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Belated Justice? The Indian Claims Commission and the Waitangi Tribunal

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In his recent book, Elazar Barkan proposes that since August 1952, when Germany agreed to compensate Jews for the crimes of the Holocaust, there has been a gathering momentum for nations to admit that they committed historical injustices and to offer restitution to the victims.[1] The claims of indigenous peoples for return of land, for compensation for dispossession, and for repatriation of skeletal remains and other sacred items are an essential part of this transition to what Barkan sees as a new age of "moral politics." By admitting to injustice and offering some form of compensation, Barkan argues, the state assuages its guilt and the indigenous population gains a reinforced identity, an enhanced legitimacy, and perhaps improved economic status. In Barkan's conception, this is a global process worked out differently in each national setting, because each nation has a particular colonial narrative and a distinctive political culture.

This is the point of departure for this article, a comparison of the US Indian Claims Commission, which heard Native American claims from 1946 to 1978, and New Zealand's Waitangi Tribunal, which has received Maori claims since 1975. The objective is to ascertain which forum—and society—has achieved the most in redressing the injustices of colonial rule and which, therefore, offers the better precedent for other societies negotiating the contorted terrain of land and other categories of claims.[2]

There exists a considerable body of scholarship comparing indigenous peoples' dispossession and claims in Canada, Australia, New Zealand, and the United States.[3] Yet the United States and Native Americans are often set apart in such comparisons. The assumption seems to be that, because the United States (through the Marshall Trilogy) early and unambiguously recognized

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Native title in law as a right of occupancy that could only be extinguished through treaty, its relationship to its indigenous people is exceptional. Continued recognition in the courts and statutes of this "measured separatism" led Charles F. Wilkinson to conclude that the United States' policy toward its original inhabitants is "one of the most progressive of any nation."[4] Still, despite the legal protection, Native Americans, like First Nations, Aborigines, and Maori, were subjected to the same "discourses of conquest,"[5] which legitimized colonization and imposed Western legal doctrine as orthodoxy. They all suffered similar traumas of dispossession, including catastrophic population loss, reduction and fragmentation of their land bases, aggressive assimilation campaigns, and marginalization and poverty. In the twentieth century, they have all, despite the continued power of the "discourses of conquest," experienced population recovery, cultural renaissance, and political resurgence. Land and other kinds of claims are part of this resurgence, and the ways that two societies, New Zealand and the United States, have dealt with them is the issue in this comparative legal geography.

It is worth specifying at the onset some problems inherent in this comparison. The Indian Claims Commission was winding up its business as the Waitangi Tribunal was just getting started, and the decades spanning their collective tenure, from the 1940s to the present, have been a time of assertiveness for indigenous peoples, proclaiming their presence and elevating their concerns in settler societies such as New Zealand and the United States. It could be argued, therefore, that the Indian Claims Commission suffers in any comparison by being the first major national forum to consider reparations for the dispossession of Native peoples because it substantially preceded those changes; it might even be argued that the United States merits praise for being the first in line, although that will not be the argument here. There is also the difference between Maori and Native American shares of population and political power in their respective states: 14 percent of New Zealand's population are Maori, providing them with political clout and legislative power; 1 percent of the United States' population is Native American, leaving them more easily ignored. Add to this the fact that in New Zealand's largely bicultural society, Maori are the significant minority, whereas in multicultural United States, Native Americans are only one minority among many (though a special minority by virtue of being indigenous).

Still, these differences do not obviate the value of comparison. The Indian Claims Commission and the Waitangi Tribunal were both created to offer full and final reparations to Native Americans and Maori for a century and a half of mistreatment. The nature of those reparations, and the ways they were decided upon, shed a great deal of light on how much has changed, and how much remains the same, in the relations between colonizer and colonized in the United States and New Zealand.

ORIGINS

The idea of an Indian claims commission, or court, was at least forty years old when President Truman signed the Indian Claims Commission Act on August 13, 1946. In 1910, former Commissioner of Indian Affairs Francis E. Leupp had called for the creation of a "special court" to settle Native American

claims arising from broken treaties and other failings of federal policy. Nothing was done, as Harvey D. Rosenthal explains, because Americans in general, and Congress in particular, believed that the downward plunge of the Native American population pointed to extinction and that the problem of claims would vanish with them.[6] But the Native American population rebounded after 1916, and at the beginning of a new era of reform in the late 1920s there was once again interest in dealing with the accumulating backlog of claims. This was expressed in the *Meriam Report*, that devastating indictment of federal Indian policy.[7] Lewis Meriam and his staff recommended the appointment of a commission to investigate claims and to submit those with merit through the secretary of the interior to Congress and on to the Court of Claims. This was not done, but attention had once again been drawn to the problem. Subsequently, in the 1930s and early 1940s, during the reform-minded administrations of commissioners of Indian Affairs Charles Rhoads and John Collier, several bills were introduced into Congress proposing either an adjudicatory court or an investigatory commission to hear Native American claims. None of them made it into law, largely because of fears of the financial burden that successful claims would impose on a nation mired in economic depression and carried into war.

These bills were reworked and a new version was put before Congress in 1944. The resulting bill, HR 4497, easily passed the House and Senate and moved forward for the president's signature. In signing the bill into law, President Truman promised that "we stand ready to correct any mistakes we have made."[8] Native Americans were finally to have their day in court.

The Indian Claims Commission Act permitted any "identifiable group of Indians" to sue the United States for claims in law and equity, including those arising from the Constitution and from treaties and other such agreements; for claims arising from the revision of treaties and other agreements on grounds of fraud, duress, or "unconscionable consideration" (that is, payment so low as to "shock the conscience"); for claims arising from the taking of Native American lands without the agreed-upon (or any) compensation; and for claims arising from the absence of "fair and honorable dealings."[9] This last clause, adding a moral dimension to allowable claims, was a departure from previous practice, an opportunity to go beyond strictly legal parameters.

In considering claims, the Indian Claims Commission would function as a specialized court modeled on the Court of Claims. The commission, composed of three members appointed by the president, would hear testimony, ascertain facts and, subject only to congressional approval, determine the final monetary award. No land would be returned, and once an award was made, or the case dismissed, the claim could not be revived. It was a one-time opportunity for Native Americans.

Native Americans' day in court had been long in coming. By 1887, they had surrendered 809 million hectares (2 billion acres) of land through treaties and treaty substitutes, leaving a residual 57 million hectares (140 million acres). Another 36 million hectares (90 million acres) were lost through the allotment policy, installed through the Dawes Act of 1887, which allocated land

(generally 65 hectares, or 160 acres) to individual Native Americans, then disposed of the remaining reservation areas to settlers as "surplus lands." Once Native Americans gained titles to their allotments, after a period of government trusteeship, they were often sold to settlers as well. As a result, Native Americans today retain barely 5 percent of the land.

Some lands—the Lakota's surrender of the Black Hills in 1877, for example—were taken illegally. But even when lands were purchased through a legal agreement, there was little justice involved. It was a buyer's market in which Native Americans, deprived of their traditional means of support by encroaching European Americans, were obliged to sell their remaining asset, their lands, simply to survive. The United States obtained the lands as cheaply as possible, then resold them as quickly as possible for profit. It was a primary means of financing the government: bursts of purchases came when the federal system was particularly in need of money.[10] Moreover, the payments Native Americans received for their lands were not theirs to use. Instead, the government used the proceeds to finance its policy of assimilation, the objective being to convert Native Americans into Christianized, yeoman farmers. In this way, Native Americans would disappear without the blemish of a more overt elimination.

There was no easy way for Native Americans to challenge this process of dispossession in the courts. At the same time the imposed Western law was wielded as justification for dispossession, Native Americans were specifically denied, after 1863, the protection of that law when they were specifically excluded from bringing suit against the United States in the Court of Claims unless they first obtained an enabling act of Congress. The drawn-out nature of this process, the expense of litigation, and the low rate of success were demoralizing. By 1946, Native Americans had managed to take 200 claims to the Court of Claims, but only twenty-eight received favorable judgements. Most had been dismissed on technicalities. The average award was only $281,746, and sometimes the entire amount was canceled out by the deduction of "gratuitous offsets," or payments that had been made by the United States (in the form of rations, for example) without legal obligation.[11] Proponents of the Indian Claims Commission, such as Felix Cohen, the nation's leading authority on Indian law, pointed to the obvious failings of this system. The commission, they reasoned, would expedite the claims process and give Native Americans a genuine opportunity to have their grievances heard.

