原住民族的礦產權*

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> 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。
>
> 『原住民族基本法』（2005）

前言

原住民族的傳統領域[1]蘊藏豐富的礦產，包括一般礦石（金屬、及非金屬）、化石燃料（石油、天然氣、煤炭）、以及戰略金屬，懷璧其罪，難免成為外來者覬覦的對象，土地及資源往往未經諮詢、同意、協商而被攫取[2]，族人往往必須面對生態改變、環境污染、土地流失、強迫遷村、甚至於生命威脅，人為刀俎、我為魚肉，連文化、精神、及社會都遭受戕害，也因此與採掘業（extractive industry）、及政府的衝突不斷。聯合國人權委員會會（Commission on Human Rights）特別報告人 Stavenhagen（2003: 2）發現，只要原住民族地區有重大的開發案，一定會造成人權及基本自由的重大影響，包括地下資源的開採。聯合國人權理事會（Human Rights Council）特地要求原住民族權利特別報告人 Anaya（2011, 2012, 2013）加以考察，發現原住民族在傳統領域遭到礦業的人權侵犯最為嚴重。

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[1] 英文 traditional territory、ancestral domain。根據 Anaya（2013: para. 27），原住民族的領域包括：（一）具有某種所有權狀（title）、或是國家保留給他們的土地；（二）不管是否擁有國家給的權狀，那些根據慣俗（customary tenure）所擁有的傳統土地；以及（三）其他具有文化或是宗教意義的地方，或是傳統上可以前往採集資源已維繫生活及文化者。原文如下：

> Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices.

[2] 話又說回來，立法院近日修訂『農田水利會組織通則』，將農田水利會 3,000 財產充公（周毓翔等人，2018），國家的粗暴，對象不分原漢。

根據 Adamson 與 Pelosi（2014: 24）的調查，在美國 1,000 大上市公司（Russell 1,000）當中，有 52 家油礦公司在世界各地的開採，總共有 330 個礦區位於原住民的領域、或是附近，其中 257 個屬於石油或天然氣、73 個是其他礦產，發現 35%（115）的礦區面對高度的風險，也就是原住民族的強烈反對、或是嚴重侵犯原住民族權利，而面對中度風險的也有 54%（177），加起來將近九成[3]；其中，投資風險的高低跟國家保障原住民族權利的程度成反比（p. 26），值得業者及投資人的深思；如果以公司為分析的單位來看風險管理，38%（20 家）的公司有社區互動、或是人權關懷的方針，卻只有 5 家提及諮詢原住民族（pp. 31-32）。

『原住民族基本法』第 21 條規定，政府或私人在原住民族土地或部落及其周邊一定範圍內之公有土地從事土地開發、資源利用、生態保育、及學術研究，並不是要「諮商」而已，而是必須取得族人的「同意」。如果『原基法』不是參考用的，政府就不該知法玩法。然而，立法院經濟委員會日前在審查『礦業法』修正案之際，針對既有礦場展延是否必須重新核定，立委跟列席的官員看法不一，經濟部官員說：「國際上沒有一個國家採礦要經過原住民同意的！」果真如此？在過去，由於國家重視經濟發展，開發至上、講求效率；隨著環境保護意識抬頭，永續發展的價值逐漸被重視；當下，國際社會關注的是如何保障原住民族的權利，那麼，三者要如何取得平衡（圖 1）？

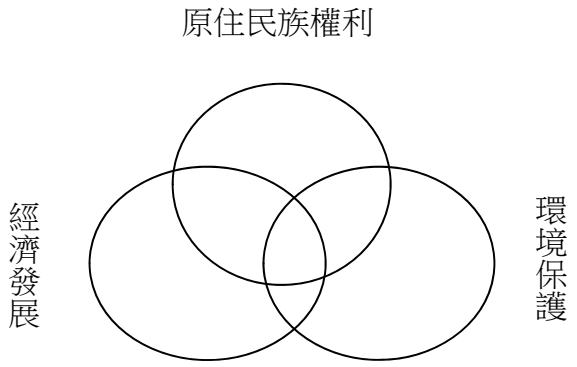

圖 1：原住民族礦產權的概念架

[3] 整體的風險指數包含國家、名聲、社區、法律、以及風險管理等五個指標，其中，風險管理包含五個次指標，譬如是否著手諮詢及取得同意、以及是否進行社會影響評估（Adamson & Pelosi, 2014: 15）。

在下面，我們先將介紹美國、澳洲、紐西蘭、以及加拿大的作法，然後說明原住民族礦產權（mineral rights）的來源，接著介紹國際上的一些相關判例，再來整理聯合國的建議。

美、澳、紐、加的作法

礦產的所有權大致上可以分為三大類（Johnson, 2010: 13-16）：（一）土地所有權制（land ownership system）認為礦物是土地的附屬品（accessory），理當屬於地主所有；（二）特許制（concession system）主張礦物屬於國家，由國家裁量許可給誰來開採；（三）聲索制[4]（claim system）認為最先找到而去登記的就是你的，主要是鼓勵民間探勘、及開採。Warden-Fernandez（2011: 7-8）則將礦權分為歐陸法系（Civil Law）、及普通法系（Common Law）：前者由國家擁有地表下的礦權，譬如拉丁美洲國家，至於後者則是土地權所有者同時擁有礦權[5]，譬如美國。以下，我們簡介美國、澳洲、紐西蘭、及加拿大等普通法國家的作法。

美國

美國早年的作法是透過條約蠶食鯨吞印第安人的土地、將他們驅策到保留區加以隔離，後來乾脆停止條約的簽訂、改以協議的方式繼續瓜分保留區的土地。目前，在印地安人現有的領域，既有的主權賦予部落相當的權力來管理保留區的資源，包括水權、漁獵權、礦權、以及木材資源（Netteim, et al., 2002: chap. 3）。美國政府在 1946 年成立「印地安聲索委員會」（Indian Claims Commission, ICC），主要是針對政府背信導致傳統領域的流失採取金錢賠償。例外的是阿拉斯加原住

[4] 聲索制又分為王權理論（Regalian theory）、以及無主物理論（Res-nullius），前者強調由王室（國家）賦予礦權，後者則把重點放在捷足者先登（first-come, first-served），兩者其實並沒有很大的差別（Johnson, 2010: 15）。請參考 Bocobo（1936）、以及 Wikipedia（2017: Regalian Right）

[5] 在普通法國家，土地的所有權不止涵蓋表，還包含地下、以及上空，也就是拉丁文所謂的 *Cuius est solum, eius est usque ad coelum et ad inferos*（whoever's is the soil, it is theirs all the way to Heaven and all the way to hell），由天堂到地獄（Wikipedia, 2017: *Cuius est solum, eius est usque ad coelum et ad inferos*）。

民族聲索土地之際剛好阿拉斯加發現油田，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，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 萬補償（HREQC, 2004: 203-204）。

