

**Negotiating Claims: Comparing State Responses to
Indigenous Land Claims in Australia, Canada, and
New Zealand**

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DRAFT

For discussion purposes, all comments welcome

Introduction

Since the 1960s there has been a global trend of increasing political activism of Aboriginal peoples. This activism asserts collective rights to self-determination within the context of the national state and to the use of traditionally-occupied lands for the cultural and economic development of Aboriginal communities. Valuable work has been done on the rise of Aboriginal social movements (Cornell 1988; Tennant 1990; Yashar 1999) and their impact on the creation of Aboriginal collective identities (Nagel 1996). Scholarly attention has also been paid to the policy impacts of Aboriginal collective action in single-country studies (Weaver 1981; Coates 1992; Leider and Page 1997; Alves 1999) However, comparative political analyses of Aboriginal politics are rare (exceptions include Dyck 1985; Fleras and Elliott 1992; Armitage 1995; Yashar 1999).

My research builds on existing literature on Aboriginal-State relations through its comparative examination of State responses to Aboriginal land claims¹. The histories of Aboriginal collective action show that Aboriginal peoples have consistently petitioned governments to address their claims; what varies is the response of the State to those claims and the effectiveness of those responses. I am interested in exploring the conditions under which governments create a negotiating space through which Aboriginal land claims are collected, examined, negotiated, and settled. Why Aboriginal peoples would want to engage the State to move on outstanding claims is fairly clear; less clear is why and under what conditions governments choose to engage with Aboriginal peoples *qua* Aboriginal peoples in a negotiated settlement process. The central question I ask is thus: why do governments choose to bargain with Aboriginal peoples to settle outstanding land claims?

The significance of this question is simple. The ownership of lands and the power of the State to determine rights to the use and enjoyment of lands is central to the relationship of power between the State and Aboriginal peoples. To examine the conditions under which governments choose to respond to Aboriginal claims to their ownership and use of land is critical to examining change in Aboriginal-State relations. It speaks to central questions in

¹ Aboriginal peoples have brought a series of actions or claims against the governments I study here. These claims are not restricted to claims regarding the ownership or use of land. Other claims, such as claims arising from specific treaty rights or state breach of its fiduciary responsibilities, are also key grievances. However, I propose to focus my efforts on claims relating specifically to the ownership and use of disputed lands.

political science: the relations between State and society, particularly changing relations between the State and a historically marginalized sector of society.

This paper draws on approximately 50 interviews I have conducted since September 2001 in Canada, New Zealand, and Australia. I have spoken primarily with government policy makers, but I have also spoken with Aboriginal legal and political representatives, Aboriginal claimants, academics, and industry representatives. My approach is to focus on how the various players in the negotiations process view their own strategic objectives, the strategies and objectives of the other players, and the role of uncertainty—both judicial and economic -- in land claims negotiations.

In this paper I focus on three issues and how they impact the modern context of land claims negotiations. These are: 1) the impact of the historical practice of signing treaties between Aboriginal peoples and the Crown; 2) the role of litigation in affecting State behaviour, and 3) the impact of federalism, or the constitutional division of State power between two levels of government over the public policy space. These three issues do not exhaust all that is interesting or at play in these negotiations, but are in my opinion critical in understanding who is sitting around the negotiation table, why they are sitting there, why they continue to sit there, and whether, at the end of the long day, a settlement is reached.

Background: National Contexts²

Treaties

Of the three countries, Canada's treaty history is the most complex. The practice of signing treaties was established under French colonialism and continued under the British. The content of these treaties varied, but two broad assertions can be made. The French by and large were not interested in acquiring large tracts of land for settlement. The French treaties were designed primarily to meet the colonial goals of the era: trade, and war. These treaties are products of the fur trade and the rivalry of English, French, and more to the South, Spanish colonial powers. As such, most treaties with Aboriginal peoples were peace and friendship treaties. In the modern context there has been litigation to establish whether these treaties served to extinguish Aboriginal interests over land and fish. With the end of the French regime in Canada and the rise of interest under the British in the land for settlement, what became known as land cession treaties were signed between indigenous bands and the

² See appendix for a view of the national histories in a table format.

Crown, the last in 1921. The basic exchange affected by these treaties, in the view of the Crown, was the extinguishment of aboriginal rights to large parcels of land in return for designated Indian reserve lands and rights to continue traditional practices over vacant Crown lands. In other parts of what is now Canada, no treaties were signed. These areas are the majority of the province of British Columbia, and in the northern regions of the country: the Yukon, the Northwest Territories, northern Quebec, and Labrador. This history created a checkerboard of Aboriginal rights as later recognized by the Crown and its courts and hence a complex aboriginal rights legal regime.

