

Indigenous rights, coalitional outcomes, and games of economic distribution

by Roger J. Bowden¹

Abstract

Political pressure from the indigenous rights movement can be interpreted as a game of economic distribution between a vocal and well organised minority and a more passive majority. The process is modelled as a repeated virtual bargaining game, mediated via the government, and spanning a number of legal or legislative sessions. Cumulative outcomes can progressively move the minority to a position of dominant economic control of a public good, though in general not to the point of total exclusion. A key objective for the minority is to change the basic frame of reference in the first play of the game. Once this is done, successive plays can progressively relax the criteria for the award of further shares of the subject resource. Key determinants of the outcome are coalitional imperatives as in MMP voting, myopia, and media capture.

JEL numbers: D72, H11, P14.

Key words: Public choice; public goods; property rights; customary title; Nash bargaining equilibrium; repeated games; MMP voting; rent seeking.

¹ Kiwicap Research Ltd, 11 Waiteata Road, Kelburn, Wellington, New Zealand; phone + 64 4 472 4984, fax 4983; emails roger.bowden@kiwicap.co.nz; roger.bowden@uni-ulm.de .

I Introduction

Debates about the nature and entitlement to indigenous rights have received renewed prominence in recent years, starting with the 2007 UN Declaration on the Rights of Indigenous Peoples, and more recent accessions to the Convention by former standouts Australia (2009) and New Zealand (2010), leaving the US and Canada as the only former OECD colonials not to ratify. Although cast in terms of human rights and anti-discrimination, the Convention has become another pressure point for a parallel and much older dispute concerning the alleged dispossession of, and compensation for, economic resources. The focus here has been on issues of ownership, in the sense of the existence of customary title as distinct from customary use rights, which are less in dispute. Originally (and in some measure still) concerned with the beneficial ownership of land, the debate has recently taken a maritime twist, and involves the privatisation of what was formerly a public good. Thus legislation has been introduced in New Zealand that will distribute effective ownership (dominium) over tracts of the foreshore and seabed to indigenous Maori claimants, extending out to the territorial limits. The recent history of this particular application is outlined in the Appendix to this paper, to which it forms a useful background, but the legislation and associated common law seems likely to establish a precedent for application to countries such as Australia and Canada, as extensions to their own body of indigenous property rights.

Customary title in general usually entails beneficial ownership of significant economic resources. An award of customary marine title, either by the courts or governmental Orders in Council, will endow economic ownership of valuable seabed resources such as mining, bottom fishing, tourism, and access royalties to the proceeds of oil and gas reserves, even where the latter are nationalised. It is the economic aspect that is the focus of the present paper, seen as an application of the general theory of public choice as developed by Buchanan and Tullock (1962), Olson (1971) and others; for surveys see e.g. Mueller (2003), Shughart (2008), Tullock *et al* (2002), and Tullock (2009). More specifically, authors such as Stigler (1971), Kruger (1974), Becker (1985), Tullock (1989), Shughart and Tollison (1998), Peltzman (1998) and Bishin (2009) have drawn attention to the ability of minority special interest groups, who may be better focussed and organised, to extract economic rent at the expense of the more diffuse majority, an outcome that has become known as the ‘tyranny of the minority’.

From this point of view, the indigenous rights movement amounts to a game of economic distribution between a vocal and well organised minority and a more passive majority. The specific context of the present paper is the conversion of a former public space into a private economic resource. The process is modelled as a repeated game, spanning a number of legal and/or legislative sessions. The cumulative outcomes progressively move the minority to a position of dominant economic control, though in general not to the point of total exclusion. A key objective for the minority is to change the basic frame of reference in the first play of the game. Once this is done, successive plays can progressively relax the criteria for the award of further shares of the subject resource.

Mixed member proportional (MMP) and similar voting systems predispose to such outcomes wherever the minority group effectively holds the balance of parliamentary power. Agency problems then arise between the majority party that forms the government, and the constituency that voted them in. The discipline of voter disapproval is removed where the official opposition party itself realises that it may need the support of the minority in the next election, or where the majority voters and the media are susceptible to clever political spin or diversion tactics.