澳洲

澳洲的礦權自來屬於國家，政府只透過立法授與原住民族一些土地的使用權，包括狩獵、祭儀、及保留區（Warden-Fernandez, 2011: 8-9）。然而，自從澳洲聯邦高等法院[6]在『瑪莫案第二號判例』（*Mabo vs. Queensland (2), 1992*）確認原住民的土地權、否定自來無主之地（*terra nullius*）的看法，政府被迫通過『原住民土地權法』（*Native Title Act, 1993 (Cth)*），設立「原住民土地權法庭」（National Native Title Tribunal）來處理原住民族對於既有土地權的聲索；緊接著，高等法院又通過『威克民族判例』（*Wik Peoples v. Queensland, 1996*），確認原住民族傳統的土地權與其他土地上的利益共存，鼓勵原住民族與公家機構、礦業公司、或牧場談判有關於傳統領域的協定，特別是原住民族土地利用協定（Indigenous Land Use Agreement, ILUA）（Behrendt, 2000; Magallanes, 1999: 249; Langton, 2001: 24; Warden-Fernandez, 2011: 12-13）。

紐西蘭

英國在 1840 年與毛利人簽訂『外坦及條約』（*Treaty of Waitangi*），認為毛利人已經同意放棄自己的主權來交換英國對於土地、森林、及漁獲等權利；一直要到政府在 1975 年通過『外坦及條約法』（*Treaty of Waitangi Act*）、設立「外坦吉法庭 」（Waitangi Tribunal），才開始接受毛利人所提的土地權、及資源訴願來進行調查，特別是在『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; Brownlie, 1992:

[6] 英文是 High Court，等於美國、及加拿大的聯邦最高法院（Supreme Court）。

13-19）。毛利人目前擁有 5%的土地；政府在 1991 年實施『資源管理法』（*Resource Management Act*）、及『礦業法』（*Crown Minerals Act*），業者必須跟部落談判，而政府得以公共利益來否定族人的決定（Warden-Fernandez, 2011: 13-15）。

加拿大

加拿大政府之所以要處理原住民族的土地權聲索，癥結在於自然資源開發的投資所費不貲，為了避免司法途徑曠日廢時，只好接受原住民族以戰止戰的策略。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，政府被迫推動「通盤土地償還」（comprehensive land claims, CLC）政策，與原住民族展開自治協定的談判；特別是聯邦最高法院在 1997 年的 *Delgamuukw v. British Columbia* 判決除了確認保留區內的礦權屬於族人（para. 122），建議以政治協商的方式處理自治區外傳統領域的土地問題。基本上，政府先跟原住民族談判協定、再經過國會立法來加以確認；大體上，原住民族必須放棄絕大多數的土地，以交換自治政府的成立、局部土地的取回、獲得補償、以及參與土地管理及環境保護[7]。

原住民族礦產權的來源

我們可以將原住民族礦產權的來源分為實質權、及程序權（圖 2），前者包含由主權而來的財產權／土地權／資源權、以及文化權，後者則由自決權而來，包含參與決策、資訊自由、及補償（施正鋒，2008：194-95）。Skogvang（2013: 328）認為，在這些權利的上位是反歧視的原則，揭櫫於『消除一切形式種族歧視國際公約』（*International Convention on the Elimination of All Forms of Racial Discrimination, 1965*）；『聯合國原住民族權利宣言』（*United Nations Declaration on*

[7] 見施正鋒、吳珮瑛（2014）、以及施正鋒（2016）有關於 James Bay Cree、Inuit、Métis、以及 Sechelt 協定當中的資源條款。

the Rights of Indigenous Peoples, 2007）在第 2 條也揭示；「原住民族及個人享有自由，與所有其他民族和个人平等，有權在行使其權利時不受任何形式的歧視，特別是不受基於其原住民族出身或身份的歧視。[8]」

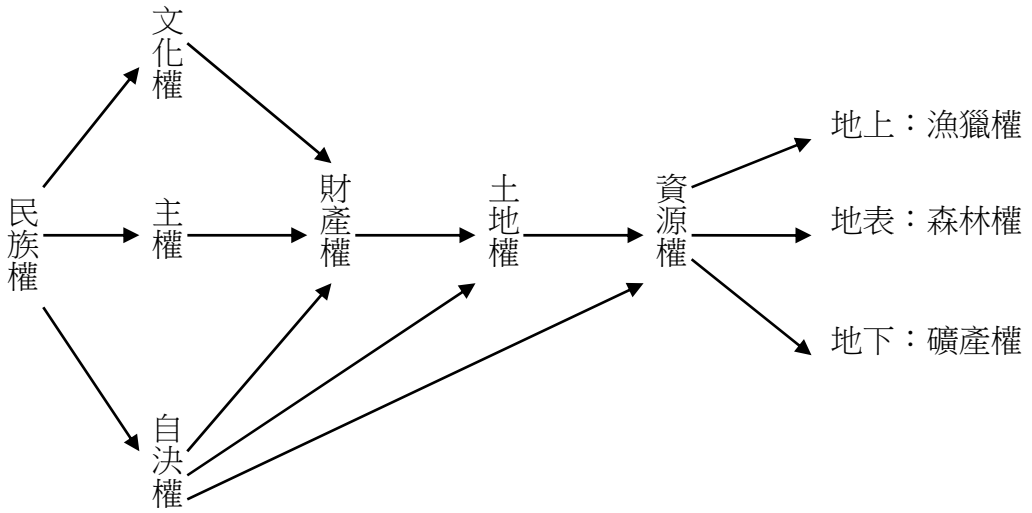

圖 2：原住民族礦產權的來源

財產權

『世界人權宣言』（*Universal Declaration of Human Rights, 1948*）第 17 條[9]、『美洲人權公約』（*American Convention on Human Rights, 1969*）第 21 條[10]、以及『非洲人權憲章』（*African Charter on Human and Peoples' Rights, 1981*）第 14 條[11]都明文保障財產權，除非是為了公共利益；後者更在第 21 條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

[8] 原文是：
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

[9] 原文是：
1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

[10] 原文是：
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.
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.

[11] 原文是：
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.

家應該加以恢復、並且予以充分的補償[12]。另外，『消除一切形式種族歧視國際公約』第 5 條特別提及人人享有「獨自或是共有財產的權利」（The right to own property alone as well as in association with other），與『世界人權宣言』幾近於雷同。儘管『公民權利和政治權利國際公約』（*International Covenant on Civil and Political Rights, 1966*）、及『經濟、社會及文化權利國際公約』（*International Covenant on Economic, Social and Cultural Rights, 1966*）未見著墨財產權，卻分別在第 47 條、及第 25 條提醒各國，不可藉口履行其他條款而侵犯到民族的資源權[13]。

還好，聯合國消除種族歧視委員會（Committee on the Elimination of Racial Discrimination）所作的『第 23 號一般性建議』（General Recommendation 23, Indigenous Peoples, 1997）提醒簽署國：必須承認並保護原住民族擁有、發展、控制、使用其共有的土地、領域、與資源；此外，如果這些未經自由知情的同意（free and informed consent）而被剝奪，必須想辦法歸還；要是事實上有歸還的困難，必須採取公平公正而適時（just, fair and prompt）的補償[14]。

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[12] 原文是：

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
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.
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.
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.
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.

[13] 原文是：

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.

[14] 原文是：

5. 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.