The complexity of Canada's treaty history is clear when comparing it to the New Zealand case. The Treaty of Waitangi, signed in 1840 by the majority of Maori leaders. The Treaty has three articles and was translated into both languages. The meaning of the Treaty and the exact understanding of what was agreed at what was not is the subject of dispute. The position of the Crown is that the three articles of the Treaty guaranteed British sovereignty over the islands, in return for Maori rights to undisturbed possession of their lands and treasures. Thrown into the deal was the extension to Maori of the full rights of British citizenship.

In Australia, of course, the treaty history is very simple: there weren't any.

Courts

The legal and moral status of the treaties in Canada and New Zealand quickly waned as the Crown and the courts came to view these agreements as imposing no obligations on the Crown which could not be abrogated unilaterally. In 1927, the Canadian government responded to the petitions of Aboriginal peoples to adhere to the conditions of the treaties and where no treaties were signed, to acknowledge continuing Aboriginal rights to unceded lands, by making it illegal to provide legal support to Aboriginal claimants pursuing their claims in the courts. This restriction was only lifted in 1951. In New Zealand, the Treaty of Waitangi was never introduced into Parliament and given statutory force, and so its provisions are not directly enforceable in a court of law.

The courts came to play a critical role in Canada, New Zealand, and Australia at different times. In Canada, the now famous Calder case came before the British Columbia courts in the late 1960s, ending in mid-1973 when the Supreme Court handed down its historic

judgement. The judgement was a study in ambivalence. Although technically a loss for the Aboriginal plaintiff, the Court's decision recognized on its merits the existence of aboriginal title in Canadian law while it remained split on whether statutory action had indeed extinguished such title. Since that time approximately 40 Aboriginal rights cases have been heard by the Supreme Court, pronouncing on the status of treaties under the law, the fiduciary duty of the Crown vis-à-vis Aboriginal peoples, the ability of Aboriginal rights to exist whether or not underlying native title has been extinguished, and under what conditions that Crown can extinguish or regulate Aboriginal rights.

In New Zealand, the critical judgement of the High Court was the Lands Case,³ in 1987. The case reviewed the State-Owned Enterprises Act which was passed in 1986. The legislation provided for the privatization of State assets, a mechanism used by the government as part of its deficit-reduction and 'smaller government' programme. At issue were two sections of the SOE Act. One read that any land subject to a claim filed with the Waitangi Tribunal before 18 December 1986 could not be transferred from public to private ownership. The legislation, however, was unclear about transferred lands which could be subject to claims filed after 1986. The court judgement was very close to according the Treaty of Waitangi constitutional status, ruling that the Treaty conferred a moral and political (but not a legal) obligation upon the government to enact legislation which did not contravene the terms of the treaty (Russell 1998).

In 1971, the Supreme Court of the Northern Territory heard the first judicial case dealing with indigenous title, the Milirrpum decision.⁴ The court ruled that indigenous peoples' relationships to land did not constitute a legal interest in property which was recognizable to Australian law. The case was not appealed to the High Court because the expectation was that the High Court would affirm the reasoning of the lower court.⁵ The catalytic judicial decision in Australia was of course the 1992 Mabo decision,⁶ swiftly followed by the Wik decision on the issue of concurrent aboriginal use rights and pastoral leases.

Negotiation Policies

In this section I will do some violence to historical subtlety in the interests of brevity. In all of these States, governments responded to the land claims agenda in various ways: for

³ New Zealand Maori Council v. Attorney General [1987] N.Z.L.R. 641

⁴ Milirrpum v. Nabalco Pty [1971] 17 FLR 141 (NTSC)

⁵ interview, 21.6.01

example, by establishing independent tribunals, or introducing heritage protection legislation. However, I focus on the decision of the governments to espouse a negotiations policy versus these other mechanisms to deal with the legitimacy of Aboriginal interests and concerns.

The Australian, New Zealand, and Canadian governments chose to negotiate land claims at different times as well. The Canadian government was first, introducing the specific and comprehensive⁷ claims policies after the Calder decision, in 1973. Less known is that the Canadian federal government approved exploratory talks with native groups in the Yukon and Northwest Territories to discuss the negotiation and settlement of claims arising from the breaches of Treaties 8 and 11 in 1972. In 1994 the New Zealand government formally introduced its negotiation policy of direct negotiation with the Crown, a policy-development process that started in earnest in 1991. In 1993 the Australian Commonwealth introduced the Native Title Act to provide a negotiating framework. In the Australian case, the Commonwealth had acted to establish land rights negotiation mechanisms in the Northern Territory under the Aboriginal Land Rights (Northern Territory) Act 1976.