But these arguments had also been made earlier, when proposed legislation came to nothing. What was different in the 1940s was the gathering momentum of termination, the policy that sought to eliminate Native Americans as a "separate factor" in American society by "liquidating" reservations and associated federal expenses.[12] The argument was that only the promise of future claims awards was keeping Native Americans on tribal rolls and preventing them from assimilating. With per capita payments in hand, the argument continued, individuals would be able and willing to move to the cities, where they would fade into the larger population. The purpose of the Indian Claims Commission, as was candidly admitted in its final report, was "to give the Indian his due" while also "giving him his walking papers."[13]

By contrast, the Waitangi Tribunal was born in the streets, the product of an outpouring of Maori protest against assimilationist policies similar to termination in the United States and the Crown's willful neglect of the promises made in the Treaty of Waitangi, New Zealand's founding charter. By that treaty, signed on February 6, 1840, at the Bay of Islands, Britain laid the groundwork for formal annexation of New Zealand, whereby Maori became British subjects under the protection of the Crown. The short document contained great ambiguities and many seeds of dispute. Whereas Article One transferred sovereignty to the Crown, Article Two confirmed that Maori chiefs retained "full exclusive and undisturbed possession of their Lands, Estates, Forests, Fisheries, and other properties."[14] The contradictions were multiplied by the issue of both Maori and English language versions of the treaty. The latter, which in various editions was long used as the standard text, emphasized British sovereignty rather than recognition of *rangatiratanga*, Maori chiefly authority. This despite the fact that only thirty-nine chiefs put their marks and signatures on the English document, whereas more than 500 chiefs signed the Maori version, as it was carried around the islands from February to September of 1840.[15]

It soon became evident that guaranteed Maori rights would not hinder the spread of Pakeha (European) settlement. Initially, the Crown retained the right of preemption, monopolizing land purchases from Maori. Because several *hapu* (sub-tribes) generally had rights to a particular piece of land, the Crown was often obliged to make multiple purchases and, in doing so, imposed hard boundaries on territories that had previously overlapped and been shared and contested in complex ways. As in the United States, the indigenous people were often forced to sell their land to ease the poverty that came when all other resources and opportunities were exhausted.[16] Also, as in the United States, lands were bought cheaply, then sold at a profit which was used to subsidize colonial development. Almost the entire South Island, for example—about 14 million hectares (34.5 million acres)—was acquired from Ngai Tahu from 1844 to 1864 for a paltry £14,750. The Arahura Block, a fifty-kilometer-wide strip running almost the entire length of the west coast, cost only £100 in 1860. Pakeha poured into the strip to mine its gold.[17]

Government preemption was abandoned after 1862 when the Native Land Act and its successors introduced the system of direct purchase by settlers from individual Maori after their customary tenure was converted to an alienable title under New Zealand law by the newly established Native Land Court. With some variation, this remained the standard policy until the end of the century.[18] It allowed easier access to Maori lands and, like the contemporaneous allotment policy in the United States, was an integral part of the drive to fracture communal systems and assimilate the isolated individuals. In both countries assimilation was the philosophy that justified the dispossession of the indigenous inhabitants.

Maori lost additional lands—more than 1.2 million hectares (3 million acres)—by confiscation in the land wars of the 1860s, though a portion of these were subsequently returned. By 1892, Maori retained only one-third of the North Island and a scattering of small reserves on the South Island, many

of which were substantially leased to Pakeha. According to M. P. K. Sorrenson, Maori populations declined most drastically where land losses were greatest and concomitant social collapse most pronounced.[19] The erosion of the Maori land base continued in the twentieth century, again mirroring the ongoing Native American dispossession. A further 1.2 million hectares (3 million acres) passed out of Maori hands by World War I and the process continued through the Maori Affairs Amendment Act of 1967, which extinguished Maori succession rights to uneconomic lands.[20] Now only 5 to 6 percent of New Zealand remains under the jurisdiction of the Maori Land Court.

But, like Native Americans, Maori did not disappear, either by death or assimilation. After falling to a low of 42,650 in 1896 (a decade before the Native American population bottomed out), Maori population rebounded in the twentieth century. Moreover, this was an increasingly urbanized and activist people who would not let the Treaty of Waitangi fade into romanticized history. Whereas Pakeha celebrated February 6, Waitangi Day, as a national day of honor, Maori saw it as an affront, a reminder of what had gone wrong, and they protested. They protested the loss of their lands, the erosion of their *rangatiratanga*, and the aggressive assimilation policies, and they insisted that the treaty be revitalized and its promise of protection fulfilled. In March 1975, the largest of these protests, the 30,000-strong Land March, converged on Parliament in Wellington, just as the Treaty of Waitangi Bill was being debated.

The Treaty of Waitangi Bill proposed the establishment of a tribunal to consider Maori claims arising from future actions which allegedly contravened the principles of the Treaty of Waitangi. Because the treaty had never been incorporated as a whole into legislation (it was called a "legal nullity" by Chief Justice Prendergast in 1877) it carried no practical weight. Throughout the nineteenth century and beyond, Maori lodged claims in the Court of Appeal and Supreme Court, and various commissions investigated their claims. Some reparations, largely monetary payments, were made, but the primary outcome was an accumulation of legal debts, which could only be met by selling more land.[21] The Treaty of Waitangi Bill, while not elevating the 1840 treaty to supreme law, would at least resurrect it as the central reference point for Maori-Pakeha relations.

The bill was introduced into Parliament by Matiu Rata, member for Northern Maori and Minister of Maori Affairs in the Labour government. Rata, representing Maori demands, wanted the tribunal's purview to be retrospective, covering breaches of the Treaty of Waitangi back to 1840. But while the Labour caucus was "willing to look to the future," it was not ready to "dwell on the past."[22] This was a concession they felt obliged to make to conservatives in their own ranks to get the bill passed, and to Pakeha voters who, for the most part, persisted in their beliefs that Maori, relatively speaking, had done quite well under the Crown. The Treaty of Waitangi Act was passed on October 10, 1975, over the objections of members of the opposition National Party (who mainly abstained) that it was merely "window dressing."[23]

The Waitangi Tribunal was empowered to investigate claims by Maori groups or individuals stemming from actions of the Crown (including acts of

omission) after October 10, 1975, which they maintained violated the principles of the Treaty of Waitangi. The three-person tribunal, chaired by the chief judge of the Maori Land Court, would inquire into the validity of such claims and pass on recommendations for remedy to the Crown. Matiu Rata, glossing over his disappointment that the past would not be exposed to scrutiny, called the tribunal a "milestone of social and political advancement."[24] The way it began its business, however, did make the tribunal seem like "window dressing."

EVOLUTION

The two forums were, therefore, very different from the start. The Indian Claims Commission was to investigate past injustices, serve as a court, and make only monetary awards. The Waitangi Tribunal would only investigate contemporary violations of the Treaty of Waitangi, and its role was only recommendatory, but there were no restrictions on what it might advocate, including the return of land. Moreover, the Indian Claims Commission would accept claims only from groups of Native American claimants, whereas any Maori could register claims with the Waitangi Tribunal. These were not static entities, however, and they evolved as precedents were set, and, in the case of the Waitangi Tribunal at least, as personnel changed and enveloping political and social forces intervened.

Native American groups were given five years to file their claims with the Indian Claims Commission. By that deadline, 176 tribes and bands had lodged 370 claims, which were eventually separated into 617 individual dockets. Only seventeen recognized tribes and bands did not file claims, either because they had none, or because they could not organize their petitions within the rigid five-year filing period.[25]

The majority of claims involved nineteenth-century land cessions whereby, it was alleged, the United States had obtained Native American homelands without payment or for inadequate compensation. The other major category was accounting claims, charging the United States with misuse of Native American trust funds. Few claims targeted "fair and honorable dealings," not because the United States had always treated Native Americans fairly, but because there were no precedents in European American law for claims founded on such grounds. The Native Americans' lawyers stuck with what they knew—issues of inadequate compensation for property—and the opportunity to pursue wider moral issues involving unfair treatment was lost.

The cases were heard in a small, musty room at the back of the Federal Trade Commission Building, not far from the White House and distant from the lands being evaluated and the people being affected. When John T. Vance was briefly chair of the commission from 1968 to 1969, he tried to rectify this real and symbolic spatial inequity by moving the hearings to claimants' reservations, but he was not supported in this by the other commissioners, who were uninterested in relaxing the rules of standard Western legal procedures.[26]

Commissioners were appointed by the president, the only restrictions being that they had to be lawyers and that no more than two of them should

be from the same political party. Early drafts of the Indian Claims Commission Act mandated that one of the commissioners must be Native American, but this clause was dropped from the final version. It was not until 1969 that a Native American, Brantly Blue, a Lumbee, was appointed to the commission. The first three commissioners were selected precisely because they had no familiarity with Indian affairs, ostensibly because in their ignorance they would be unbiased.[27] Cohen, the most qualified person for the job, was passed over as too sympathetic to Native Americans and too dedicated to a comprehensive process.[28] Unfamiliarity with Native American law remained a common characteristic of appointees until 1968, when Margaret Pierce, who had clerked with the Court of Claims for twenty-one years, joined the group.

The initial plan was for the commission to speedily handle its work and terminate by 1956. But by that date there were still 555 dockets outstanding. With the claims backing up, a reluctant Congress, skeptical over the expense, extended its tenure to 1967, then to 1972, 1976, and finally 1978. At that point, the commission disbanded and the remaining sixty-eight dockets were transferred to the Court of Claims.

Against the backdrop of congressional complaints that the commission was too slow and too expensive, steps were taken to expedite the process, and the number of cases completed increased after 1960 (fig. 1). In 1967 the size of the commission increased to five, only one commissioner needed to be present at a trial, the length of trials was shortened by pre-trial conferences, and expert witnesses were permitted to submit their reports before the trial, leaving only cross-examination for the hearing. The most important reason for the expedition of proceedings after 1960 was the promotion of compromise settlements, which eliminated steps in the adjudicatory process. The *Omaha* case, decided in 1960, was the precedent.[29] Here four separate dockets were consolidated by agreement between the government and the Omaha Tribal Council, leading to an award of $2.9 million. Following the Omaha Rule, thirty-two of the fifty cases settled from 1961 to 1965 were concluded by compromise agreements. Arthur V. Watkins, former senator from Utah and chair of the commission from 1961 to 1968, was particularly instrumental in the implementation of speedy compromise agreements. Watkins had written the opinion in the *Omaha* case and, as a fervent supporter of termination, was determined to get cases settled, the commission dissolved, and the tribes eliminated as sovereign bodies. It is worth noting, however, that because tribes had to agree to compromise settlements before they were forwarded to the commission, this at least gave Native Americans an opportunity—their only real opportunity—to participate in the claims process.