國際勞工組織『原住暨部落民族條約』(*Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989*）在第 13-19 條具體規範原住民族土地權的保障，尤其是在第 14 條要求簽署國承認原住民族傳統領域、並設法保護其使用，同時要採取必要的措施找出（identify）這些土地[15]、並有效保障其所有權，而且要設立充分的法律程序來解決土地的聲索（附錄 1）。

聯合國大會在 1962 年通過決議(Resolution 1803: Permanent Sovereignty over Natural Resources)，宣布所有的民族擁有其自然資源的永久主權（Daes, 20014a, 2004b）。『聯合國原住民族權利宣言』有三分之一的條款是在規範原住民族的土地資權利：原住民族除了擁有土地、領域、及資源的權利，還有使用、發展、及掌控的權利（第 26 條）；國家應該原住民族的傳統土地制度（第 27 條）；原住民族的土地資源有獲得保育及保護的權利（第 29 條）；除非自由知情同意、及公平公正的補償，否則不可強迫遷村（第 10 條）（附錄 2）。

文化權

『公民政治權利國際公約』第 27 條強調少數族群的文化權不可被剝奪[16]，而根據聯合國人權事務委員會（Human Rights Committee）所作的『第 23 號一般性意見』(General Comment 23: The Rights of Minorities (Art. 27), 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，並要求各國積極立法來保障這些權利、而且確保族人能有效參與那些攸關權利的決策[17]。由於原住民族有權保有其文化，而土地資源則是維繫

[15] 也就是傳統領域的「劃設」。

[16] 原文是：

> 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.

[17] 原文是：

> 7. 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

其獨特文化所必須的物質基礎（Skogvang, 2013: 333-34）。換句話說，原住民族的土地資源權也可以由文化權衍生而來。Manning（2017: 943-44）主張也可以援引『經濟、社會及文化權利國際公約』第 11 條有關於食物權的規範，也就是礦產的開採可能危及原住民族的食物採集，也是間接推演而來的實質權[18]。

自決權

『公民政治權利國際公約』及『經濟社會文化權利國際公約』第 1 條都揭櫫民族自決權，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，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，而且國家有責任去推動自決權的實踐[19]；另外，第 19 條提及自由獲得資訊的權利[20]。人權事務委員會針對加拿大、挪威、以及澳洲人權保障的觀察，特別強調原住民族的自決權取決於是否能自由處理自然資源（Daes, 2004b: paras. 5-6）。

國際勞工組織在『原住暨部落民族條約』在第 6、7 條分別宣示原住民族擁

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positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

[18] 原文是：

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[19] 原文是：

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.

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.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[20] 原文是：

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

有的一般性諮商權、以及參與權（規劃、執行、及評估）[21]；第 15 條特別要求政府保障原住民族的土地資源權，包含使用、管理、及保育；即使是國家保有礦產、或其他地下資源的所有權，政府也應該要建立諮商的程序，在從事或是同意開採或開發之前，確認他們的利益是否會受損，並且儘可能讓他們分享利益、同時補償可能帶來的損害（附錄 1）。

『聯合國原住民族權利宣言』在第 3 條正式揭示「原住民族都享有自決權」、「可以自由處理其天然財富及資源」，幾乎是『國際公民暨政治權公約』及『國際經濟、社會、暨文化權公約』第 1 條的翻版；又在第 5、11、18-20 條規範程序權，譬如決策權（第 18 條）、及諮詢及合作（第 19 條）。其中第 28 條；

> 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.
>
> 第 28.1 條 原住民族傳統上擁有、或以其他方式佔有或使用的土地、領域、及資源，如果事先未獲得他們的自由知情同意而徵收、沒收、佔有、使用、或是損害，他們有權要求補救，補救的方式包括歸還，或是在無法歸還的情況下予以公平、公正、及合理的賠償。
>
> 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.
>
> 第 28.2 條 除非原住民族自由同意了其他的方案，賠償的形式包括相同品質、大小、及法律地位的土地、領域、及資源，金錢，或是其他妥適的補救。

同樣地，第 32 條宣示原住民族有權決定其土地、領域、其資源的使用及發展的優先順序，要求國家在核准於他們的土地上從事礦產、水、及其他資源開發、利用、或是開採之前，應該誠心誠意地（in good faith）諮詢原住民族、並尋求合作，以便取得自由及知情的同意，特別針對開發或開採可能造成的負面環境、經濟、社會、文化、或是心靈影響，國家應該提供有效的機制，以便著手公平、公正的補救（附錄 2）

[21] 另外，除了第 2 條強調政府的責任，第 4-5 條提到原住民族的制度，尤其是代表制度。

聯合國人權事務委員會的判例

進入千禧年，美洲國家組織（Organization of American States）的美洲人權法院（Inter-American Court of Human Rights）、及美洲人權委員會（Inter-American Commission of Human Rights）依據『美洲人權公約』（1969），作了一些對原住民族傳統領域、以及資源權相當有利的判決，包括 *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）、*Moiwana Community v. Suriname*（2005）、*Indigenous Community Yakye Axa v. Paraguay*（2005）*Saramaka People v. Suriname*（2007）、*Salvador Chiriboga vs. Ecuador*（2008）、*Xákmok Kásek Indigenous Community v. Paraguay*（2010）、以及 *Kichwa Indigenous People of Sarayaku v. Ecuador*（2012）。這些判決主要是依據財產權，要求政府針對採掘業在原住民族傳統領域進行開採，必須有誠意諮詢、有效參與、合理分紅、影響評估、以及充分賠償（Anaya & Crider, 1996; Anaya & Williams, 2001; Anaya, 2005; Alanís, 2013; Antkowiak, 2013）。

在聯合國人權公約監督機制（treaty body）當中，人權事務委員會、消除種族歧視委員會、及經濟社會暨文化權委員會（Committee on Economic, Social and Cultural Rights）針對原住民族的諮詢同意權，也分別對各國提出建議，基本原則是必須根據雙方條件的改變，在開採的過程持續向原住民族諮商（Burger, 2014: 17）。另外，國際勞工組織的條約適用及建議專家委員會（Committee of Experts on the Application of Conventions and Recommendations, CEACR）依據『原住暨部落民族條約』，也針對政府對於原住民族的參與權，先後向哥倫比亞（*U'wa Report, 2001*; *Embera Report, 2001*）、厄瓜多爾（*Shuar Report, 2001*）、以及墨西哥（*Mexico Report, 2004*）提出建議書[22]（Anaya, 2005: 11-12）。

相較於其他條約的監督機制，人權事務委員會有關於原住民族所提的意見書

[22] 這些建議書可以由國際勞工組織（International Labour Organization, 2017）取得。

（communication）比較多，我們在這裡特別檢視委員會對於加拿大、芬蘭、以及秘魯原住民族所提訴願的看法，包括礦產、伐木、水利、甚至於漁獲，整理出一些跟土地資源開採的相關原則。只不過，Antkowiak（2013: 133-34）提醒我們，由於『公民政治權利國際公約』並未提及財產權，所以該委員會的意見書還是第 27 條所保障的文化權為主，相對上比較自我克制。