Two patterns are of note here. First, the introduction of a negotiations policy was predated in both New Zealand and Canada with government attempts to address Aboriginal grievances. The establishment of the Waitangi Tribunal in 1975 was an important step on the way to the current negotiations policy in New Zealand; and in Canada the federal government introduced legislation into the House of Commons three times in the 1960s, and established the office of the Indian Claims Commissioner through an Order in Council in 1967. The Canadian legislation essentially imported the American model at the time: the establishment of a judicial framework which would determine the validity of Aboriginal claims and set compensation rates. These policy responses in both countries tried to deal with land claims issues, it is true, but neither was a negotiations policy where the Crown and Aboriginal peoples sat down deal with grievances via a negotiated settlement.

Second, the beginnings of the modern negotiations policies in Canada and Australia were first trialled in areas of the respective countries where the federal governments reigned supreme. In the histories of the two countries, the only forays into a negotiations policy by governments not in direct response to catalytic court decisions were in areas where no provinces existed so

⁶ The original claim was brought to the High Court in 1982. The case was sent to the Queensland Supreme Court for fact-finding in 1986. The final judgement was thus delivered ten years after it was first presented to the court. The 1992 decision had only one dissent (Judge Dawson).

⁷ Specific claims refer to claims arising from a Crown breach of a treaty or other legal agreement. Comprehensive claims are claims arising where no previous treaty or legal agreement exist. Extending this Canadian language to the international context, New Zealand can be seen as one big specific claim, and Australia as one big comprehensive claim.

the federal governments could not run afoul of intergovernmental relations, and during times of infinitesimal issue salience.

Turning to political science: A Lit Review

Explanatory variables for the salience of land claim politics and the development of negotiation policies in these countries fall generally into three categories: variables associated with characteristics of interest groups or interest group politics, variables associated with the courts and judicial activism, and variables associated with the institutional configuration of each State. I argue that what has been missing from the analysis of native title negotiations is a concerted application of theories of State behaviour.

Interest Group Explanations

The experiences of Canada, Australia, New Zealand, and the United States lead to the hypothesis that governments negotiate when interest groups grow strong enough (either in terms of organizational resources or by building electoral coalitions) to drag the State to the bargaining table. This hypothesis is appealing as it identifies a strong causal link between aboriginal political and organizational acumen and government response. The work on collective action and resource mobilization in the interest group literature identifies possible sources of interest group strength as the information interest groups provide to clarify future policy outcomes (Austen-Smith 1997; Sloof 1998), the ability to deliver electoral support through a membership base or through coalitions with other groups (Dixit and Londregan 1998), or the ability to deliver financial resources to political decision-makers.

In the case of aboriginal land claims politics, it is clearly critical for aboriginal peoples to be organized in order to press a land claims policy agenda forward. However, the link between the relative size of the aboriginal population and their ability to force a government response to their claims is somewhat tenuous. In all the countries except New Zealand, aboriginal peoples represent less than 5% of the population; and in New Zealand where it can be accurately stated that minority politics is Maori politics, the government only instituted a direct negotiation policy in the 1990s, almost fifty years after the establishment of the American claims commission process. Given the demographic size of the aboriginal populations in question, their past-- and for some, continuing-- reliance on the State for organizational and financial resources, and the unclear link between the growing salience of aboriginal politics and support for land claims negotiations in public opinion (Gibbins 1988:

21; Ponting 1988 ; Turner 1999) resource mobilization arguments hold insufficient weight in explaining State negotiating behaviour.

Judicial explanations

The national cases demonstrate that independent courts are clearly important actors in the development of land rights regimes and that policymakers pay courts special attention when designing their policy responses. The catalytic roles courts play in changing the legal status quo is most dramatically evident in the Canadian and Australian cases, where judicial rulings have significantly changed the bargaining leverage of Aboriginal peoples vis-à-vis their domestic governments. In these cases, the link between judicial decision and the choice by a government to develop policies and administrative capacity to negotiate claims is relatively clear, especially Canada in 1973 and Australia after the *Mabo* decision in 1992. However, as mentioned previously, governments have chosen to negotiate claims with Aboriginal peoples in the absence of clear judicial change. The hypothesis that governments negotiate when the courts make them do so is too simplistic, because it overshadows the fact that governments have the prerogative to initiate policy responses to claims “from below” without prior direction from courts. At issue is a prior question: why are courts and judicial activism such a strong force in bringing governments to the bargaining table? Also, this hypothesis does not highlight the fact that while judicial change may induce governments to respond to claims, it does not determine the nature of the response.