Apart from the compromise agreements, the increase in membership, and the expediting measures, the functioning of the Indian Claims Commission did not change significantly from 1946 to 1978. Despite the efforts of the appellate court, the Court of Claims (whose charge was broader than merely ending tribal claims), to force the Indian Claims Commission to do its job more diligently, and the unsuccessful effort by Chairman Vance to stage his "in-house revolution," the commission stubbornly maintained its

Decisions and Awards by the Indian Claims Commission, 1949–1978

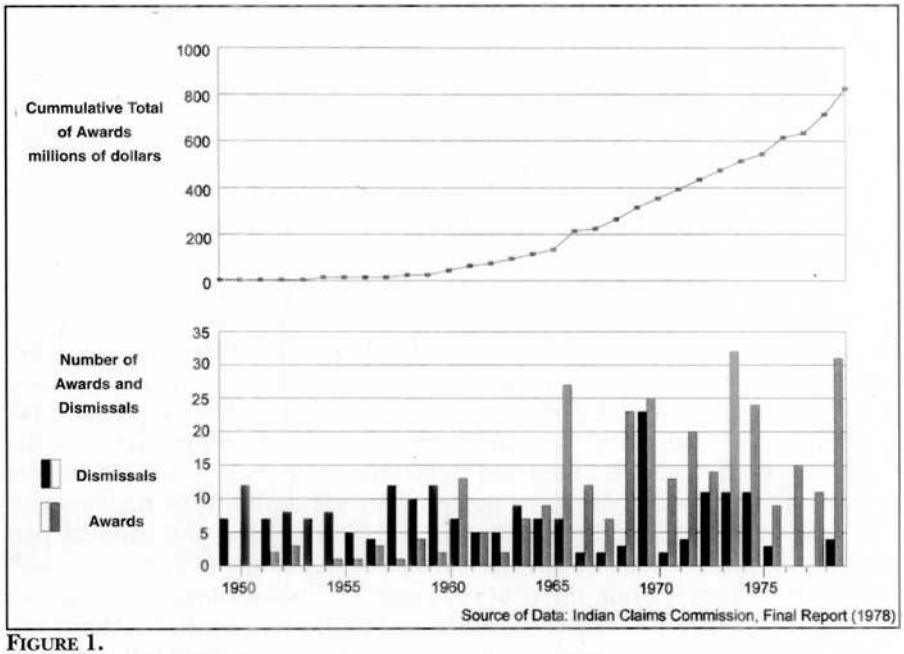

FIGURE 1.

direction, more concerned with cleaning the slate of cases than with "repaying historical debts."[30] It remained anchored in its termination origins while in the wider sphere of United States-Native American relations termination was renounced, self-determination was again promoted, Native American activism surged, and substantial gains—including some returns of land—were made in the higher courts and in Congress. By contrast, the Waitangi Tribunal has continued to evolve—in size, composition, practices, and attitudes—mirroring and sometimes leading the changes taking place in Pakeha-Maori relations as a whole.

In its early years, from 1977 to 1982, the Waitangi Tribunal was inconspicuous and ineffectual. So much so that when the distinguished lawyer Paul Temm was asked to join in 1982 he was not even aware of its existence.[31] The tribunal, operating out of the ballroom of Auckland's fancy Intercontinental Hotel, received only six petitions by 1981 and resolved nothing, except to dismiss the Fisheries Regulations claim, a claim brought by Joe Hawke (later a member of Parliament) to take fish in accordance with customary law but outside the official regulations.[32] In doing so, the tribunal refused to take a stand on whether or not Article 2 of the treaty protected Maori in the possession of their lands and resources. Maori regarded the tribunal with suspicion: it seemed to be yet another co-option device. They again took their frustration to the streets, occupying traditional tribal land at Bastion Point in Auckland in 1978 and staging increasingly bitter protests at the annual celebrations at Waitangi from 1979 to 1985. The stand of many formerly moderate Maori, including Matiu Rata, hardened, with many now calling not for an honoring

of the treaty but for its rejection as an imposed instrument depriving them of their sovereignty. Some Pakeha, including church groups, sympathized; but even those who didn't took notice.[33]

Unlike the situation in the United States, where the Indian Claims Commission remained impervious to reform, the dramatic changes taking place in New Zealand society permeated the tribunal, which was metamorphosed in 1982 when Edward Taihakurei Durie took over as chief judge. Durie was determined to use the tribunal as a means to develop a "bicultural jurisprudence" which incorporated Maori values and prioritized Maori rights. He made this clear in his first report, which dealt with the Motunui claim. This claim concerned the polluting of a Te Atiawa *hapu* fishing reef off the coastal town of Waitara by sewerage out-fall and oil pipelines. In making his report, Durie took into account not only the chemical aspects of pollution but also Maori worldview, which holds such mixing of human wastes and food sources to be a ritual pollution. The tribunal held that Maori traditional values, as well as tribal rights, were protected by the treaty. More than this, the tribunal argued that such values and rights should be given a "priority of consideration" in planning decisions made under the authority of the Crown.[34] With the backing of largely Pakeha conservation groups, the tribunal persuaded the government to change its sewerage and oil delivery systems.[35] Under Durie's leadership, the tribunal began to hold sessions on *marae* (village meeting places) of Maori claimants, to hear testimony in the Maori language, and to give equal weight to Maori customs and insight.[36] Influenced by the tribunal, the Court of Appeal made important decisions in 1987, 1989, and 1991 that confirmed the concept of partnership between Pakeha and Maori, thus restoring some balance to sovereignty issues.[37] As confidence in the commitment of the tribunal was established, the number of claimants multiplied: by 1987, eighty-four claims had been lodged, and reports had been issued on thirteen of them (fig. 2).

Meanwhile, in response to the growing crisis in Maori-Pakeha relations, a major and controversial revision of the Treaty of Waitangi Act was made in 1985. Following its return to power in 1984, the Labour Party moved to expand the authority of the Waitangi Tribunal to consider claims extending back to the 1840 Treaty of Waitangi. The Treaty of Waitangi Amendment Bill was introduced into Parliament on June 17, 1985. Additional proposed amendments included increasing the size of the tribunal to seven, four of whom should be Maori, and holding sessions with only three members present, including one Maori.

It took almost six months of acrimonious debate for the bill to make it through its three readings. Leaders of the opposition National Party, particularly Winston Peters (himself Maori), protested that the Maori majority clause was racist, that an avalanche of claims would put a heavy burden of expense on the country, and that the security of private landowners would be threatened by taking them to task for the sins of their forebears. But increasingly Pakeha recognized the contradiction between New Zealand's self-proclaimed reputation for good race relations and the reality of Maori dispossession and deprivation, and they were willing to rectify at least some past grievances.

Number of Claims Received and Reported by the Waitangi Tribunal, 1975–1998

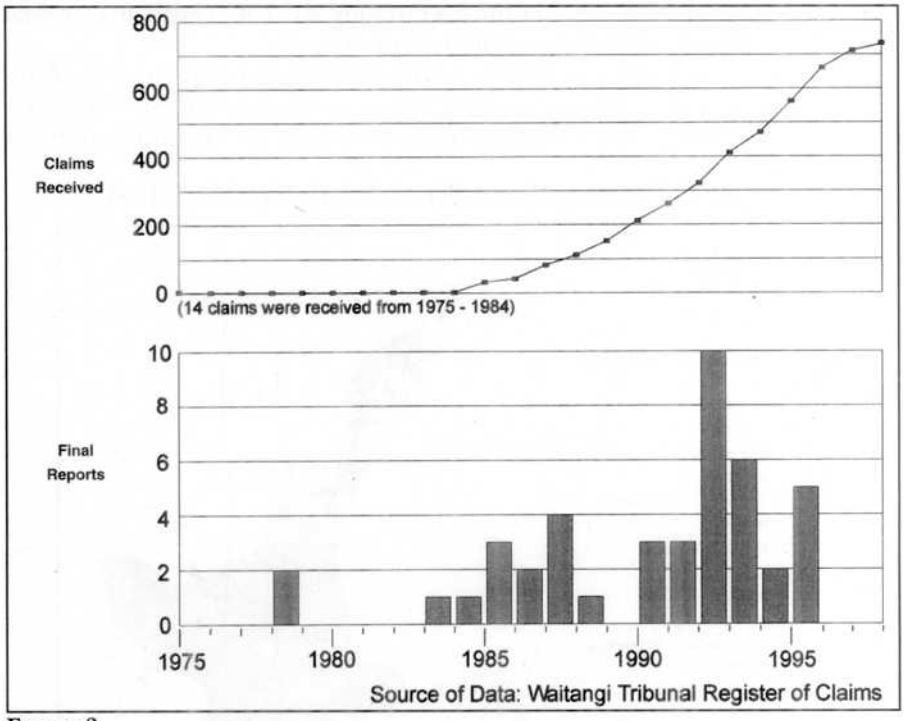

FIGURE 2.

Moreover, continued Maori street protests and land occupations pointed toward a complete repudiation of the Crown's sovereignty unless serious reparations were made. The Treaty of Waitangi Amendment Act was passed on December 3, 1985.[38]

Three years later, on December 13, 1988, again while Labour was in power, the Treaty of Waitangi (State Enterprises) Act protected Maori claims to Crown lands and forests which were being privatized through the State Enterprises Act of 1986. Such lands could be returned to Maori ownership upon the recommendation of the tribunal, this being the only situation in which the tribunal's recommendation is binding on the government.[39] The tribunal's scope has also been limited: the August 13, 1993 Treaty of Waitangi Amendment Act, promoted by the then-ruling National Party, took away from the tribunal the right to recommend that the Crown acquire private land in order to compensate Maori for past losses.[40]

With the expanded purview, the enlarged size (the number of members was again increased to sixteen in 1988, allowing concurrent sessions), and the confirmation that this was indeed a genuine forum for Maori grievances, the number of claims proliferated: to 260 by 1991, 408 by 1993, and 728 by July 1998 (fig. 2). Claims came from all over New Zealand, most numerously from those parts of the North Island, such as Auckland (and Northland), the Volcanic Plateau Country, and the Bay of Plenty, where Maori were or are particularly numerous. The South Island would have produced many more

claims if individual *hapu* had registered their grievances separately, but the claims were agglomerated under the overarching *iwi* (tribe) structure of Ngai Tahu. Some claims covered the entire country (fig. 3).