***Chief Bernard Ominayak and Lubicon Lake Band v. Canada*（1990）**

位於 Alberta 省北部的 Lubicon Lake Band 原住民族在 1984 年控訴加拿大政府，未經過族人的同意，徵用傳統領域（10,000 平方公里）給省政府、再轉租给私人公司開採石油及天然氣，破壞當地環境、以及他們的經濟基礎，也摧毀了族人的維生方式，因此剝奪他們的自決權、違反了『公民權利和政治權利國際公約』第 1 條的三個款。族人特別強調，他們要求委員會裁決的不是領域權（territorial rights），而是政府允許油氣公司在傳統的獵場肆無忌憚地開採，完全無視當地族人的存在、威脅到他們的生存，因此必須負責。對於族人來說，政府表面上佯裝提供保留區，卻派人慫恿其他的原住民族競相聲索傳統領域，沒有誠意的談判終究只是緩兵之計（paras. 29.7, 29.9）。

加拿大政府則主張『公民權利和政治權利國際公約』保障自決權的對象是「民族」（people），而 Lubicon Lake Band 只是加拿大 582 個「社」之中的一個，並非民族；此外，加拿大政府援引委員會的『第 12 號一般性意見』（General Comment No. 12: Article 1 (Right to Self-determination), 1984），認為自決權是集體權、並不適用於個人，告訴人缺乏『公民權利和政治權利國際公約任擇議定書』（*Optional Protocol to the International Covenant on Civil and Political Rights, 1966*）第 1-2 條適用的資格，因此，委員會不應該受理才對（paras. 6.1-6.3）。

加拿大政府自始否認族人的生存遭到威脅，而資源的開採也沒有給他們的傳統生活方式造成不可回復的傷害（para. 29.2）。政府坦承，Lubicon Lake Band 的族人在歷史上的確遭到不公平的待遇，照理應該可以有自己的保留區、並獲得相

關的權益；事實上，政府也曾經同意提供一塊 96 平方英里的保留區、79 平方英里的礦權、加上平均一人加幣 9 萬的補償金，最後因故談判破裂（para. 24.1）。換句話說，國內還其他補救的方式，包括司法途徑，並沒有必要告洋狀。

人權事務委員會同意，根據『公民權利和政治權利國際公約任擇議定書』，個人不能就集體權提出訴願；然而，由於訴願者、以及其他 Lubicon Lake Band 的成員的確遭受這些開採影響，因此可以依據第 27 條（少數族群的文化權）來裁決（paras. 13.3-13.4）。換句話說，第 27 條所保護的文化權，就是個人與社群他人從事經濟及社會互動的權利，因此，他們究竟是否構成民族已經不是問題（paras. 32.1-32.2）。委員會同意，司法途徑或許是救濟方式之一，恐怕是緩不濟急，畢竟，族人的傳統文化及生活方式已經瀕危。總之，委員會判定，歷史的不公、加上政府近年的開發，已經威脅到 Lubicon Lake Band 的生活方式、及文化，並侵犯到第 27 條所保護的文化權，要求加拿大政府根據第 2 條的規範著手救濟、以便撥亂反正[23]。

***Länsman et al. v. Finland*（1994）**

芬蘭 Sami 原住民族在 1992 年提出控訴，指控芬蘭政府將他們的傳統領域[24]

[23] 原文是：

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

[24] 這塊土地由中央森林委員會（Central Forest Board）所管轄，族人與政府對於所有權仍有爭議。

租給私人公司，鈣長石礦場所在的山腰是他們神聖的祖靈地，礦石開採、以及卡車出入森林古道干擾到當地的自然環境、並影響到他們的馴鹿放牧，已經侵犯到『公民政治權利國際公約』第 27 條所保障的少數族群文化權。由於族人已經窮盡國內的補救途徑，因此援引 *Ivan Kitok v. Sweden*（1988）、以及 *Lubicon Lake Band v. Canada*（1990），要求人權事務委員會主持公道。

芬蘭政府認為，族人的放牧地區總共有 2,586 平方公里，而礦石公司所圈圍起來的礦場也不過是 1 公頃，相較起來九牛一毛（insignificant），而地方政府的環境局也認為對當地環境的影響很小（minor）。芬蘭政府援引國內法院針對鄰近的一個伐木、及道路計畫所做的判決，佐證開採並不影響族人的放牧。芬蘭政府也引用 *Sandra Lovelace v. Canada*（1981），指出並非所有的干擾會抵觸『公民政治權利國際公約』第 27 條所保障的少數族群文化權（para. 15）[25]。芬蘭政府同時又引用 *Ivan Kitok v. Sweden*（1988）的看法，也就是「要判定社群是否能享有文化權，不能抽象、必須看脈絡」（para. 9.3）[26]，認為政府有裁量權的弦外之音。另外，芬蘭政府也強調在立法、及執法的過程一直遵守第 27 條的規定，同時，該國的最高法院也認為許可證的核准、以及相關措施是合法而妥適。

人權事務委員會指出，第 27 條並不是如芬蘭政府所言「只保障少數族群傳統生活的方式」（traditional means of livelihood），因此，儘管族人多年來借用現代科技而調整其放牧馴鹿的方式，並不因此排除他們援引第 27 條的保護（para. 9.3）。委員會同意國家鼓勵企業開發的用心，然而，裁量餘地（margin of appreciation）的自由必須看少數族群的文化權是否被否定；話又說回來，對於少數族群生活方式的一些影響，未必都會構成否定享有第 27 條所保護的文化權（para. 9.4）[27]。委員會特別指出，『第 23 號一般性意見』（1994）提到[28]，為了

[25] 原文是：「. . . , not every interference can be regarded as a denial of rights within the meaning of article 27.」

[26] 原文是：「The Committee observes in this context that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstract but has to be placed in context.」

[27] 原文是：「. . . , measures that have a certain limited impact on the way of life of persons belonging to

要保障少數族群的文化權，譬如漁獵、或是馴鹿放牧，國家必須採取積極的措施，以確保族人可以有效參與影響到他們的決策（para. 9.5）。

人權事務委員會終究認為礦場目前已經開採的數量，規模並沒有大到足以實質剝奪族人的文化權；此外，委員會也確認芬蘭政府在核發許可證之前，**的確**有考慮到族人的利益、並且徵詢族人的意見，而當地的馴鹿放牧並未明顯受到不利的影響（para. 9.6）[29]。儘管如此，委員會還是對芬蘭政府耳提面命，經濟活動必須確保讓族人能繼續畜養馴鹿的利益；未來要是打算擴大展延開採的範圍、或增加數量，就有義務考量是否會危及族人的文化權（para. 9.8）[30]。換句話說，政府必須重新諮詢族人，而非虛應故事、一次吃到飽（Manning 2017: 954）。

***Jouni E. Länsman v. Finland*（1996）**

芬蘭 Sami 原住民族人在 1995 年向人權事務委員會提出控訴，指控政府在他們的傳統領域[31]不只是採石，還進一步擴及 3,000 公頃的伐木，以致於喪失馴鹿冬天放牧所賴為生的地衣[32]，馴鹿必須尋找其他的棲息地，而族人因此必須付出更多的人手、並額外提供糧草，很可能會造成長期的重大負面影響，已經符合委員會在 *Länsman et al. v. Finland*（1994）所提出有關新措施的預警（para. 9.8），