Institutional Explanations : Federalism

The impact of institutions in land claims politics is not well developed in the literature, and the role they play alongside courts and interest groups as a causal variable is unclear.

One feature of the institutional design of States which is mentioned in the land claims literature, although tangentially, is federalism. The usual literature on federalism in political science (putting aside the vast literature on fiscal federalism for the moment), is in my opinion not as helpful as it could be to provide answers for the question of this project.

The political science literature linking interest group activism and policy change does include federalism as a potentially important institutional variable. The basic theoretical metaphor used is federalism as “container”, creating a series of discrete institutional spaces where similar political battles are fought, but where other elements are different enough to create more or less fertile political environments for political change. This container argument is at

root of the federalism-as-policy-laboratory metaphor. It's argued that by creating different sub-national units where politics over particular policy issues can play out, federalism increases the probability that groups can win gains in these smaller arenas, sub-national governments can act as policy-innovators, and ideally these innovations spread across the federation (Kriesi and Wisler 1999). The policy laboratory argument may or may not stand up to empirical scrutiny but my objection to the applicability of the metaphor lies its inherent assumptions. The policy-laboratory construct is predicated on sub-national states having the jurisdiction to innovate in a particular policy area. It is assumed that sub-national states can innovate in their own sphere of competence without interference from or even the necessary cooperation with the national level government. In the policy fields the metaphor has been extensively used—health insurance for example (Sparer and Brown 1996; Maioni 1998), sub-national states have the jurisdiction to act, and the difficulties posed by the subnational-federal relationship lie more dramatically in questions of inter-governmental cost-sharing rather than fundamental jurisdictional disputes.

The national cases I outlined illustrate that federalism is important to the story of land claims negotiations—the Canadian and Australian cases in particular. However, the policy laboratory metaphor is only useful as an explanation for State negotiation of claims when these two federal governments sought to negotiate deals with aboriginal peoples in the Northwest and Northern Territories—where no sub-state actors were necessary parties to any settlement process. This leads to a contrary hypothesis: that these federal governments were able to start negotiations only because these federations included these unitary “islands” where negotiations would be simpler, and that federalism served only to stop negotiations in other parts of these countries. If one adopts the theoretical view that federalism creates a positive political opportunity structure for political change, clearly its application is limited when looking at a policy area where negotiated settlement solutions necessarily cross governments' jurisdictional boundaries, and where the ability to achieve a negotiated outcome depends inherently on getting the approval of both levels of government. The more the resolution of a policy question crosses governments' autonomous spheres of action, presumably there is more cause for governments to engage in strategic play when deciding whether to negotiate such a resolution.

This line of reasoning is a challenge to rethink how federalism, as a key institutional design variable, creates or stymies political opportunities for land claims negotiation. The challenge is to recast the question from federalism as laboratory to federalism as strategic environment, and to develop hypotheses about why and under what conditions governments choose to negotiate. By privileging federalism as a strategic environment, this perspective highlights

how different federal designs establish different rules between government actors, thus regulating the incentives for governments to act as negotiating parties. By doing so, one can generate hypotheses about whether a federal or unitary government would act differently under similar circumstances.

Wherefore the State?

Up until now I have outlined why in my opinion the literature on land claims politics and the respective literatures in political science on courts, interest groups, and federalism alone do not provide satisfactory explanations for why States choose to bargain with Aboriginal peoples. In my opinion, this is because the land claims literature has paid insufficient attention to understand the State itself. In this next section I attempt to build an argument that takes into account the respective roles of Aboriginal peoples, the courts, and federalism, by relying on a view of how States behave. It is an argument that links State propensity to negotiate with Aboriginal peoples with a theory of what drives State behaviour. It is an argument based on a particular view of how States react to risks of punishment and reward.