The game theoretic framework employed to model these effects may be called a directed virtual Nash bargaining game. The outcome at each play is a marginal additional share of the resource to be awarded to the minority. This is obtained as the asymmetric Nash point where the bargaining power weights reflect the governing party's own marginal utilities as functions of the utility gains and losses of the majority and minority, respectively. If the governing party needs to ensure that the minority group obtains a given threshold marginal share to keep them in coalition, it will determine the outcome as a virtual Nash point with the bargaining power just sufficient for the purpose. At the first play of the game, this may be quite moderate, for the minority is more concerned to establish the ongoing frame of reference for future plays. It may therefore be quite easy for the government to 'sell' the outcome to its own constituency, to a degree that depends on the latter's myopia as to future outcomes. The latter effect can itself be modelled in terms of the effect of existing ownership shares on the willingness to surrender further increments.

The primary thrust of the development is conceptual in nature. However, an Appendix surveys the history of claims to the New Zealand foreshore and seabed, aligned

to draw the parallels with the game of economic redistribution as modelled in the body of the paper.

The scheme of the development is as follows. Section II sets up the basic structure as a three player game with the governing party as dominant player, setting the parameters for a directed two player Nash bargaining outcome. Section III uses the first period outcome as the starting point for successive future plays, with the object of determining whether an interior stationary share is ultimately obtained. The implicit assumption to this point has been that one of the parties is more myopic than the other. Section IV considers what happens to when the majority group is less myopic as to the likely result of repeated plays. Section V contains some concluding remarks, while an Appendix contains a case study for illustrative purposes.

II The allocation model: one period

The model is concerned with the distribution or beneficial share of some valuable resource that is currently publicly owned, in the sense that free access and use is available to all members of the public. Conflict has arisen because one group of voters claims beneficial ownership of the entire resource, based on moral rights or historical claims, rather than existing formalised legal ownership. In the context of indigenous rights, the resource is claimed to be subject to indigenous title, a claim not accepted by the other group of voters, who are numerically in the majority. However the latter realise that if the minority is not pacified, there is the prospect of civil unrest or moral pressure from bodies such as the UN if some sort of accommodation is not offered.

The ruling regime is a coalition of two parties, a major one (G; the ‘governing party’ or just ‘the government’) and a minor one (M) that holds the balance of power between the government and the official opposition. The minor party has interests aligned with the group of voters (m) claiming beneficial ownership of the subject resource. The major party has been elected by the larger group (p) of voters, who dispute the ownership claims of group m .

The object of interest will be taken as the proportion of the resource to be allocated to the voter groups m and p . At the outset, group p is endowed by precedent with a proportion² y_{p0} of the resource, while those of group m have $y_{m0} = 1 - y_{p0}$. The

² These could be considered as net rather than gross. The latter would apply where the resource is initially shared by both groups (m and p) as the general public. A net concept might then

outcome allocations will be y_{p1}, y_{m1} . To facilitate later discussion of multi-period horizons, it will be convenient to set x as the change in holdings in favour of group m , such that

$$(1a) \quad y_{p1} = (1-x)y_{p0}; 0 \leq x \leq 1,$$

$$(1b) \quad y_{m1} = y_{m0} + xy_{p0} = y_{m0} + (1-y_{m0})x.$$

The asymmetry implicit in (1a,b) is carried throughout: because of its coalitional power via party M, and in the interests of social stability, group m can never lose and its gains are at the expense of the more diffuse group p .

One could imagine a conceptual experiment in which voter groups p and m , left to their own devices, could get together and bargain their way to a solution x . The Nash (1950) cooperative equilibrium provides the classic³ bargaining solution. In such terms, there will be a disagreement point, or threat point, that represents the best outcome for each group if a bargaining solution is not reached, often portrayed as the maximin solution to the non cooperative game. This will be denoted by $(\bar{y}_{p1}, \bar{y}_{m1})$ and their corresponding utility values. The threat points of the two groups need not be mutually consistent, i.e. it is not necessary to have $\bar{y}_{p1} + \bar{y}_{m1} = 1$.