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a minority will not necessarily amount to a denial of the right under article 27.」

[28] 原文是：「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.」（para. 7）

[29] 原文是（黑體重點是原來就有的）：

> It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors **were** consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

[30] 原文是：

> 9.8. With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

[31] 傳統領域總面積 255,000 公頃，所有權的爭議尚未解決。

[32] 地衣附著在老樹的樹皮（維基百科，2018：地衣）。

侵犯到他們在『公民政治權利國際公約』第 27 條所保障的文化權。族人也抱怨，國家森林及公園署（National Forest and Park Service）在規劃的過程，事先並沒有協商、也沒有真正的諮詢，頂多只有在事後知會當地的放牧委員會（Muotkatunturi Herdsmen's Committee）主席有關於伐木計畫，缺乏「有效的參與」（effective participation）。

芬蘭政府則反駁，伐木範圍只有 254 公頃，對於族人的影響很小，並不構成人權事務委員會在『第 23 號一般性意見』所建議的「確保少數族群文化、宗教、及社會認同的生存及發展」[33]，因此未達到『公民政治權利國際公約』第 27 條侵犯少數族群文化權的門檻。芬蘭政府表示已經採取妥適的森林管理方式來調和當地的一般經濟利益、以及族人的利益，同時也指出在規劃的過程也有諮商當地的放牧委員會，後者當時對於伐木計畫並沒有負面反應（react negatively），現在豈可出爾反爾？

人權事務委員會在受理後援引 *Länsman et al. v. Finland*（1994）的先例，認為判準在於目前、以及未來的伐木是否會影響到族人的生活方式，認為從現有的證據來看，並沒有辦法判斷是否會威脅到馴鹿的畜養。委員會指出，儘管原住民族並不滿意政府的諮詢方式，由於族人的放牧委員會當時並未反對伐木計畫，所以也不能說規劃過程沒有諮商（par. 10.5）。不過，委員會還是提醒芬蘭政府，要是未來核准的伐木範圍遠超過目前、而且可能所造成的影響比當下還嚴重，那麼，就有可能威脅到第 27 條所保護的文化權；此外，委員會也指出，要是政府在當地同時有其他重大開發案（譬如採石場），那麼，這些活動結合起來便有可能會影響到自然環境、進而侵犯到族人的文化權（para. 10.7）[34]。

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[33] 原文是：「The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.」（para. 9）

[34] 原文是：

> The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point

***Apirana Mahuika et al. v. New Zealand*（2000）**

毛利人在 1993 年控訴紐西蘭政府將他們的漁獲權加以消除（extinguished）而轉換為漁獲公司的股權[35]，這樣的作法並未獲得多數族人的同意[36]，已經違背 *Treaty of Waitangi*（1840）所承諾的義務，而且也侵犯到『公民政治權利國際公約』第 1 條所保障的自決權，也就是接近並掌控自己的資源；此外，由於 *Treaty of Waitangi (Fisheries Claims) Settlement Act*（1992）剝奪了族人傳統的商業性漁獲，威脅到部落的生活方式、及文化，又侵犯第 27 條所保障的文化權。

紐西蘭政府認為，『公民政治權利國際公約』第 1 條所保障的是集體權，委員會不應該受理個人的訴願。至於第 27 條所保護的文化權，並非沒有限制，只要有客觀的道理，當然必須接受合理的管制、或是限制，政府為了所有國人而從事資源保育、永續管理，不免改變毛利人商業漁獲的本質。政府也指出，毛利代表也將談判的結果向族人諮詢、並獲得充分的授權。最後，政府援引委員會在 *Marshall v. Canada*（1991）的意見書，並非所有的部落都有諮商權。

人權事務委員會首先指出適法性，認為一群人（a group of individuals）要是以為權利共同遭到侵犯，根據『公民權利和政治權利國際公約任擇議定書』，第 6-27 條都適用個人權，至於第 1 自決條雖然是集體權，也可以用來詮釋其他權利而受理，特別是第 27 條所保護的文化權（para. 9.2）；另外，委員會認為經濟活動如果是社群文化的基本要素，即使是經過現代技術的調整，也可以接受隸屬於第 27 條的範疇（paras. 9.3-9.4）。最後，委員會援引 *Länsman et al. v. Finland*（1994: para. 9.6），認為絕大多數的族人有機會參與決策，因此判定紐西蘭政府

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out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

[35] 有關於紐西蘭政府的漁獲配額作法（Quota Management System, QMS），見施正鋒、吳珮瑛（2014）。

[36] 根據訴願者，毛利代表跟政府所簽訂的備忘錄（Memorandum of Understanding）並沒有跟族人交代得很清楚，有時候，根本無法作知情的決策，不少部落只是有條件支持、甚至於通盤反對（para. 5.8）。

的確有善盡諮商的責任（para. 9.5）[37]。由此可見，究竟是否侵犯到第 27 條所保障的文化權，委員會強調的是族人由過去到現在「有沒有機會」參與決策，也就是有沒有被諮詢到。

***Jouni Länsman et al. v. Finland*（2001）**

芬蘭 Sami 原住民族人又在 2001 向人權事務委員會提出控訴，指出政府自從 1980 年代開始在族人的傳統領域伐木，有 1,600 公頃的馴鹿牧地流失，造成 40% 的地衣損失、族人因此必須額外提供飼料，已經危及畜牧業的經濟自主性，比原先的預期還嚴重，妨礙到他們在『公民政治權利國際公約』第 27 條所保障的文化權。此外，族人也指出，儘管國家森林及公園署兩度邀請放牧委員會參加實地考察，而委員們也對於伐木計畫表示反對，然而，伐木依然進行；同樣地，放牧委員會也受邀參加公聽會，只不過，也只是意見表達、不能上訴，因此，實質上是缺乏有效的參與。

芬蘭政府則反駁，放牧委員會的傳統領域有 248,000 公頃，國有林地只有 16,000 公頃（6%），而真正伐木的範圍只有 1.2%，並沒有打算增加伐的木面積，頂多是進行撫育間伐，因此看不出有額外的重大負面影響。此外，芬蘭政府也表示跟放牧委員會有固定的接觸，包括通信、協商、甚至於現地參觀。

人權事務委員會重申 *Länsman et al. v. Finland*（1994）的看法，指出如果政府打算許可的伐木範圍比原來的大很多、或是負面影響超乎原本的預期，那麼，就必須考量是否侵犯到第 27 條所保障的少數族群文化權。委員會提醒，在衡情論理之際，必須同時考量政府在同一個地方、或是其他地方所採取的措施可能造成的綜合效應（combined effects），而且不能只是觀察特定時間，必須看過去、

[37] 原文是：

In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.