Until recently the majority of academic interest in affairs Aboriginal has come from two intellectual disciplines: law, and anthropology. Any academic discipline approaches a subject within a given set of questions, or biases, about what it is about that subject that is interesting. From within law it is natural to look at land claims politics by understanding Aboriginal rights jurisprudence, and the foundations of developing legal thought. Law scholars have focussed on how a received body of law, grounded in a Western theory of liberal rights and Crown sovereignty, can be reconciled with the aspirations and legal structures of Aboriginal peoples and their organizations (McNeil 1989; Macklem 1991; Henderson 1995; Brookfield 1999; Mantziaris and Martin 2000). Within this literature the State features only occasionally, and if its appearance is requested, it is to prevail upon the State to use its law-making power in the interests of greater justice. From within anthropology the interest in land claims politics has primarily been to document historical patterns of Aboriginal social structure and land tenure. With few exceptions, (Dyck 1985), interest in the State in land claims politics is tangential to the core pursuits of this discipline.

The renaissance of interest within political science in Aboriginal rights and land claims politics is conditioned to a degree on the interests of these prior intellectual traditions. The current rich debate and theorizing on Aboriginal sovereignty and liberal conceptions of citizenship (Kymlicka 1995; Cairns 2000) stem from the interest in these States practices of

assimilation and internal colonialism. But it remains that although political theorists are more and more engaged in the principles that regulate or should regulate the Aboriginal-nonAboriginal relationship, in all but a few cases (Weaver 1981; Coates 2000) the motivations of the State itself as an independent actor have been left to one side.

As a result of this intellectual division of labour, the literature on land claims politics betrays a fragmented treatment of the State. The approach I adopt in understanding State behaviour is to focus on the state in its strategic environment and how it evaluates the risks, rewards, strategies, and possible outcomes of its action or inaction. It is an approach that privileges the analysis of state behaviour as a result of interactions with other actors. In this analysis I start from the assumption that the State has its own set of interests that it seeks to achieve when adopting policy positions. I also view the State as involved in balancing other interests (Selway 2000); I add, however, that part of this balancing role is done with an eye to the State's own "bottom line".

(Reader: I don't have time right now to get into a decent survey of state theory – any suggestions as to alternate approaches or literature to address here, would be appreciated. I'm just going to jump into Mancur Olsen and let the chips fall where they may. CS)

Looking to the literature on collective action, Olsonian theory predicts that groups which are directly affected by public policy will organize more effectively than those diffusely affected. The natural decision of the State in the face of this organizational response is to provide public goods in order to "claim electoral credit and to resist policies with concentrated costs" (Harrison 1996: 12). In a world where States are motivated solely by the relative risks of electoral reward and punishment, they should be predisposed to offer policies which provide concentrated benefits and diffused costs. On the face of it, land claims settlements are precisely this type of policy. [Harrison: 169 #134] However, given the relative size of Aboriginal communities, in conjunction with their voting rates historically, the electoral reward for States to provide land claim settlements is marginal at best. On the costs side, the risk of electoral backlash should diffuse interests be mobilized can be great. That being granted, the risk of electoral backlash to governments providing land claim settlements is also low historically because the salience of Aboriginal affairs is, on the balance, marginal compared to other policies such as health, education, or even defence policy. The only strong prediction that can be made from this electorally-based view of state behaviour is that in periods of high issue salience, States will not provide land claims settlements because the

risk of electoral punishment overshadows what are almost certainly to be miniscule electoral rewards.

This electoral logic provides a prediction of State intransigence to land claims negotiations during periods of high issue salience, but offers unclear predictions about what happens in the more usual historical context in this policy area: habitual public disinterest and general neglect. One needs to call upon other motivating factors for State behaviour. Here enters the importance of exposure to fiscal risk. In period of low issue salience the threat of electoral backlash may subside, but the gains from electoral reward remain very low. In this situation there is very little incentive for the state to do anything at all – while there might be little downside, there isn't much of an upside either, especially since the settlement of land claims grievances is an expensive business. The natural incentive for States is to not negotiate with Aboriginal peoples. In this situation, the only options open to Aboriginal peoples interested in pursuing a negotiation policy is to significantly raise the State's exposure to fiscal risk should it continue with its default position, the non-negotiation option.

I now turn to the results of my interview research. I emphasize here how policy actors in Canada and New Zealand evaluated and weighted the importance of the risks in this policy area. I outline here how treaty legacies, courts, and federalism together structure the strategic environment and establish the risks and rewards for State in its choice to negotiate land claims.