The types of claims are diverse. As Alan Ward put it, "[t]he well of historic grievances is bottomless, and the claims are hydra-headed."[41] Historic claims include major tribal land losses from Crown and private purchases

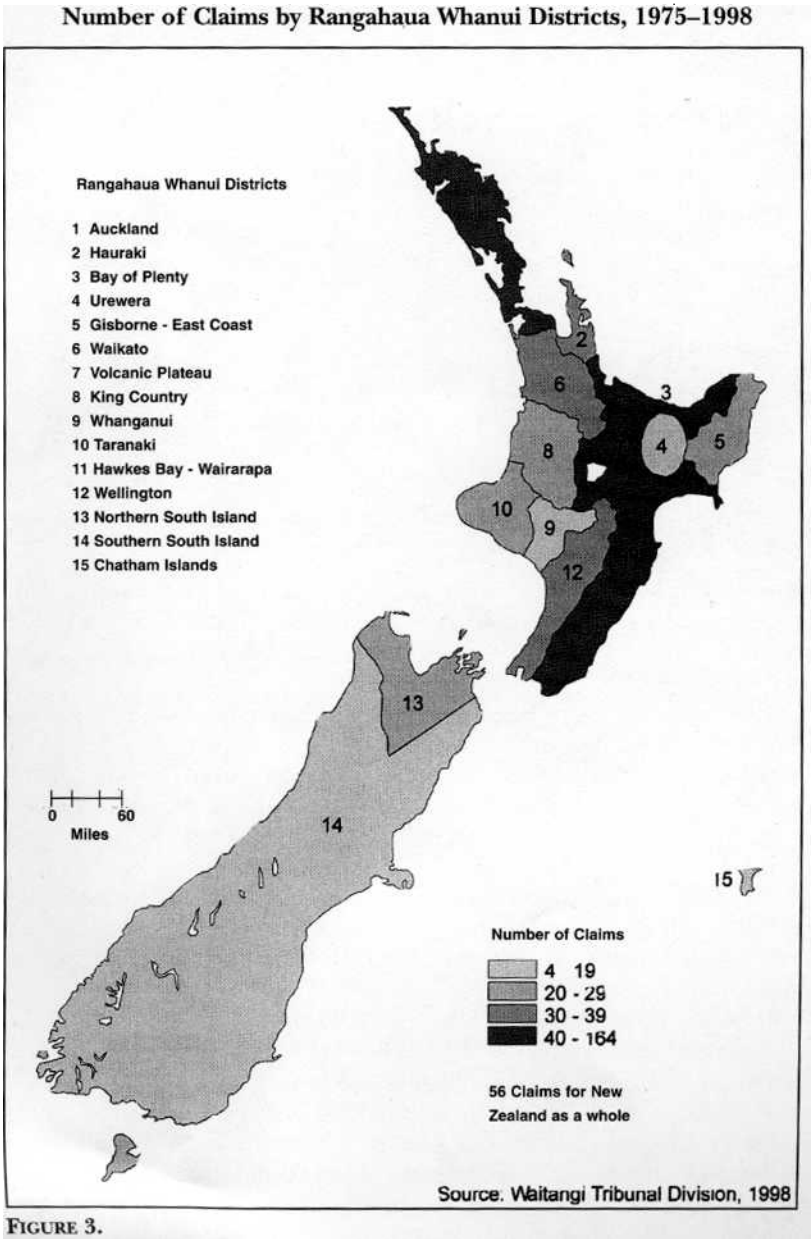

FIGURE 3.

and confiscation, as well as claims lodged by individuals for specific grievances. Contemporary claims include such matters as resource management issues, Maori language rights, land administration, and, to give a specific example, the petition by kiwifruit growers that their right to export their product was compromised by the New Zealand Kiwifruit Marketing Board's monopoly.[42] To do justice to such an array of the claims, the Waitangi Tribunal, by necessity, has to have a flexible process.

PROCESS

The first step in the Waitangi Tribunal's claim process is to verify that the claimant or claimants are indeed Maori (fig. 4). Claims must identify at least one Maori to register the petition on his or her own behalf or on behalf of an *iwi, hapu,* or other group. The claims must specifically refer to a breach of the terms or principles of the Treaty of Waitangi, and they can only be brought against the Crown, its legislation, and its policies. The Waitangi Tribunal has gone out of its way to publicize the procedures for filing a claim, even issuing resource kits for schools.[43]

Having received the claim, the tribunal then checks it against the provisions of the 1975 Treaty of Waitangi Act. If the claim does not indicate a breach of treaty principles and show material, cultural, or spiritual loss to the claimants, it will be referred back to the claimants for revision or rejected as irrelevant. Otherwise it moves forward to registration. All interested parties are then notified and a copy is sent to the Crown Law Office, which serves as the Crown's lawyer. Since 1987, especially, claims have been aggregated (when there is partial overlap of issues), consolidated (when there is complete overlap of issues), and grouped (when discrete claims are heard together), all to rationalize and expedite the process. The Taranaki claim, for example, involving Crown purchases and confiscation of land in the western North Island before and after 1860, brought together twenty-seven separate claims through aggregation and consolidation.[44] In fact, Durie hopes that by connecting major and minor historic claims, the total number might eventually be reduced to about thirty.[45]

At this point in the proceedings, the claimants may go into direct negotiations with the Crown, as occurred in the Tainui claim. A mediator, perhaps a member of the tribunal, might be appointed to reconcile differences. If this "fast track" route is not feasible, or does not work out, the claim moves to the inquiry stage (fig. 4). Because many claims are lodged before substantial research has been done, it is understood that they will be amended as information accumulates. Many are referred back to claimants for additional research. Within the limits of budgetary constraints, the tribunal may commission and fund researchers to work on behalf of claimants, and legal counsel may be appointed and paid for by the tribunal if claimants lack the necessary wherewithal. The publication of the *National Overview Report,* documenting the role of the Crown in Maori dispossession, will be a boon to researchers: in effect much of their work will have already been done.[46] If the investigation reveals that there is no basis for the claims, then they will

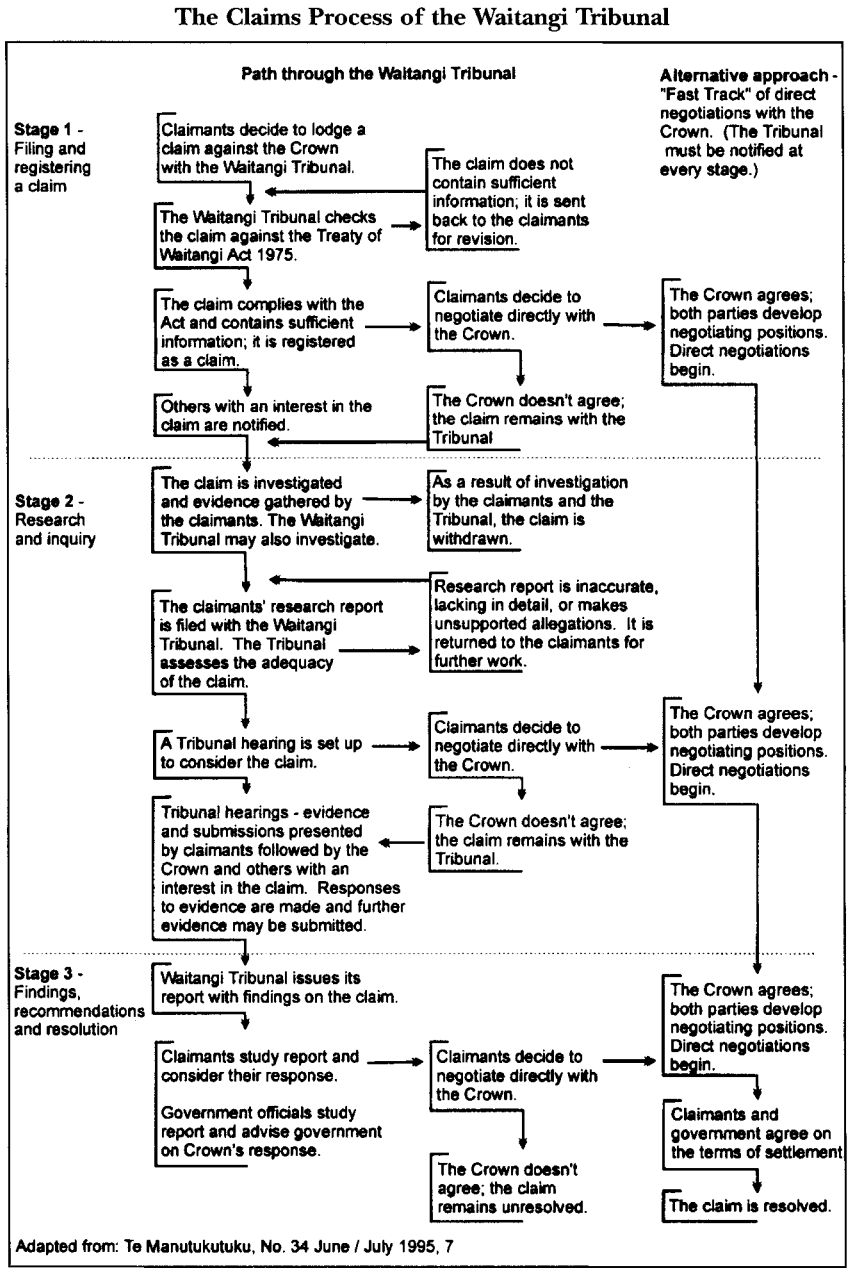

FIGURE 4.

be withdrawn. Claims may be withdrawn for many other reasons, however, as when the Otomatea Trust Board ended its claim in 1995 to a piece of private land whose title was in dispute, as "an act of reconciliation and good will." The trust board concluded that it did not want to penalize the current

owners, who had bought the property in 1965 in good faith, for a dubious sale of the land by missionaries in 1895.[47]

Once the claimant's report is taken into evidence by the tribunal, and if direct negotiation does not occur, the claim advances to a hearing (fig. 4). Again, the "fast track" can bypass this stage and head directly to negotiations with the Crown. If the hearing goes ahead, evidence is presented first by the petitioners, then by the Crown, and finally by any other affected or interested parties (in the Taranaki case, for example, the Federated Mountain Clubs, concerned that wilderness areas would pass out of Crown control and beyond their access, submitted evidence).