現在、以及未來（para. 10.2）[38]。委員會的結論是政府目前所進行的伐木，並未發現嚴重到足以影響到族人的文化。儘管如此，Manning（2017: 957-58）認為對於核准採礦所作的評估有相當的啟示，也就是必須考察一段期間、而且必須是跨越地區，並沒有定時（時間凍結）、定點（只看該地）的限制。

***Ángela Poma Poma v. Peru*（2009）**

一位 Aymara 原住民族婦女控訴秘魯政府從 1950-90 年代持續改變河道，繼而在 1970 年代先後開鑿一系列的深水井，10,000 公頃傳統領域上的牧地因為缺水而破壞，造成成千的駱馬（llama）、以及羊駝（alpaca）死亡，族人唯一的維生方式被剝奪，已經危害到『公民權利和政治權利國際公約』所保障的自決權（第 1.2 條）、以及財產權（第 17 條）。她進而指控，政府在 1990 年代未經過環境影響評估一口氣挖了 12 口深井、而且又打算再挖 50 口；她又陳述，族人的領導者因為帶頭反對政府開挖新的水井而被謀殺，迄今未見司法單位展開調查。另外，由於政府並未立法保護原住民族因為開發所帶來的負面影響，也違反國際勞工組織『原住暨部落民族條約』的規定。

秘魯政府則辯稱，根據這些水井是根據『普通用水法』（*General Water Act, 1969*）所訂的優先順序核准的，也就是一般大眾的用水具有優先權；至於『環境及自然資源法規』（*Code on Environment and Natural Resource, 1990*）是後來才訂的，前者當然不用進行環境評估，而該國的監察辦公室（Office of Ombudsman）也認為政府並沒有侵犯到環境權。

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[38] 原文是：

> In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

人權事務委員會首先承認，『公民權利和政治權利國際公約任擇議定書』適用的個人訴願的確並不包含第 1.2 條所揭示的「所有的民族都有權利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」，不過，第 17 條所保障的財產權、及第 2.3 條的救濟權，倒是可以跟第 27 條所保護的文化權一起討論而適用，甚至於，光是援引第 27 條也就夠了（paras. 6.3-6.5）。

緊接著，委員會根據『第 23 號一般性意見』（1994: para. 7）提醒，少數族群的個人所享有的獨特文化包含與傳統領域及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，並要求各國積極立法保障、並確保有效參與決策；委員會更指出，這些權利的保障是為了文化認同的持續發展，同時也可以充實社會的整體結構(para. 7.2)。委員會承認，國家當然可以採取措施來促進經濟發展，然而，卻不可以破壞第 27 條所保護的權利，因此判斷政府的作為已經嚴重負面影響到文化權（paras. 7.4-7.5）。

委員會注意到，針對訴願人個人的生活方式及社區的經濟被破壞、以及土地跟傳統經濟活動被放棄的控訴，秘魯政府並沒有加以反駁、只是強調這些水井開鑿的所謂合法性（alleged legality）（para. 7.5）。委員會認為關鍵在於社區的成員是否有機會參與決策、以及是否能繼續保有他們的傳統經濟利益，尤其是這些參與必須有效，不只是諮詢而已、而是必須是自由事前知情同意，並且必須合乎比例原則（para. 7.6）[39]。委員會發現，族人從頭到尾並未被徵詢過，政府也從未找獨立的機構來評估對於族人傳統經濟活動的影響。由於當事人因為土地乾涸、牲畜死亡而無法繼續享有傳統的經濟活動，秘魯政府已經侵犯到第 27 條所保護的文化權。委員會指出，由於政府拒絕當事人有效的救濟，也剝奪了第 2.3 條的

[39] 原文是：

> In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

救濟權，因此裁決政府必須著手有效救濟、並且予以與損害相當的賠償；此外，委員會更訓令政府，有義務確保在未來不會再發生類似的侵權作為（para. 9）[40]。

聯合國所建議的最佳作法

根據 Anaya（2013），在原住民族傳統領域開採自然資源的模式主要有兩種：他認為最好的模式是由族人自己成立公司來進行，這樣才能實踐原住民族的自決權，同時也比較合乎『聯合國原住民族權利宣言』的規範；只不過，由於自然資源的採掘往往需要相當的經營、及技術，而且除了開辦的投資所費不貲，通常也要幾年後來獲利，國家除了要尊重原住民族的權利，更要加以積極保護、推動、以及落實（protect, promote and fulfill），因此，政府應該優先鼓勵族人在自己的傳統領域開採自然資源（paras. 9-15）。第二種模式則是由外來的第三者所成立的公司前來開採，這時候，什麼是國家、礦業、及原住民族之間合理的定位（圖 3）？難道政府一定要站在業者的一方？難道原住民族一定是經濟發展的絆腳石？Skogvang（2013: 327）憂心，實際上的情況很可能是沒有人負責。

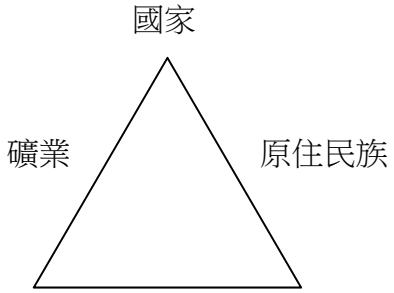

圖 3：原住民族礦產權的相關行為者

根據聯合國人權理事會（Human Rights Council）在 2011 年公布的『企業及人權的指導原則』（Guiding Principles and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework），政府有義務尊重、保障、以

[40] 原文是：

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

及實踐保障人權與基本自由：企業必須守法、以及尊重人權，當人權被侵犯時，必須採取適切而有效的修復，也就是「保障、尊重、及救濟框架」，而政府必須對企業曉以大義，要去關注到原住民族等弱勢者可能面對的挑戰，特別是其脆弱度、以及邊陲化（Ruggie, 2011）。

Anaya（2011）在提交給人權理事會的調查報告中指出，不管是政府單位、或是私人企業在原住民族的傳統領域或附近從事開採資源，往往會給族人帶來重大的負面影響、並且侵犯到族人的權利，特別是環境影響、社會及文化影響、缺乏諮詢及參與、缺乏明確的管制框架及制度積弱、以及有形利益的分享有限。他特別指出，政府為了保護原住民族而提供管制性框架之際，必須體認到族人的土地及資源權可能受到商業活動影響（Anaya, 2012）。在自由事前知情的同意（free, prior and informed consent）的大原則下，不管原住民族是否贊成開採、政府是否決定逕自裁量，Anaya（2012）提出相當詳細的建議。

首先，原住民族有權利反對開採行為，而政府除非是為了公共秩序，不得藉故報復、甚至於施加暴力（paras. 19-20）；原住民族如果以抗議行為來向當局表達心聲，政府不可以採用刑罰來壓制，除非是明顯已經違法（para. 21）。此外，政府的教育、衛生、及基礎建設，不可以拿來威脅族人同意，而國家、及公司更不可以操控、或是脅迫原住民族的領導者（para. 24）。要是族人已經明確表達反對的立場，國家就不應該堅持族人進入諮商的階段；換句話說，如果族人已經明白表示不願意進行磋商，國家就沒有協調磋商的義務（para. 25）。

再來，Anaya（2012: para. 30）強調，同意過程的用意是保障（safeguard）基本人權，而非孤立的正當化的機制：也就是說，同意權的行使不是用來背書（say yes）那些已經早就預定的決策，也不是用來確認（validate）對自己不利的協議，也就是自我閹割；因此，所謂的同意不是只要求自由、跟事前，而且還要希望能有公平的條件，以便保護原住民族的權利。