Risks and Rewards of the Negotiation Option: Interview Results

Modern land claim negotiations are caught between two competing State objectives. This tension is present in all negotiations, but some have managed the tension better than others. The States is caught in its need to end the uncertainty created by the Aboriginal land rights issue -- an uncertainty in terms of economic development and the international investment climate as well as its own fiscal position -- and its need to build a “new relationship” with Aboriginal peoples. How the policy makers define this “new relationship” is sometimes fuzzy, and often inarticulate. Land claim negotiations are thus caught between ending uncertainty through “full and final” settlements and establishing bases for a more positive on-going future relationship between Aboriginal peoples and the State. These competing

objectives create a fundamental ambivalence in these negotiations, because the push to ensure “finality” can undermine the bases of this “new relationship”.

The Canadian comprehensive claims policy is particularly fraught with this dilemma. The purpose of the policy at that time was simple as far as the Canadian government was concerned: to achieve economic certainty by achieving the extinguishment of native rights in return for compensation. This basic contract of extinguishment for compensation also serves the purpose of removing the threat to the Crown of continued litigation on the underlying claim. Despite the strong objections of Aboriginal peoples (Assembly of First Nations 1990), independent reviewers (Task Force to Review Comprehensive Claims Policy 1985), and scholars (Asch and Zlotkin 1997), the federal and provincial governments insist on the extinguishment part of the bargain.

The New Zealand policy of direct negotiations is not as fraught with this tension as in the Canadian case, but it still remains. In New Zealand, extinguishment is not part of the language of negotiations, but I argue that this is less a result of enlightened thinking on the part of policy makers than by the lower degree of risk the land claims question poses for the Crown generally. In New Zealand, the Crown’s opinion that native title was extinguished over the two islands rests on a firmer legal basis than in Canada, and so the New Zealand government can afford to drop the language of extinguishment, while ensuring that the settlement removes the possibility of future judicial action.

Shaping the Strategic Environment: Treaty Legacies

The consequences of the historical practice of signing treaties are myriad, but for my purposes here I will single out how treaties structured an important part of the modern strategic environment: who the players at the negotiating table are.

Treaties identified a historically-defined Aboriginal claimant group with a leadership structure having an established representative mandate to negotiate on behalf of its people. The paradox of land claims negotiations is that for the first time in the history of Aboriginal-State relations, the State has a self-interest in whether the Aboriginal negotiating team does in fact have an accepted mandate to act on behalf of a majority of its group members. The State has an interest in ensuring that the negotiations it undertakes are seen to be largely legitimate within Aboriginal communities because without this legitimacy no finality or reasonable certainty to the land claims question can be achieved. So while regional Aboriginal organizations are involved in discussing the general shape of negotiations with the State (the First Nations Summit in British Columbia, the Council of Yukon Indians, or the

Union of Nova Scotia Indians for example), it is recognized that the appropriate Aboriginal claimant group who will be the signatory to a land claims settlement rests with an individual band or tribe. In Canada the constitution of that band or tribe is more structured due to the history of Aboriginal administration under the Indian Act when compared to the New Zealand case, but the general pattern remains.⁸

The next legacy is the acceptance that Aboriginal peoples historically were involved in a privileged bargaining relationship with the Crown. Not only did treaties identify Aboriginal claimants, but they also established a negotiating relationship where the Crown was the appropriate negotiating party as well. This distinction is an important one and one too easily dismissed as trivial. The result is that the Crown itself accepts that land claims discussions are appropriately between itself and aboriginal peoples. Australia provides the counterexample. With no historical treaties to establish a privileged bargaining relationship with the Crown, it has been politically possible for the Commonwealth under the Native Title Act to establish a negotiating framework where it removes itself as a direct negotiating partner. So, in Australia, the conceptual arrangement governing the structure of native title negotiations is one of interest group politics, where land claim issues through the Indigenous Land Use Agreement mechanism are hammered out with miners, loggers, pastoralists, and Aboriginal peoples and the role of the State is to give the outcomes of this process its nod of approval. This model is opposed to the British Columbia Treaty Commission model, where extensive reporting and consultation mechanisms with third party interests (logging industry, energy industries, municipalities, game & fishing interests) are developed in lieu of their inclusion at the negotiating table.

One other important legacy of the treaty history is the acceptance among the non-Aboriginal community of Aboriginal rights as emanating from a basis in contract. For those who are loathe to recognize the more fundamental argument that Aboriginal rights emanate an inherent sovereignty, they may well support the argument that whatever the wisdom of the exercise, a deal was or should have been signed, and the contractual obligations of the State flowing from that deal need to be upheld, and that breaches of that contract require compensatory action. In Western societies founded on the hallowed language of liberalism and contract, it is a potent argument.

⁸ The exception is the case of the Maori fisheries settlement of 1992, which was negotiated on a pan-Maori level with the Crown.