For the purposes of the present section, the threat point is taken to be $(\bar{y}_{p1} = 0, \bar{y}_{m1} = y_{m0})$: group p members think they could lose everything, while group m think their gains could be zero. An alternative is that the default outcome \tilde{y}_{p1} , say, cannot be perfectly predicted in advance. The allocated default point represents an expected utility formed on the basis of a probability distribution: thus for group p $\bar{u}_{p1} = E[u_p(\tilde{y}_{p1})]$ and \bar{y}_{p1} is a certainty equivalent such that $E[u_p(\tilde{y}_{p1})] = u_p(\bar{y}_{p1}) = \bar{u}_{p1}$. This will be useful in subsequent discussion on myopia (section IV).

Voter groups p and m possess social utility functions $u_p(y_{p1}; y_{p0})$, $u_m(y_{m1}; y_{m0})$ in which the psychological values of outcomes are conditioned by

correspond to initial shares in proportion to their relative group population numbers, or alternatively equal shares as a public good.

³ It is not the only such. Kalai & Smorodinski (1975) suggest a solution in terms of an ideal point for each party, and the closest feasible approach to this as constrained by the bargaining frontier. Kalai (1977) has an alternative egalitarian solution, which in the present context describes the initial shares but not the allocation outcomes.

existing resource shares. The utility functions are concave (diminishing marginal utility) in outcomes (y_{p1}, y_{m1}) ('primary arguments') respectively. Incremental utilities \tilde{u} relative to the disagreement point are given by

$$(2) \quad \tilde{u}_{p1} = u_p(y_{p1}; y_{p0}) - u_p(\bar{y}_{p1}; y_{p0}); \quad \tilde{u}_{m1} = u_m(y_{m1}; y_{m0}) - u_m(\bar{y}_{m1}; y_{m0}).$$

The object to be bargained is the incremental share x as in expressions (1a,b).

The classic Nash (1950) bargaining solution is obtained as:

$$(3) \quad x^* = \arg \max[\gamma \ln \tilde{u}_{m1}(x) + (1 - \gamma) \ln \tilde{u}_{p1}(x)]; \quad 0 < \gamma < 1.$$

If the parameter $\gamma \neq \frac{1}{2}$, criterion (3) is the asymmetric solution, where the original Nash asymmetry condition (invariance over reversal of parties) does not hold. The usual interpretation is that γ represents relative bargaining power, in this case of group m relative to group p .

If the governing party G has a comfortable majority, one could normally expect that the relative bargaining powers in the maximand (3) will be correspondingly loaded on favour of their constituency group p , and the concessional share x would be small or even token in nature.

On the other hand, agency problems arise where the majority party G is not assured of parliamentary supply. To most, if not all politicians, achieving or remaining in power is a personal priority. In such a situation, party G will have to accommodate their coalition partners M with concessions. The ministers of party G are prepared to weather disapproval of their own rank and file voters if there remains a reasonable prospect of retaining power at the next election. The latter will limit their ability to accommodate the demands of group m unless either palliative action can be taken or circumstances fall out, or can be induced, that will facilitate retaining power.

Palliative action might include public relations spin, withholding information, disinformation campaigns, and token public consultation on the basis of pre-programmed agendas or insufficient time for responses. Media capture⁴ is also important, taking advantage of residual public guilt, misplaced where the resource was a public good to begin with.

⁴ Of course, this does not limit the channels for media capture. A common motive is the desire of mainstream political columnists to preserve channels of political access. For other mechanisms see Besley and Prat (2002), Petrova (2008).

An example of a facilitating circumstance is where the official opposition come to realise that they too may need the support of group m , if the next election results in no party achieving a workable absolute majority. If this is the case, it strengthens the hand of the governing party G by removing the dimension of voter choice, come the next election. Group p electors, in other words, have lost the ability to discipline the government they have voted into power. Section V discusses the implied agency failure, and the Appendix case study incorporates an instance.

To model how this might strengthen bargaining power in favour of minority group m , imagine that the governing party G is itself a third, dominant player, with a utility function of the general form $U_g(\ln \tilde{u}_m, \ln \tilde{u}_p)$. Under this interpretation, the parameters $\gamma, 1-\gamma$ in expression (3) would reflect the marginal utilities for G attached to utility outcomes for groups m and p , respectively. In turn, these reflect party G 's stake in current and future survival as a government, as earlier outlined. The outcome is that the governing party G calls the shots, formalised in the model by setting the power parameter γ just sufficient to ensure coalitional survival. This is a model of virtual bargaining mediated via the government as itself an interested party.