The purpose of the hearing is to go beyond the specifics of a given claim, "to expose the whole past" and "seek a firm base for lasting settlements."[48] Although both versions of the 1840 treaty are consulted, particular weight is placed on the Maori-language version and the way its terms were understood by Maori who signed it.[49] Beginning in 1982, hearings have often been held on *marae* and conducted in the Maori language, using a protocol that is acceptable to Maori elders, as well as in the public buildings that serve as the usual context for western law. At the *marae* hearings, sworn testimony is suspended and cross-examination restricted. Such concessions to indigenous convention have been criticized, but as Durie and Orr point out, testimony given on ancestral land, with frequent corrections by kinfolk, is as binding as any statement made with a hand on the Bible.[50] The *marae* hearings also give Maori an opportunity to publicly lament their losses and so to staunch old wounds that continue to bleed into the present.

After the hearings, and generally lengthy deliberations, the tribunal issues a report that proposes remedies for the grievances. In the sense that the report is based on findings of fact and interpretation, the tribunal has the attributes of a court, but because it is limited to only advising the Crown, it is indeed a commission, whose purpose it is to facilitate settlements. The claimants and the Crown then enter into negotiations, and the claim is resolved when the parties agree on the terms of the settlement and the details of implementation.

The Indian Claims Commission, functioning specifically as a court, had no such flexibility and went no distance to meet Native American claimants on their own terms. Early in the process, tribes engaged the services of attorneys, subject to approval by the secretary of the interior. These attorneys were generally drawn from the relatively few firms that had prior experience with Indian litigation in the Court of Claims. Lawyers from the Land Division of the Department of Justice represented the United States in what was, from the onset, an adversarial contest stacked in the government's favor. Ignoring what should have been an ethical dilemma—the United States was both trustee of and defendant against Native Americans—the Department of Justice used its army of staff to get Native Americans' claims dismissed or, failing that, their awards minimized.[51]

The claims process consisted of four main stages, with avenues for appeal to the Court of Claims and Supreme Court and opportunities for compromise settlements (fig. 5). First, the claimants had to prove that they

The Claims Process of the Indian Claims Commission

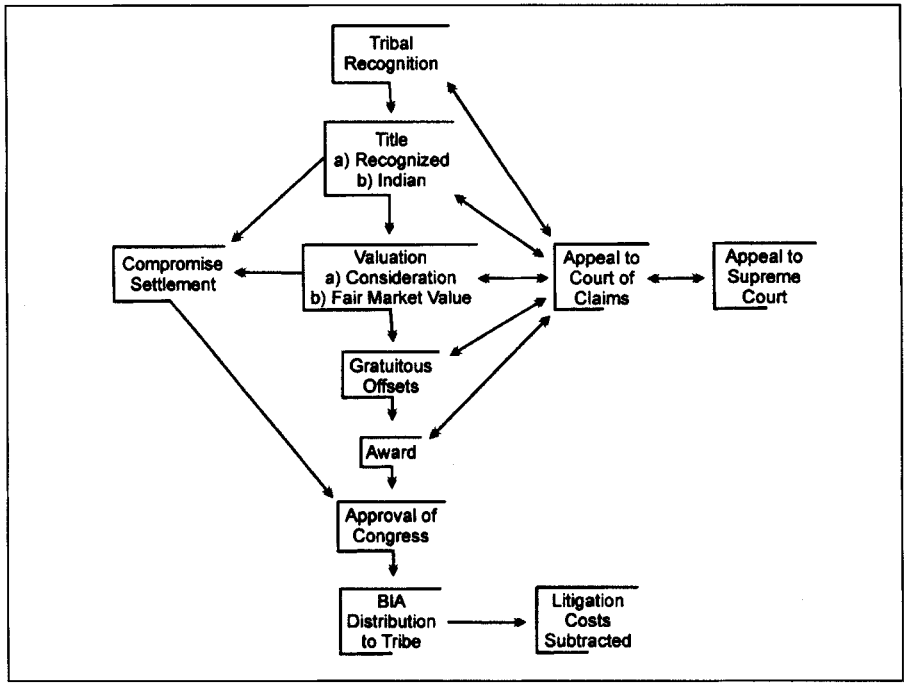

FIGURE 5.

were recognized as a tribe, band, or other "identifiable group." Most were able to do so, having had more dealings than they cared to have with the United States; but some could not, and their grievances were never aired.

With recognition established, the case entered the title stage (fig. 5). There were two ways for Native Americans to prove that they historically owned and occupied a defined territory: recognized title and original title. The first and only unambiguous way to prove title before 1955 was if the United States had recognized the rights of a tribe to a specific tract of land. This often occurred when the United States, having obtained a cession of land from a tribe, then confirmed that the remaining land—a reservation, for example—was theirs. The other more torturous route to proving title was for Native American claimants to establish that they had exclusively owned and occupied a defined territory "since time immemorial." This became a permissible and common means of proving title after the Court of Claims ruled in the *Otoe-Missouria* case that the Indian Claims Commission could not exclude claims based on original title from its jurisdiction.[52] Of course, proving original title was difficult to do: the idea of exclusive ownership, as Rosenthal cleverly points out, "is exclusively a white man's concept."[53] Richard W. Yarborough, who sat on the commission from 1967 to 1978 and was largely responsible for producing the map of "Indian Lands Areas Judicially Established" that accompanies the commission's *Final Report* (and is here used as a base for figures 6 and 7), similarly admitted that Indian title is "completely a creation of our legal system."[54] Flexible, overlapping traditional

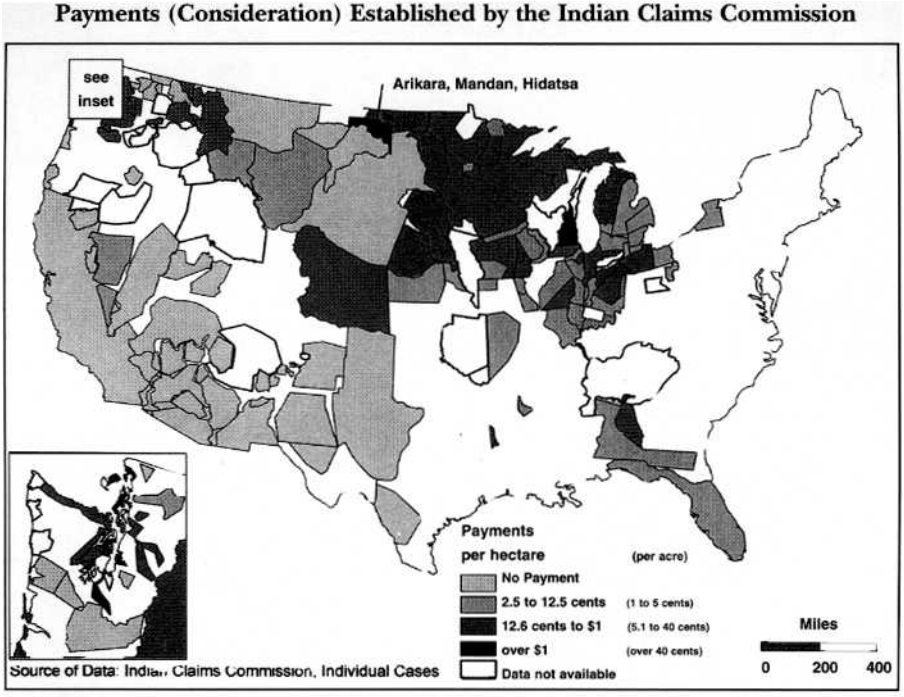

FIGURE 6.

territories were transformed into rigidly bounded properties with defined acreages. The presence of so many straight boundaries on the map, drawn along some compass line, is evidence of the priority given to Western concepts of space and territoriality and the effacement of Native American geographies.

The way the Indian Claims Commission dealt with title complexities was in the customary adversarial manner: claimants and defendants hired expert witnesses, generally anthropologists or historians, who presented their cases, then faced what Nancy O. Lurie described, from experience, as an "inquisition" from the opposing lawyers.[55] The claimant's experts, generally using criteria of Native American occupancy, such as agricultural use, hunting use, and sacred geography, tried to prove title to the largest possible territory; the defendant's experts, emphasizing the condition of exclusivity, tried to prove that no such title existed or, if it did, only to the smallest feasible area. Native American testimony was occasionally heard, but never listened to: oral traditions were given no weight; speeches by elders were dismissed as irrelevant. On the rare occasions that Native Americans were called before the commission, the purpose was to remind the commissioners that they were dealing with real people; they rarely seriously elicited their opinions on land and justice.[56] Following the testimony, the commission made its ruling. In some instances, disputed territorial claims were settled when neighboring claimants agreed to stipulate boundaries, which had nothing to do with historical reality, but much to do with legal expediency.[57]

With title established to a specific acreage, the claim moved to the valuation stage, which had two components (fig. 5). First, the consideration, or what had originally been paid for the land, was assessed; then, in an extraordinary leap of historical imagination, the fair market value, or what an informed purchaser would have paid for the land at the time of taking, was devised. If the consideration was shown to be significantly lower than the fair market value, then an award (fair market value minus consideration and any other offsets) was due. No interest was allowed on awards unless, as in the Lakota's Black Hills cession of 1877, it was proven that the taking had violated the Fifth Amendment (due process).[58] Any increase in the value of the land after the time of taking, such as the discovery of oil, was irrelevant.

