻子走，那是見樹不見林，也就是把牛貫仔掛在自己的鼻上。Glenn T Morris 在 1992 說 (Churchill, 2003: 201)，是不是尊重印第安人不是掛在嘴巴，而是看對方的耳朵是否接受：

If people are genuinely interested in honouring Indians, try getting your government to live up to the more than 400 treaties it signed with our nations. Try respecting our religious freedom which has been repeatedly denied in federal courts. Try stopping the ongoing theft of Indian water and other natural resources. Try reversing your colonial process that relegates us to the most impoverished, polluted, and desperate conditions in this country ... Try understanding that the mascot issue is only the tip of a very huge problem of continuing racism against American Indians. Then maybe your ['honors'] will mean something. Until then, it's just so much superficial, hypocritical puffery. People should remember that an honor isn't born when it parts the honorer's lips, it is born when it is accepted in the honoree's ear.

附錄 1：『外坦及條約』的三種版本³⁹

第一條英文版：The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of *Sovereignty* which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

毛利語版：Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te *Kawanatanga* katoa o o ratou wenua.

毛利語的現代英文翻譯：The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England forever the *complete government* over their land. ◦

第二條英文版：Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the *full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties* which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

毛利語版：Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te *tinu rangatiratanga* o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

毛利語的現代英文翻譯：The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their *chieftainship* over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

³⁹ 出處 Waitangi Tribunal (2017b), 斜體為作者所加。

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