Figures 1a,b illustrate how the solution (E) is obtained, in utility⁵ space (as $\ln \tilde{u}$) and incremental outcome space (x) (the dotted curves A', C' of figure 1b can be ignored at this point). The bargaining power parameter has been set at $\gamma = 0.25$, such that E and its share outcome x_E is just enough to ensure coalitional survival. The solution depicted is $x_E \approx 0.225$ or a 22.5% transfer from p to m , with relatively minor % loss in p utility and a significant gain for m utility. If group m 's bargaining power increases, the slope of the line in figure 1a becomes more negative, leading to a greater utility gain.

The one period solution may not be stable, for an obvious strategy for group m is to agree by stages. Acknowledgement by party G in period 1 bargaining, and its embodiment in the form of period 1 gains for group m , has established a frame of reference which admits of further gains by repeating the game wherever group m finds itself in the position of swing partner in a coalition. Ensuing discussion explores possible outcomes in a multi-period context.

⁵ The specifications used are $\ln \tilde{u}_m = 2(1 - \exp(-\lambda x))$ and $\ln \tilde{u}_p = 2(1 - \exp(-\lambda(1-x)))$ with $\lambda=2$.

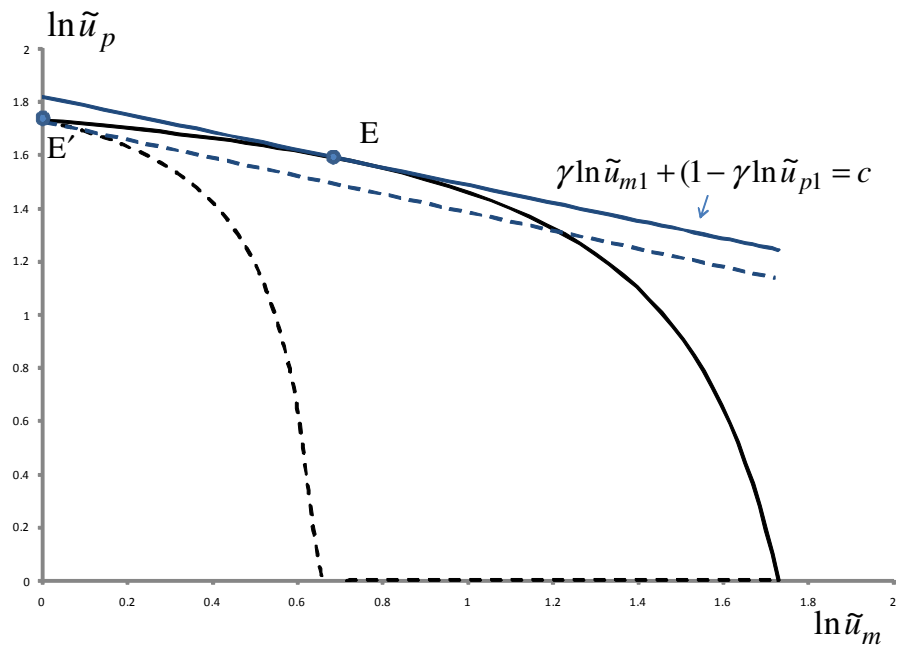


Figure 1a: solution in utility space

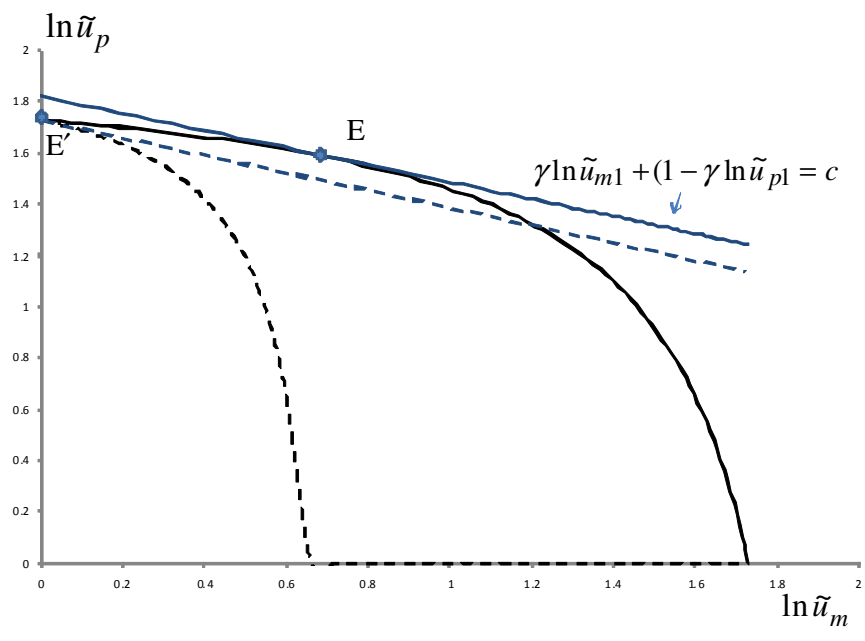


Figure 1b: Solution in incremental share space

III Repeated bargaining

Three years later, there is a new election, but once again party M has the balance of power. Having moved part way towards their ambitions for resource control, its constituency group m will push for a reprise of the bargaining game. It is assumed that the period 1 bargaining outcome has contained no binding commitment as to a full and final settlement; or if it has, it is now in dispute as to the terms and understandings that were agreed to at the time. The myopia assumption on the part of group p is provisionally maintained in this section.