接著值得討論的是，在何種情況下政府可以不用取得同意？Anaya（2012: para. 31）指出，如果可以明眼看出開採不會對原住民族有明顯的影響，當然就

沒有必要多此一舉；話又說回來，這是不太可能發生的情形。那麼，要是政府決定不顧一切逕自核准開採，必須先看是否符合「合理的公共用途」（valid public purpose）的門檻條件，檢視對於族人的權利限制是否合理，也就是合乎必要性及比例原則（necessity and proportionality），同時還要考察是否有悖國家的國際人權保障責任，當然，終究還必須以法律為之（paras. 32-36）。

Anaya（2012: para. 31）特別提醒，所謂的合理公共用途不是指私人的商業利益、或是增加政府的財源，更不用說要是採掘的收益主要是落入業者口袋；此外，即使土地的所有權歸國家所有，根據國際人權規約，原住民族在傳統上的財產、文化、以及其他權利，應該還是要歸族人所有。即使政府決定不取得族人的同意，依然要保障其他的權利，特別是誠意諮商，以達成協議[41]；此外，政府必須想辦法採取減輕或彌補權利受損的措施，譬如影響評估、補償、以及利益分享（paas. 37-38）。假使政府決定逕自發照，也應該有公正的司法審查機制，看是否合乎國際人權的標準；要是被判定不符，即使計畫已經獲得政府許可，就不應進行開採（paras. 39-40）。

最後階段是透過以權利為中心的公平協商，以促成伙伴關係的建議。首先是根據國內法、或是國際法所承認的權利，建立參與式監控機制來避免、或是減輕負面的影響，包括環境、健康、維生、文化、或是宗教層面，並且雙方同意設置共同機制來衡量影響、以及如何商議處理（Anaya, 2013: paras. 73-74）。接著是利益分享，除了諸如就業、或是慈善等附帶利益，還應該包括直接利益，包括分紅、以及參與管理，特別是保證固定百分比的利潤（paras. 75-76）。最後是政府的救濟機制外，公司應該有訴願程序，用來主持公道、以及化解衝突（para. 78）。

結語

雖然礦產的所有權有屬於國家（歐陸法系）、或是屬於地主（普通法系）兩

[41] 有關於公平而充分的諮商及協議過程，譬如克服權力不平衡、資訊蒐集及分享、時間壓力、以及參與機制的代表性，見 Anaya（2013: paras. 58-71）。

大類，在我們所考察的美國、澳洲、紐西蘭、以及加拿大等四個國家，除了保留區的礦權比較沒有爭議，特別是美國只肯賠償、不願意歸還土地（阿拉斯加例外），問題在於原住民族傳統領域的土地權。加拿大的作法是透過通盤的土地談判，與自治區的設置一併處理；澳洲對於區域型的談判有所忌憚，傾向於鼓勵談判小型的協議；紐西蘭相較上比美國願意妥協，漸次歸還一些土地，而業主也必須跟族人談判礦產的開採。

就相關國際規約來看，原住民族的礦產權來自於財產權、文化權、以及自決權，由於牽涉到土地權歸屬的爭議，加上自決權牽涉到個人（部落、社）、還是民族，國際人權事務委員會判決的主要依據是文化權、或是將文化權與自決權合併討論，關鍵在於政府在許可之前是否有誠意諮商、影響評估、以及有效參與，同時必須著手救濟，包括亡羊補牢、以及充分補償。值得注意的是，委員會強調這些措施必須斟酌時空環境變動來進行，沒有定時、或是定點的限制。

Anaya（2103）根據聯合國人權理事會所提出的建議，首先強調原住民族有反對開採的權利，指出自由事前知情同意權的行使是用來保障族人的權利，而非確認既定的開採計畫；如果政府決定逕自核准開發、限制族人的權利，必須起碼合乎合理的公共用途，也就是必要性及比例原則，同時要衡量國際人權保障的義務，而業者的商業利益、或是政府財源不在考慮之內；經過諮商達成協議，政府必須確保影響評估、補償、分紅、以及參與監督跟管理。

總而言之，不管是同意、或是補救並沒有時間的限制。這個政府的腦筋有嚴重的脫窗，堅持轉型正義只適用於威權時期，就算可以如此選擇性失憶，為何提到亞泥等等開採的同意權，明明迄今還是對原住民族造成嚴重的威脅，卻可以刻意迴避『原住民族基本法』第 21 條的規定、執意排除同意權的行使，難道是被財團豢養？台灣如果要標榜民主、人權立國，不能對於國際人權的規範視而不見，官員更不可以公然在國會信口開河；人懷疑，中華民國政府決策者的知識水平、或是御用學者的研究能力，甚至於在無知之外，是否心態上仍然開發至上，根本不屑一顧聯合國宣示對原住民族權利的保障、及世界潮流的進步？

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. 13.2. 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. 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.
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』土地資源相關條款

Art. 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Art. 5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
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. 11.1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
Art. 12.2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
Art. 18. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.
Art. 19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
Art. 20.1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
Art. 20.2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.
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. 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.
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. 31.1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
Art. 31.2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
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：「亞泥案」是官商勾結欺壓原住民族*

「亞泥案」是指位於花蓮原住民族太魯閣族所發動的還我土地運動，族人住在山腰平台祖靈地被迫集體遷到礦山腳下的富世村，已經四十多年了，依然控訴政府勾結財團霸佔土地。若非近日墜機罹難的《看見台灣》導演齊柏林生前指出，「亞泥比五年前挖得更深了」，大家才猛然發現美麗山河被開腸剖肚並沒有改善、甚至於繼續惡化。沒想到，經濟部在立法院醞釀修『礦業法』前夕，竟然以迅雷不及掩耳的方式核准亞泥展延開採二十年，難怪部長李世光被譏為「水泥部長」。

亞泥花蓮新城廠位於太魯閣國家公園入口前，礦區將近四百五十公頃，當年，遠東集團旗下亞泥公司聯手秀林鄉公所，以五鬼搬運的方式剝奪當地族人的保留地。具體而言，公所拿可疑的「拋棄同意文書」塗銷了兩百多筆原住民的耕作權、進而阻止族人取得所有權，再廉價轉租給亞泥取得開礦權。二十多年來，族人四處奔波，政府屢以「亞泥正在使用、原民沒有自用耕作事實」駁回；儘管終究有兩位族人贏了官司取得權狀，她們還是回不了家，因為土地依然被礦場圍起來。

問題在於『礦業法』有兩個令人訾議的「霸王條款」：首先，即使土地所有人不同意，礦業權者只要提存地價、租金、或補償金，就可以「先行使用其土地」，真是吃人夠夠；另外，民進黨政府在 2003 年修法，將礦權展延改為「許可為原則、否准為例外」，擺明圖利。在去年 8 月，反亞泥精神領袖依貢・希凡（田春綢）代表族人接受蔡英文總統道歉，特地遞交陳情書，要求亞泥展延必須取得同意，而原民會也在總統交辦下回函應允，沒想到政府轉過身來卻食言而肥。