Specifying the consideration should not have been difficult to do. The Indian Tribal Claims Branch of the General Accounting Office (after 1965, the General Services Administration) made available detailed reports of all financial transactions between claimants and the United States. Moreover, the Indian Claims Commission Act had created an Investigation Division for the purpose of ascertaining such facts. But because the commission functioned as a court, the Investigation Division languished, and any possibility of an impartial investigation was lost. Chairman Vance did try to reinvigorate the Investigation Division in 1969, to make it the centerpiece of the entire claims process, but again he was opposed by the other commissioners, and Congress provided no funds.[59]

Consequently, once the fiscal information got into the hands of the protagonists, estimates of consideration diverged drastically. In the Pawnee case, for example, the claimants maintained that the United States had paid $840,450 for the massive 1857 cession of north-central Nebraska. The United States countered with a figure of more than $4.6 million. The commission settled on $1.5 million.

Overall, based on 149 dockets that underwent the consideration and fair market stages, the United States paid an average of 23.2 cents per hectare (9.4 cents per acre) for Native American lands. Highest payments were for small acreages (such as the slivers of land around the Puget Sound) or for lands already surrounded by American settlers and sure to generate profits upon immediate resale, such as the late (1891) sale in North Dakota of Mandan-Arikara-Hidatsa lands for $1.09 a hectare, or 44 cents an acre (fig. 6). Overall, the amount paid reflects the more favorable perception of lands with agricultural or other resources such as timber, although any such correlation is obscured by the United States' buying policy, which was to obtain all Native American lands as cheaply as possible. Lowest payments were for arid and semiarid western lands occupied by Native Americans who relied on extensive hunting and gathering for their subsistence. Some groups, such as the California Indians, were illegally dispossessed and received nothing for their lands.[60]

Estimating fair market value was nothing less than arbitrary. The "informed purchaser" was a Euro-American, so the land was evaluated for what it would have been worth as a piece of capital to a settler, not what it meant as a homeland to a Native American: "Values," pronounced the Court of Claims in 1955, "cannot be determined on the basis of berries and wild fruits."[61] Instead, fair market value was based on such criteria as agricultural

potential, presence of resources, proximity to transportation lines, and the price the land sold for when it eventually went on the market (at sub-market prices, it might be added, because the United States subsidized settlement by making land available cheaply). Anthropologists and historians now gave way to land economists and real estate specialists as expert witnesses. Again, claimants' and defendants' figures were poles apart: in that same 1857 Pawnee claim, the claimants valued the land at $17.4 million, the defendant at $2.4 million, and the commission allowed $4.9 million.

For the 149 dockets in which fair market value was calculated, the average evaluation was $2.51 per hectare ($1.02 per acre), or 10.7 times the original compensation. By the very nature of this assessment, lands that had abundant resources (as recognized by Euro-Americans), such as timber, fertile soil, and minerals, were rated highly, as were lands close to the encroaching frontier of settlement, which raised their worth in dollars and cents (fig. 7). The relatively high value ($4.81 a hectare, or $1.95 an acre) placed on Coeur D'Alene lands in northern Idaho and Washington, with their proven reserves of gold and silver at the time of taking, is an example of the former situation, and the late (1892) cession of much of northern North Dakota by the Turtle Mountain Chippewa, valued at $16.05 a hectare, or $6.50 an acre, is an example of the latter. Lands that did not possess the prerequisites for Euro-American agricultural settlement or mineral extraction, such as the Wyoming and Montana plains ceded by the Crow in 1868, were given a low fair market value (99 cents a hectare or 40 cents an acre). Yet as Crow Chief

Fair Market Value Established by the Indian Claims Commission

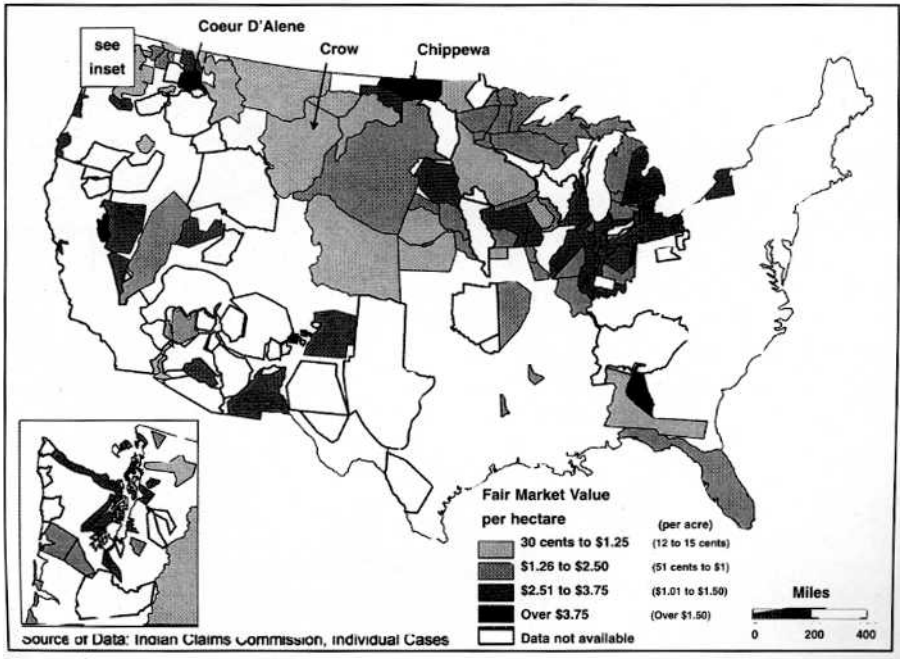

FIGURE 7.

Arapooish explained to a trapper in the 1830s, the Great Spirit had put their homeland in "exactly the right place," with climates and resources for every season.[62] Such assessments carried no weight in the claims process: they were too "subjective,"[63] as if the fictional monetary value was not.

Before an award could be finalized, the commission decided whether any "gratuitous offsets" should be deducted. The Indian Claims Commission Act, recognizing that earlier awards made in the Court of Claims were sometimes entirely negated by such deductions, had reduced the number of grounds for offsets. This was a concession to the spirit of "fair and honorable dealings," which otherwise played a rather small role in the claims process. Overall, according to Russel L. Barsh, about 2 percent of the awards from a sample of 186 dockets was lost to gratuitous offsets.[64]

Following the commission's ruling, the money was appropriated by Congress and placed in the United States Treasury, accruing interest until the method of distribution was approved by the Bureau of Indian Affairs. Legislation governing distribution varied over the years and from case to case, but predominantly the money was distributed on a per capita basis to individuals after tribal rolls had been assembled. Most Native Americans wanted it that way; many lived far from the reservations that would benefit from community investments and all had good reason to question the wisdom of having their funds held in the Treasury and administered by tribal governments. According to one admittedly broad estimate the average per capita payment resulting from claims to the Indian Claims Commission was less than $1,000.[65]

AWARDS

The Indian Claims Commission made 274 awards, involving 342 dockets, by the time it closed its doors in 1978. Two hundred and four dockets were dismissed (fig. 1). Altogether the commission awarded precisely $818,172,606.64, which is close to the figure of $800 million that Felix Cohen estimated the United States had originally paid Native Americans for its land base.[66] The largest award was $35 million, which went to the Kiowa, Comanche, and Arapahoe in a compromise settlement in 1974; the smallest, an accounting award, was the $245.80 given to the Ponca in 1965. Although there were some sizable awards in accounting claims, such as the Jicarilla compromise agreement in 1974 ($7 million), most of the substantial awards were for lands that had been wrongfully taken or taken for an unconscionably low payment.[67] An additional $400 million to $500 million was later awarded in cases resolved in the Court of Claims.[68] All these amounts were before deduction of lawyers' fees and, before 1963, when a public fund was established to defray such costs, expert witness payments.