For any subsequent repeats of the game, the new resource shares are determined recursively by

$$(4a) \quad y_{pt} = (1 - x_t)y_{pt-1}; 0 \leq x_t \leq 1,$$

$$(4b) \quad y_{mt} = y_{mt-1} + x_t y_{pt-1} = y_{mt-1} + (1 - y_{mt-1})x_t; t = 2, 3, \dots$$

The issue arises as to whether repeated bargaining would converge to any solution other than full control by group m (i.e. $y_{mt} \rightarrow 1$).

3.1 Quasi homogeneous preferences

To see what happens, it is convenient to start by considering the case in which group p 's utility preferences are mathematically homogenous: for any $\lambda > 0$,

$$(5) \quad u_p(\lambda y_{pt}; \lambda y_{pt-1}) = \lambda^{\theta_p} u_p(y_{pt}; y_{pt-1}); \theta_p > 0.$$

What is important is only the ratio of outcomes (y_{pt}) to existing shares (y_{pt-1}). In terms of incremental shares x_t bargained for period t , equations (4a) and (5) imply that

$$(6a) \quad \tilde{u}_p(x_t) = y_{pt-1}^{\theta_p} [u_p(1 - x_t; 1) - u_p(0; 1)].$$

On the other hand, group m 's preferences cannot be perfectly homogenous. The relationship for its incremental share becomes

$$(6b) \quad \tilde{u}_m(x_t) = y_{mt-1}^{\theta_m} [u_m(1 + \frac{1 - y_{mt-1}}{y_{mt-1}} x_t; 1) - u_m(1; 1)]; y_{mt-1} \neq 0,$$

a 'quasi homogenous' relationship.

In forming the asymmetric Nash maximand for period t corresponding to (3), the scale factors $y_{pt-1}^{\theta_p}$, $y_{mt-1}^{\theta_m}$ have the effect of additive constants, which disappear in the maximisation. The solution is given by

$$(7) \quad x_t = \arg \max \left\{ \gamma \ln \left[u_m \left(1 + \frac{1 - y_{mt-1}}{y_{mt-1}} x_t; 1 \right) - u_m(1; 1) \right] + (1 - \gamma) \ln \left[u_p(1 - x_t; 1) - u_p(0; 1) \right] \right\}$$

The homogeneity assumption implies that in bargaining for period t incremental share and hence y_{pt} , group p will have no regard to its current absolute state y_{pt-1} . Under the full myopia assumption, group p is presumed to reset its preferences at every repeat of the game with no memory as to what has gone before.