Courts and Aboriginal rights jurisprudence:

While the courts are not parties to land claims negotiations, through the development of Aboriginal right jurisprudence they have a huge role to play in how risky the policy choice of negotiation is to States. This happens in at least two ways. First, the recognition of a native title as a property interest creates uncertainty for other economic actors, especially in those areas where no historical arrangements existed to extinguish those rights. The other aspect of risk is the sheer cost involved to the State itself with pursuing a litigation strategy. As the cost of litigation rises in conjunction with an increasing probability of Crown losses in the courts, the benefit of pursuing a negotiations policy increases. There's no surprise there. In a policy area where there would be unclear or little electoral benefit to pursuing a negotiations policy, the increasing risk of fiscal punishment should be the main force behind securing a State decision to negotiate.

My interviews show that while attitudinal change and an increasing acceptance of Aboriginal rights among policy makers is important to a negotiations policy, achieving behavioural change is primarily a result of the increasing fiscal risks associated with economic uncertainty and continuing legal action. What is also evident from the interviews is that while court action is important to getting states to the bargaining table, it is less important in achieving a settlement outcome. Because of this, the marginal utility of legal action in cementing the negotiation choice is decreasing with time. Also, once a State commits itself to a negotiations process, other mechanisms come into play to keep the government at the bargaining table. The creation of a negotiations policy leads to the development of administrative mechanisms with the State bureaucracy. This creates within the State itself communities of interest which, as time goes on, become invested in the negotiating process itself. As such the longer land claims negotiations continue, the less important the litigation card becomes relative to these bureaucratic factors in making sure that the State doesn't change its mind.

Federalism

The assignment of jurisdictional responsibilities in federal states in the area of Aboriginal affairs is a direct result of historical treaty making. In Canada, jurisdiction over "Indians and lands reserved for Indians" is federal reflecting the bargaining relationship between the two parties. However, land management and its use, aside from these Indian reserves and limited federal lands, are assigned to the provinces. In Australia, Aboriginal affairs was assigned to the states, and only in 1967 through the constitutional referendum was the Commonwealth

given concurrent jurisdiction. Land management and its use is, as in the Canadian case, vested in the states.

In the context of modern land claim negotiations, this assignment of jurisdictions between the federal and sub-national governments means that in order to negotiate a land claims settlement that involves more than strictly cash compensation, sub-national governments are necessary parties to the agreement and as such are veto players.

I argue that this division of State power into two levels works against Aboriginal peoples at the bargaining table. In the first instance this gives third-party economic interests more leverage in the negotiations. The importance of land and resource management to provincial governments is such that they will jealously guard their power in this jurisdiction and are more disinclined to imposing costs on concentrated interests in the face of inter-state economic competition. [Harrison, 1996: 169 #134]

In the second instance, having both federal and sub-national governments at the bargaining table necessarily means that a settlement requires the two governments to cooperate. A difficulty is that while two government players can cooperate to share the costs of settlement between them, the benefits of settlement are also diffused. This can dilute the urgency and commitment of either government player to the negotiations and in effect create incentives for either part to “stall”. If provincial cooperation is not forthcoming, to what degree is the federal government willing to coerce provincial cooperation? Federal governments usually have the means to ensure sub-national cooperation through the cash carrot, by underwriting the sub-national government’s negotiation and compensation costs. The federal government’s willingness to use coercion by withholding fiscal transfers is also limited by the need for sub-national cooperation in other policy areas.

Conclusion

In this presentation I have explored how a State’s decision to negotiate land claims policies are necessarily linked to the incentives and risks inherent in this particular policy response, and how treaty histories, courts, and federalism structure the strategic environments in which land claims negotiations take place. I have argued that in order to understand the politics of land claims negotiations one needs to take a closer look at the State itself.

While my comments have not strayed into issues of Aboriginal sovereignty in any meaningful way, one needs to be reminded that land claims negotiations are not the final expression or

ultimate policy goal of Aboriginal peoples. The ultimate success of land claims negotiation policies will be measured against how they contributed to the larger relationship between Aboriginal peoples and the national societies in which they find themselves and to which they may consider themselves to belong. The issue of Aboriginal rights to land is inseparable, in the final analysis, from the issue of sovereignty. “The key issue associated with Aboriginal rights pertains to separate political jurisdiction and establishment of a land base.” (Fleras and Elliott 1992: 29) As another scholar writes, “...the first step in regaining lost sovereignty is reclaiming traditional lands” (Frantz 1998:520). The link between Aboriginal sovereignty and their rights to land necessarily questions fundamental assumptions about the legitimacy and normative limits to the reach of the State over peoples within its borders. Indeed, Aboriginal land rights question the legitimacy of underlying sovereign title to land and hence the legitimacy of the State to regulate the land’s use. Because Aboriginal land rights and the legitimacy of sovereign power are intertwined, the choice of the State to negotiate these claims is fundamentally different from a choice by the State to recognize and respond to claims brought by other social groups. As a result, getting purchase on when the State will negotiate Aboriginal land claims, how it chooses to do so, and the consequences (intended or otherwise) of these choices is an important contribution to central questions in political science.