On closer analysis, it is evident that even large awards diminished to relatively small amounts by the time the money was distributed. Take the case of the Yankton of South Dakota. Their first docket, 332A, involving lands ceded through the 1825 Treaty of Prairie du Chien, resulted in an award of $1,250,000 in 1969. The money sat in the Treasury for almost a year, adding interest, until the commissioner of Indian affairs established the method of

disbursement. The resulting award of $1,611,303.44 was distributed in the following manner: $40,000 for attorneys' fees and expenses; $250,000 for the salaries and expenses of expert witnesses; and $11,000 for the cost of preparing a tribal roll. This left $1,260,680, 25 percent of which was invested for tribal purposes. The remaining $945,510 was distributed on a per capita basis to the 1,200 Yanktons living on the reservation and almost twice as many living elsewhere. Each Yankton received $249 as the reward for enduring more than ten years of litigation.[69]

A similar outcome—small per capita payments, or tribal investments which, even if they were judiciously applied, as they were on the Mescalero Apache Reservation, did little to improve general standards of living—was the lot of most tribes and bands that took their grievances to the Indian Claims Commission. For the Pawnee, the end product of seventeen years of litigation was per capita payments of $3,530 in 1964;[70] and the Omaha's $2.9 million settlement in 1960 for land, trespass, and accounting claims yielded $750 for each tribal member and a residual amount for tribal investment. Shortly after the Omaha received their money, children were proudly riding new bicycles and considerable prestige was earned at giveaways, but the award had no appreciable affect on the crushing poverty of reservation life.[71]

In many instances, awards were a curse rather than a boon. Distributing the money was a particularly divisive issue. Off-reservation members naturally objected to the investment of money in reservation development, and the newly drawn-up tribal rolls sometimes dismissed longtime members from the tribe and therefore excluded them from per capita disbursements. This happened to 200 Omahas in 1961.[72] The divisions went even deeper among the Osage, when in 1971 more than $10 million was allocated to 8,200 members who traced their ancestry to a tribal roll drawn up in 1906 to assign allotments. It was well-known that this was a fraudulent document, padded with "mixed-bloods" and persons with no Osage blood at all and purged of the names of many full-bloods. Despite protests, this was the document that determined the distribution of the award.[73]

Some Native Americans rejected their scripted role of "passive acceptance"[74] and refused to receive their awards. The Western Shoshone have left their $26 million award in the Treasury because they do not agree that they ever ceded any land. The Lakota, having been given a "fair-and-honorable-dealings" award of $17.5 million by the Indian Claims Commission in 1978, then subsequently awarded interest on that amount by the Supreme Court in 1980, have refused to accept the more than $500 million that now swells in their account. Instead they want their sacred land, the Black Hills, returned.[75]

For the most part, however, Native Americans resigned themselves to the disappointments of the outcome of their long-awaited day in court. As poor people they needed the money, no matter how inadequate. Disappointments and inadequacies had always characterized their dealings with the United States, and the Indian Claims Commission marked no break with the past.

The Waitangi Tribunal did make such a break once Durie took the helm. By July 1998 forty-three claims were reported fully or in part, involving a great number of recommendations (fig. 2). Just as the range of claims brought to

the tribunal is far more diverse than that heard by the Indian Claims Commission, so too are the recommendations and eventual implementations. Cash awards, returns of land (though not, so far, large amounts), new environmental regulations, resource protections, and increased Maori decision-making power are among the outcomes. Of course, not all recommendations have favored Maori claimants. In 1995, for example, the tribunal decided that the Maori kiwifruit growers did not have a case against the New Zealand Kiwifruit Marketing Board. The tribunal found that the Crown had consulted sufficiently with Maori kiwifruit growers in 1987 when it set up its export policy and that the right to export kiwifruit was not a *taonga* (treasure), as Maori claimants asserted, protected by Article 2 of the Treaty of Waitangi.[76]

The *Orakei Report*, issued in 1987, was particularly influential in setting a precedent for remedies. The alienation of the Orakei lands of Ngati Whatua began with the founding of Auckland and continued through the Native Land Courts and right up to the 1970s, prompting the occupation of Bastion Point. Dissatisfaction with the agreement that ended the occupation led Ngati Whatua to submit their grievances to the Waitangi Tribunal. In its report, the tribunal acknowledged that the Crown had breached treaty principles in not protecting the tribe's property and welfare and recommended the return of fifty hectares (124 acres), including Bastion Point, and the provision of a NZ$3 million development fund to be administered by the Ngati Whatua of Orakei Maori Trust Board. The recommendations were implemented in the Orakei Act of 1991. The settlement established the principle that awards, while not amounting to full legal restitution (fair market value and compound interest), should secure a tribe's economic base and, therefore, restore its *rangatiratanga*.[77]

Included in the implementations are the abandonment of the ministry of work's plan to discharge effluent from the Rotorua waste treatment plant into the Kaituna River and ultimately the Bay of Plenty, which would have damaged Maori fishing grounds and desecrated sacred sites; the recognition, in the Maori Language Act of 1987, of Maori as an official language and the confirmation that it can be used in court proceedings; and an official apology by the Crown and redress in the form of lands and money to the value of NZ$170 million to the Tainui for unjust land confiscation in the Waikato district in 1863 and 1864. As a result of the latter settlement, the title to the campus of the University of Waikato in Hamilton was transferred to the Tainui, and the Crown now provides the funds so that the university can pay the rent. Tainui have put their funds under a central management which has invested them through subsidiaries, nurturing their capital while using the dividends to subsidize educational and other community needs.[78]

Some implementations have (as in the United States) proved contentious, not only because of conflicts in negotiations between Maori and the Crown, but also because of disputes among Maori claimants. In 1999, both the Muriwhenua Land and Taranaki implementations were being held up because of internal disputes between *iwi*. Also, as in the United States, there has been pressure for per capita disbursements rather than investments through *iwi* trust boards or other representative bodies. But this has been resisted by the Waitangi Tribunal, whose director recently pointed out that

per capita payments would be small and would buy no more than a "refrigerator," whereas communal investment is for the generations.

Perhaps the most significant implementation to date, because of the vast areas involved, the great variety of grievances, and the amount of the award, was the Ngai Tahu settlement in 1997. This was reputedly the "longest running indigenous land claim in the world."[79] Ngai Tahu first protested in 1848 that their lands and livelihoods were being unjustly taken from them by the Crown. Official government inquiries began in 1872 and continued intermittently until 1920. Pursuant to the 1920 Native Land Claims Commission findings, Ngai Tahu were eventually (twenty-five years later) awarded an annuity payment, and the matter was considered closed by the Crown.[80]

The matter was by no means closed. On August 26, 1986, Ngai Tahu filed their claim with the Waitangi Tribunal. They alleged that in taking almost all the South Island for such a meager payment and leaving them with a fragmented land base of only 15,180 hectares (37,492 acres), the Crown had committed seventy-three acts that violated the articles and principles of the Treaty of Waitangi. In the course of the hearings, which lasted for more than two years, over 200 associated claims were identified. Under the direction of Paul Temm, who was appointed by the tribunal as counsel for Ngai Tahu, the array of claims was condensed into nine, called the Nine Tall Trees of Ngai Tahu. More specific claims were referred to as Branches of Ngai Tahu and, perhaps stretching the metaphor, the mass of even smaller claims was identified as undergrowth.[81]

The grievances involved, amongst other matters, disputes over the boundaries of the land cessions (fig. 8); inadequate compensation for those cessions; failure to provide adequate reserves after the cessions were made and exploitative land-leasing arrangements on some of those reserves; failure to follow through with promised schools and hospitals; and denial of access to *mahinga kai* (traditional food supplies) such as fisheries and to *taonga* such as *pounamu* (nephrite jade). In general, the main issue was not the land, or even the woeful compensation, but the contention that the dispossession had left Ngai Tahu without the means to compete in the new economic order that had been imposed on them.[82]

By the time the hearings closed on October 10, 1989, the tribunal had convened on seven different *marae*, as well as in schools, university halls, and a rugby clubhouse. On February 1, 1991, the tribunal submitted its lengthy report to the minister of Maori affairs, proposing remedies for Crown breaches of the Treaty of Waitangi. Their recommendations, and the entire report, they hoped, would "establish a strong goodwill base for negotiations to succeed."[83]

On November 21, 1997, Prime Minister John Bolger signed the agreement that settled the Ngai Tahu claim. Ninety-three percent of the 30,000 Ngai Tahu approved the settlement. Ngai Tahu accepted a cash award of NZ$170 million, first right of refusal to buy surplus crown lands, title to the Mutton Bird Islands (fig. 8), rights to thirty-two customary fishing grounds, recognition of seventy-eight Maori place names, reservation of seventy-two waterside camps for food gathering, and a Crown apology. Sir Tipene O'Regan, chief negotiator for Ngai Tahu, probably captured the feelings of

Ngai Tahu Land Cessions 1848–1864 and Disputed Areas

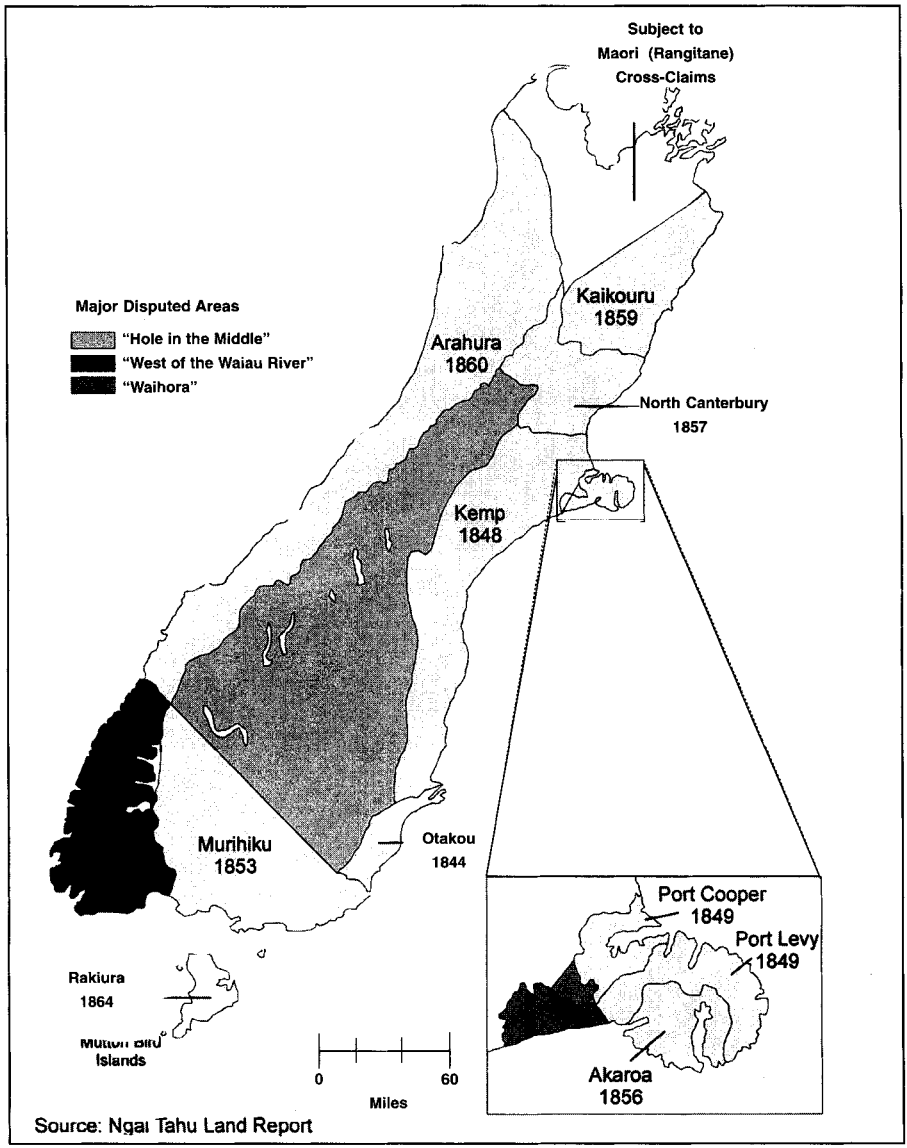

FIGURE 8.