根據『原住民基本法』，「政府或私人於原住民族土地或部落及其周邊一定範圍內之公有土地從事土地開發、資源利用、生態保育及學術研究，應諮商並取得原住民族或部落同意或參與，原住民得分享相關利益。政府或法令限制原住民族利用前項土地及自然資源時，應與原住民族、部落或原住民諮商，並取得其同意；受限制所生之損失，應由該主管機關寬列預算補償之。」開礦是資源利用，依法

* 《台灣時報》社論 2017/7/2。

應該取得原民同意，也就是「事先知情同意」，並且要分享利益、及補償損失。

然而，在去年底由政務委員張景森所召開的跨部會研商會議，行政部門竟然以該法只適用新增礦權為由，硬生生剝奪族人的同意權，目無國會立法。我們知道，「法律不溯及既往」是刑法的原則，用意是避免回溯處罰過去錯的行為，而非用來就地合法。更何況，法律有「新法優於前法」的原則，特別是『原基法』可以說原住民的人權法案，當然要立竿見影、積極恢復人權。政府豈可以有爭議為由護航財團？至若審查過程產官學沆瀣一氣，令人瞠目結舌。

當下國產水泥有三成賤價外銷，七年前還半數外銷，國家安全是寡斷的藉口。據估計，亞泥至少已經獲利八百億，每年只要繳八萬的稅。環保署長李應元在去年宣示將停止亞泥開發、作為環境資源部成立的獻禮，顯然被以開發為重的同僚打臉。二十年前，國民黨政府以影響國內水泥供應為由讓亞泥續租，民進黨政府高喊轉型正義，卻複製對原住民族的不公不義。

附錄4：『礦業法』修正案洩了天機*

立法院經濟委員會目前正在審查『礦業法』修正案，針對既有礦場展延是否必須重新核定，立委跟列席的經濟部次長王美花看法不同，特別是委林淑芬質疑政府有放水的嫌疑，雙方的爭執進而引發其他立委的嘲諷。由於執政黨立委內部看法南轅北轍，修法進度不如原先預期，很可能必須留待臨時會繼續處理。在這同時，團保團體公布，上回立委選舉，水泥、及石礦業捐了將近一億政治獻金給四十四為現任立委，特別是四名委員會成員。

『礦業法』修正是政府勾結財團最醜陋的一幕，太魯閣族先是在四十多年被迫遷村，民進黨上回執政更將舊礦展延改為許可制。此番，若非《看見台灣》的導演齊柏林不幸罹難，恐怕國人不會注意到花蓮亞泥開採如何蹂躪國土，也因此，一些立委主張舊礦展延仍需重新核定。只不過，在政務委員張景森的主導下，經濟部早先快速核准亞泥展延開採二十年，引起環保人士、及原住民族的強烈反彈，大眾的眼光放在環保起家的執政黨如何自處。

檢驗執政良心的是在 2005 年通過的『原住民族基本法』，其中第二十一條規定，在原住民族地區從事開採、開發、保育、及研究，必須取得同意，然而，經濟部堅持新法的適用不能溯及既往，因此排除現有的礦場。問題是，這只是程序上的要求、並非實質剝奪礦主的權益，如果為了環保、及原權的公共利益，即時針砭自來的疏漏是必要的，政府的曲意護航令人費解。更何況，民進黨政府高唱轉型正義，同意權只是補一道手續，還原民公道，有何難處？

面對原民立委的質疑，經濟部次長王美花說：「國際上沒有一個國家採礦要經過原住民同意的！」一聽到這種全稱的說法，就知道是在信口開河。美國印地安保留區的礦權歸原住民族，加拿大、以及澳洲的原住民族則是透過談判決定參與管理及分紅多少，至於菲律賓民答那峨自治區，莫洛人可以分到戰略礦產的半數收益、金屬礦產四分之三、非金屬礦產百分之百。民進黨政府現在對於亞泥的

* 《台灣時報》社論 2017/12/29。

態度，也就是在原住民族土地上恣意開發，大致上還停留在五十年前的澳洲。

政治人物往往為了選舉疲於奔命、焦頭爛額，聽任產官學勾搭、裝聾作啞。『原基法』的用意是在保障原住民族的權利，包括同意權。然而，在高談轉型正義及和解之際，硬是排除亞泥等開採案的適用，亦即既定事實的就不用去管；當立即的目標與終極目標矛盾，應該是前者無效才對。難道民進黨政府以為原住民很好騙？難道政府官員可以公然在國會殿堂胡言亂語？難道這個政府的良心分成兩半，紅色的是面對財團，黑色的是面對原住民族？

最駭人聽聞的是，這個會期的經濟委員會成員有四名被揭露接受水泥、石礦業的獻金，包括孔文吉、陳明文、邱志偉、以及蕭美琴，其中有兩名還直接跟亞泥有地緣、或是族群上的關連。政治人物並非不能接受利益團體的獻金，然而，君子愛財、取之有道，畢竟『政治獻金法』只能規範君子、不能防小人，拿了人家的錢手軟，這是人之常情。因此，為了避免瓜田李下，當然必須接受選民的考驗，特別是相關的發言、迴避、或是投票，立委自清不能被視為羞辱同志。

附錄 5：引用條約、判例、意見書

『原住民族基本法』（2005）

Treaty of Waitangi, 1840

Universal Declaration of Human Rights, 1948

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

International Covenant on Civil and Political Rights, 1966

Optional Protocol to the International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

American Convention on Human Rights, 1969

General Water Act, 1969

Alaska Native Claims Settlement Act, 1971

Calder v. Attorney-General of British Columbia, 1973

Treaty of Waitangi Act, 1975

Sandra Lovelace v. Canada, 1981

African Charter on Human and Peoples' Rights, 1981

Ivan Kitok v. Sweden, 1988

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989

Chief Bernard Ominayak and Lubicon Lake Band v. Canada, 1990

Code on Environment and Natural Resource, 1990

Resource Management Act, 1991

Crown Minerals Act, 1991

Marshall v. Canada, 1991

Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992

Mabo vs. Queensland (2), 1992

Native Title Act (Cth), 1993

Maori Land Act, 1993

Länsman et al. v. Finland, 1994

Jouni E. Länsman v. Finland, 1996

Wik Peoples v. Queensland, 1996

Delgamuukw v. British Columbia, 1997

Apirana Mahuika et al. v. New Zealand, 2000

Jouni Länsman et al. v. Finland, 2001

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

U'wa Report, 2001

Embera Report, 2001

Shuar Report, 2001
Mary and Carrie Dann v. United States, 2002
Mexico Report, 2004
Mayan Indigenous Communities of the Toledo District v. Belize, 2004
Moiwana Community v. Suriname, 2005
Indigenous Community Yakye Axa v. Paraguay, 2005
Saramaka People v. Suriname, 2007
United Nations Declaration on the Rights of Indigenous Peoples, 2007
Salvador Chiriboga vs. Ecuador, 2008
Ángela Poma Poma v. Peru, 2009
Xákmok Kásek Indigenous Community v. Paraguay, 2010
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