Appendix: Table of national case histories

	Canada	New Zealand	Australia
Treaty	Various: Peace and friendship/ Military alliances Land cession treaties “modern” treaties where no historical agreements existed	Treaty of Waitangi: Sovereignty Possession of taonga Extension of citizenship	None
Jurisdiction over Aboriginal Affairs	Federal (status Indians, Inuit) **inclusion of Metis and Non-status under Constitution Act 1982	N/a	Exclusive to states until 1967 Concurrent jurisdiction post 1967
Jurisdiction over land and resource management	Provincial Federal in territories and (few) federal lands (national parks, military ranges)	N/a	State Federal in Northern Territory
Key (federal) legislation	Indian Act Constitution Act, 1982 James Bay and Northern Quebec Act 1976 Nunavut 1993 Nisga’a Settlement 2000	Treaty of Waitangi Act, 1975 State-Owned Enterprises Act (amended) 1987 Waikato-Tainui Settlement Ngai Tahu Settlement Treaty of Waitangi	Racial Discrimination Act 1975 Aboriginal Land Rights (Northern Territory) Act 1976 Heritage Protection legislation Native Title Act, 1993, amended 1998

	Canada	New Zealand	Australia
		Fisheries Settlement	
Key court cases	<p>Calder 1973</p> <p>Guerin 1984 (fiduciary duty)</p> <p>Sparrow 1990 (fishing, extinguishment test)</p> <p>Delgamuukw 1997</p> <p>Marshall 1999 (fishing, moderate livelihood)</p>	<p>Lands Case 1987 (principles of Treaty of Waitangi, privatisation of state assets)</p> <p>Marlborough Sounds case, (ongoing)</p>	<p>Milirripum 1971</p> <p>Mabo 1992 (terra nullius)</p> <p>Wik 1996 (concurrent use, pastoral leases)</p>
Federal Negotiation Policies	<p>-ad hoc: initial negotiation talks in NWT 1971</p> <p>Comprehensive and Specific Claims Policy 1973 (revised 1986)</p> <p>Self-government policy (1995)</p>	<p>Ad hoc c.1985-1994</p> <p>Direct Negotiation with the Crown, 1994</p>	Native Title Act
Key independent institutions	<p>Indian Specific Claims Commission 1991</p> <p>1993 British Columbia Treaty Commission</p> <p>--2002?? Independent Specific Claims Body</p>	Waitangi Tribunal 1975	National Native Title Tribunal 1993
Key Aboriginal Organizations	<p>Assembly of First Nations (status Indians)</p> <p>Inuit Tapirisat/</p>	New Zealand Maori Council	ATSIC

	Canada	New Zealand	Australia
	Tunngavik First Nations Summit (BC)	Maori Trust Boards Individual claimant groups: eg Ngai Tahu	
Key (federal) government portfolios	Minister of Indian and Northern Affairs (Cabinet) Federal Interlocuteur, Non-Status and Metis (non-Cabinet)	Minister of Maori Affairs (Cabinet) Minister in Charge of Treaty of Waitangi Negotiations Minister of Justice	Minister of Aboriginal Affairs (non-Cabinet)
Key bureaucratic actors	Indian and Northern Affairs Canada Justice Canada	Office of Treaty Settlements	ATSIC Attorney General's Department
Formal parties to negotiated agreements	Federal government Provincial/Territorial government (comprehensive claims) Aboriginal claimant group	New Zealand government Maori claimant group	State government Aboriginal claimant group Pastoral interest Mining interest
Factors affecting centralization of federal power	Strong parliamentary majorities and party discipline in House of Commons 2+ party system federally until multipartism of the 1990s	No Senate FPTP electoral system until 1996 Unitary system	Strong Senate – check against government ability to pass legislative agenda untouched.

	Canada	New Zealand	Australia
	FPTP electoral system		
	Weak Senate		

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