The same is not true however for group m . Their marginal utility in period t will necessarily be conditioned by what has been achieved thus far, as y_{mt-1} . The effect of this can be seen from expression (7). As $y_{mt-1} \rightarrow 1$ the marginal utility of any given increment x_t tends to zero. The dotted curves in figure 1b illustrate in x space. As A translates to A' over time, the incremental proportion solution x^* becomes smaller. For any given bargaining power ratio γ , a point in time t^* is reached at which the boundary solution applies and $x_{t^*} = 0$. Curve C' of figure 1b depicts the outcome; the bargaining outcome has moved from E to E' . The stationary shares are given by

$$y_{pt^*} = y_{p0} \prod_{t=1}^{t^*} (1 - x_t); \quad y_{mt^*} = 1 - y_{pt^*}.$$

If the government felt compelled to create a long term outcome with $y_{mt^*} = 1$ it could do so only by progressively empowering group m to the point where $\gamma = 1$. It would become progressively harder to 'sell' each successive relaxation to its own constituency p .

The existence of an asymptotic stationary solution at which positive shares exist for both groups arises because as group m 's shares becomes larger, the marginal utility value to group m becomes smaller, while under the homogeneity assumption group p 's marginal utility stays constant. The effect is to swivel the trade off curve in figure 1a downwards and to the left (dotted curve).

3.2 *Non homogenous preferences, both parties*

If group p develops a memory, its members will feel more deprived as their share diminishes. The utility function will no longer be fully homogeneous with respect to both arguments. Group p 's incremental utility is now of the general form

$$(8) \quad \tilde{u}_p(x_t) = y_{pt-1}^{\theta_p} [u_p(1 - x_t; y_{pt-1}) - u_p(0; 1)] .$$

The influence of the multiplier $y_{pt-1}^{\theta_p}$ disappears in the Nash bargaining maximand, but that of y_{pt-1} remains in the utility function. As group p 's share y_{pt-1} becomes smaller,

the marginal disutility of further bargaining increments x increases, making group p more and more reluctant to make concessions.

Figure 2 illustrates in incremental share space. The bargaining equilibrium has shifted from E to E' . The effect, namely to lower the increment x at each step, will now be stronger, because there is a second reinforcing effect to add to the progressive willingness of group m to make concessions, noted in section 3.1. Hence the stationary equilibrium at which $x^*=0$ is reached sooner, and the stationary value y_{pt^*} is larger; group p retains more of the resource share.

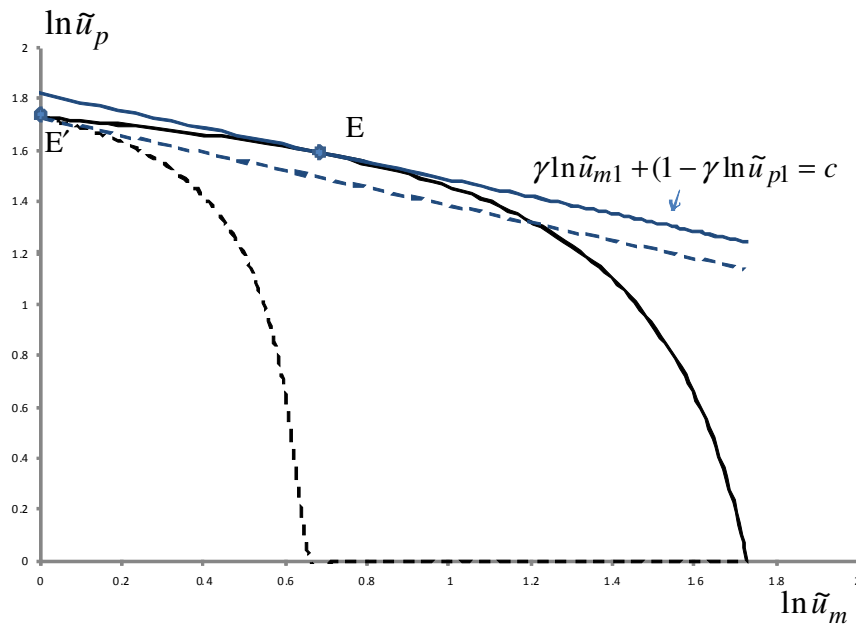


Figure 2: The effect of non homogenous group p preferences

IV Myopia and foresight

Foregoing analysis has implicitly assumed that group p has at best only a limited ability to foresee the outcomes from bargaining that may be repeated in the future, as in section III. Alternatively, the government's spin doctoring machine may be persuasive enough to allay concerns in this respect.