most of his people when he concluded that "[this] settlement is not justice for our losses, but it provides the basis on which we can grow a future."[84]

CONCLUSION

Sir Tipene O'Regan is right, of course: there can be no justice for indigenous peoples who lost their lands and livelihoods because Europeans blithely

asserted a superior sovereignty, assumed a higher civilization, and pushed them aside. That history cannot be rolled back; the Waitangi Tribunal has repeatedly made the point that past injustices cannot be rectified by perpetrating new ones.[85] Barkan, more generally, makes the same point: only partial justice is possible in restitution, and to expect a complete reversal of the past is "utopian."[86] What can be done, however, is to reduce the significance of past injustices by making reparations in the present.[87] To that end, the Waitangi Tribunal has made a much more genuine effort than did the Indian Claims Commission.

Writing in 1945 in anticipation of the passage of the Indian Claims Commission Act, Cohen specified the essentials of a just process: the inclusion of all claims, moral as well as legal; broad interpretation of the law; and sufficient appropriations to ensure that claimants, even those too poor to hire their own lawyers, could get their grievances settled within a reasonable amount of time.[88] None of these was achieved because, despite the good intentions of Cohen and other supporters of Indian rights, the Indian Claims Commission was mainly created for a political purpose—to expedite termination—and its composition, methods, and results prioritized expediency rather than justice. The strict adherence to standard legal parameters, the virtual absence of Native American participation, the refusal to hold sessions on reservations, the rigid adversarial procedure, the neglect of the Investigation Division, the failure to apologize, the prohibition on returning land, and the unsatisfactory monetary judgments all add up to a precedent that other nations investigating indigenous claims should seek to avoid, unless they simply want to salve their consciences. Relating this back to Barkan's formulation of the new moral politics, there was no real atonement for historical injustices in the workings of the Indian Claims Commission, no "construction of a shared past," no balancing of the relationship between the colonizer and the colonized.[89]

Would a more contemporary commission, situated more completely in Barkan's putative age of moral politics, have taken its responsibilities to redress past injustices more seriously? Possibly, but contingent upon when it was established. Federal Indian law, as Wilkinson argues, is a "time-warped field," with the substance and tone of the laws reflecting the swings in the larger society's attitudes toward and plans for Native Americans.[90] A more enlightened commission might have emerged from the late 1960s and the 1970s, a period of resurgent tribalism that saw the restoration of terminated tribes, return of land through acts of Congress to the Taos Pueblo, congressional approval of funds for the Maine Indians so that they could buy land, and the (albeit flawed) Alaska Native Claims Settlement Act. But the climate for Native Americans turned cold again in the 1980s when James Watt, as secretary of the interior, tried to revive termination of federal responsibility. A conservative Supreme Court, intent on retracting the boundaries of Native American sovereignty on reservations, has kept the climate cold through the present.[91] Some Native American claims are ongoing, and there have been successful negotiated settlements in the 1990s (most recently between the National Park Service and the Timbisha in Death Valley National Park) which

may be seen as a degree of legislative balance to the judicial obduracy. As Sutton points out, however, the proportion of land returned to that which was taken is "minuscule," and the number of claims are few compared to the national enquiry that was undertaken by the Indian Claims Commission.[92] A landbase of about 100 million acres, which Churchill sees a minimal foundation for Native American security, remains a pipe dream.[93] Furthermore, there is no indication from their other dealings with Native Americans that any President after Nixon would have appointed commissioners, including Native American commissioners, who would have taken a broader, more sympathetic view of Indian claims. Antipathy to "big government" by the public and the parsimony of their representatives would have militated against more substantial awards. Perhaps the continued refusal to hear Native Americans and to incorporate them into legal discourse is simply because, with such a small share of the national population, they have little political sway; but more likely it is a deeper malady, an expression of a pervasive American racism and a conviction that no group, even the original inhabitants, deserves special rights. In such a hostile political culture not only is the redressing of past injustices unlikely, but the perpetration of new ones is also probable.

By contrast, the Waitangi Tribunal has operated in what is, for Maori, an ameliorating social context, and has been an important agent in the loosening of Pakeha hegemony. After Durie took over in 1982 and its authority was made retroactive in 1985, the tribunal broadened the scope and relaxed the strictures of orthodox New Zealand law.[94] As a commission, with Maori well-represented, the tribunal has produced more complete reconstructions of the contexts of claims than did the Indian Claims Commission with its rigid court structure. A close examination of the two types of reports reveals a startling contrast: the one, bipolar versions of history followed by an arbitrary resolution by the Indian Claims Commission; the other, multifaceted accounts with many voices represented and reasoned arguments leading to considered recommendations. Moreover, Maori values and perspectives run through the tribunal's reports, unlike the abstractions of non-Native expert witnesses that guided the Indian Claims Commission. The willingness to organize hearings on *marae*, to allow Maori to bear witness, and to subsidize Maori counsel are all evidence of good intent, and the great variety of proposed remedies, built on developing principles but catered to each case, is a much more satisfactory resolution than the payoff proffered by the Indian Claims Commission.

What the Waitangi Tribunal mainly lacks as a model is ensured permanence and guaranteed authority. Good faith will be tested within the next few years when the current ceiling on the total of settlement payments (NZ$1 billion) is reached and many claims are still outstanding.[95] There is still considerable opposition to the tribunal and to exposing history among politicians and the public alike. A recent poll concluded by the *New Zealand Herald* found that 54 percent of respondents thought the government was spending "too much" on settlements, while only 6 percent thought the compensation was "too little."[96] It would only take an unsympathetic government to refuse to implement the tribunal's recommendations or, indeed, to dissolve it completely. Moreover, it awaits to be seen whether the claims settlements will be an end in themselves, or whether

Crown-Maori relations have been permanently transformed and a dialogue set in motion that will carry into the post-claims world.[97] If not, radical Maori scholars who see the tribunal at best as only a temporary aberration from an otherwise unerring colonization would be proven correct.[98] But the process has likely gone too far for this to easily happen: the Treaty of Waitangi has been revitalized as an agreement between partners, and the reparations made through the tribunal have gone a long way in confirming that New Zealand has indeed embraced the principles of the new moral politics.

ACKNOWLEDGMENTS

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NOTES

1. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York and London: W. W. Norton and Company, 2000).

2. The list of such countries is vast and the nature and contexts of the claims are so diverse that the Indian Claims Commission and the Waitangi Tribunal precedents can offer only lessons, not models to be adopted wholesale. Such claims processes include warfare in Chiapas, Mexico, and in many other indigenous rights movements throughout Latin America; compulsory confiscation (without compensation, if necessary) of white-owned commercial farms in order to resettle the majority indigenous people in Zimbabwe; direct negotiations between federal and provincial agencies and First Nations in Canada, involving specific and comprehensive claims; and in Australia recognition of Aboriginal lands traditionally held under native title, and compensation for extinguishment of such title through the National Native Title Tribunal. Of course, lessons can also be learned at home: the United States has yet to engage the question of Native Hawaiian claims, even though they have compelling reasons for redress.

3. See, for example, Augie Fleras and Jean L. Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford

University Press, 1992); Paul Havemann, *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999); and Barkan, *The Guilt of Nations*, 159–182.

4. Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), 4–5.

5. Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

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51. Lieder and Page, *Wild Justice*, 93–94.

52. *Otoe-Missouria Tribe of Indians v. United States* 1955, 131 C.C. 593.

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57. David J. Wishart, "The Pawnee Claims Case, 1947–64," in *Irredeemable America*,

ed. Sutton, 176–178.

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90. Wilkinson, *American Indians, Time, and the Law*, 13.

91. David E. Wilkins, *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1987). The erosion of Native American sovereignty on their own reservations is particularly blatant. For example, in its 1989 decision *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* (492 US 408), the Supreme Court ruled that the tribe had authority to zone only that part of their reservation that was predominantly Indian in population, not the mixed areas. And in 1998, in *State of South Dakota v. Yankton Sioux Tribe* (118 US 789), the Court diminished the size of the Yankton Reservation by 40 percent, ruling that the "surplus lands" created by allotment and sold to Euro-Americans in the 1890s were thereby detached from the original reservation. The policy of allotment—a policy repudiated in 1934—is still being used to impair Native American sovereignty. This is not an atmosphere conducive to a more postcolonial Indian Claims Commission.

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94. P. G. McHugh, "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches," in *Justice, Ethnics and New Zealand Society*, ed. Oddie and Perrett, 91–128.

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