But it may be that group p members have enough foresight to perceive that the final stationary equilibrium is likely to see them surrendering much more than envisaged as the period 1 equilibrium under short term directed bargaining. This would convert their period 1 preference structure into something more similar to the steeper utility curve B' of

figure 2 , effectively converting the myopic B to B', or an eventual long run B* (not depicted) under a myopic sequence.

A steeper period 1 concession curve could be modelled via two mechanisms:

(a) Less myopic group p voters would be more pessimistic about the default outcome to be assumed in period 1 bargaining. Thus the certainty equivalent default (section 2) for period 1 could refer to the projected long run solution that might result from the absence of foresight.

(b) Group p could form anticipative non homogenous preferences, in which the long term myopic outcome y_{p0}^* would enter as a modifying argument. Thus the period 1 utility function $u_p(y_{p1}; y_{p0})$ assumed in section II would become $u_p(y_{p1}; y_{p0}^*)$.

Under either (a) or (b), period 1 bargaining would proceed on the basis of a much steeper trade-off between the two groups analogous to B' in figure 2. For a given value of the power weight γ , the outcome would be a smaller concession on the part of group p ; or if a corner solution applies similar to E' of figure 1b, no concession at all, preserving existing resource shares. Attempting to preserve its coalition with party M, the government G could try to impose a solution as modelled with higher γ , but this might stretch its ability to pacify its constituency group p .

In turn, party M may decide to moderate its period 1 coalitional demands, hoping that such a strategy will arouse fewer fears on the part of group p voters. This is especially true where the period 1 outcome is to change the frame of reference within which future settlements will take place, e.g. establishing a customary title right, as distinct from the weaker customary use right. Doing so might be viewed as group m 's defensive strategy for period 1, to be followed by more aggressive demands once the new frame is set in place. It is not proof against group p foresight (in this case of the effect of the new frame of reference), but it may be enough to hinder its development.

V Concluding remarks

The existence of a repeated political game can reinforce the long term interests of a minority to the extent that may not be envisaged by majority acquiescence in the outcome of the current period. This is particularly the case when the subject measures are constitutional in their effect, in this case because they create property rights and cannot be easily reversed. Thus in the context of indigenous rights, it would be almost unthinkable

that any subsequent government would ever remove the property rights granted to an ethnic minority as original occupiers of the country. Likewise, quasi-constitutional changes also amount to a change in the underlying reference frame, which in turn can be used to extract further concessions and relaxations of the qualifying rules for claiming property rights.

The effect is to lever up the economic value accruing to the ‘tyranny of the minority’, where the resource has hitherto been in public ownership and use. The latter can arise even within conventional majority voting systems, where the minority are well organised and focused on the single issue, at the expense of a more diffuse majority. But it is reinforced by MMP and similar style voting systems, which are susceptible to outcomes in which minor parties can more easily hold the balance of power. To preserve the current coalition and the baubles of power, the politicians of the majority party will acquiesce to measures that are against the interests of its own constituency group. The official opposition group may likewise come to perceive the future coalitional necessity and remain silent, abandoning its own duty to oppose.

In either case, the result is a failure of economic agency. In the short term, the government will invoke public relations spin that portrays the outcome as minor, or resorts to attention diverting stratagems. If the electorate is myopic, it will likely accept the same assurances at each successive revisiting of the issue under successive electoral cycles. In this respect, much depends on the sophistication of the electorate and the media who help to frame the public debate. Where indigenous rights are concerned, media frequently back away from confrontation from fears of being seen as racist, leading to a one sided reporting of the views of competing parties, and framing the public debate in such terms. In turn, this can influence the legal environment within which determinations are made; the opinions of jurists are products of their times.

Appendix: The New Zealand foreshore and seabed as a case study

Controversial at every step, the legal and political debate in NZ about foreshore and seabed property rights has a long history. The two parties involved are Maori, settlers since c.1300 AD (Wilmshurst *et al* 2008), and the NZ Crown, representing the collective of Maori, European and other racial groups, the latter settlers since c.1800. The present population proportions of Maori to non Maori are 15%: 85%, though extensive interbreeding has since occurred, and a one eighth genetic share qualifies as Maori for beneficial purposes.

The 1840 Treaty of Waitangi between Maori and the British Crown laid out a framework for property rights that is widely cited in recent legislation and ownership claims as a quasi constitutional basis (NZ does not have a codified constitution). But the Treaty, effectively only a few lines hastily cobbled together, is badly incomplete as a contract, with disputes over translation equivalence of sovereignty and other concepts. In the English translation, it guarantees signatory Maori tribes (*iwi*) continued title to their 'estates', without specifying what those estates actually consist in, and specifically whether they encompass property rights to the foreshore and seabed. For many years, it was assumed in NZ legislation that the British common of tenure held, according to which the Crown had title to the foreshore and seabed. This was reinforced with a landmark 1963 Court of Appeal ruling ('Ninety Mile Beach').

The precedent was overturned following a 2003 appeal from six *iwi* (Ngati Apa v. Crown) to the Court of Appeal, newly empowered as an indirect result of 2003 legislation abolishing the UK Privy Council as final avenue of appeal. The NZ Court of Appeal *inter alia* held that whether *iwi* property rights to the foreshore and seabed continued to exist was to be determined in concordance with Maori custom. In this respect, it was significant (the Court held) that the English Laws Act 1858 provided that English law was part of the law of New Zealand 'so far as applicable to the circumstances of New Zealand'. The latter qualification was the basis for allowing that claims to the foreshore and seabed could be tested in the Maori Land Court; *de facto* recognition that customary title to the foreshore and seabed could in fact exist. Less clear to others was whether the qualification is strong enough to justify customary title, as distinct from customary use rights; or what was required to set aside the competing public good right. The Appeal Court cited such Maori practices as burial at sea as examples of seabed usage that would *prima facie* justify customary title. One of the Court's tests was whether the *iwi* or *hapu* (subtribe) concerned had enjoyed continued and exclusive access to the area since 1840; which created its own contradictions in view of the long established precedent in the interim, as well as subsequent land sales by Maori to the European settlers.

In spite of the suggested barriers, or in anticipation of their nullification, the 2003 decision led to a flood of claims from Maori interests. The then Labour government moved quickly to stabilise things (as they saw it), in the form of the 2004 Foreshore and Seabed Act. This formalised the position in favour of continued Crown ownership (i.e. Crown dominium as well as radical title), but endowed Maori with the option to establish customary use rights by negotiation with the government.

By now the Maori movement as a whole had become highly organised and vocal, partly as a result of the economic power accruing from extensive grievance settlements over land. The result of the new legislation was a storm of Maori protest that led to some Maori members abandoning the Labour Party and forming the Maori party to contest the 2008 general election. The election itself was technically won by the centre right National party, but with a majority they

deemed unworkable. To cement the majority, they entered into a coalition in which the Maori party would be a pivotal partner. In addition to reserved Maori seats, NZ operates a MMP (mixed member proportional) voter system similar to that of Germany, endowing minority parties with additional representation.

The majority National Party's own constituency support basis was itself path dependent. Following overwhelming defeat in the 2002 election, the party had restored its voter popularity with a 2004 speech by the replacement leader Dr Don Brash, a former central bank governor. The 'Orewa speech', as it became known, drew on voter resentment against special treatment of Maori predicated, as Dr Brash saw it, on poorly understood references to the 1840 Treaty, and a trend to preferential race based separatism that he considered incompatible with unified nationhood. Coming back from the wilderness as a consequence, the party was narrowly defeated in the 2005 general election. Dr Brash resigned, and a new leader took over the helm, Mr John Key, formerly a senior foreign exchange dealer with Merrill Lynch in New York, and well accustomed to deal making.

An early sign of the Maori party flexing its new found leverage was a surprise announcement, made in the United Nations assembly, that NZ would sign up to the 2007 UN Convention on Indigenous Rights, a remarkable about face from the governing National Party, which had labelled the Convention 'toxic sludge' when in opposition. The government then moved swiftly to repeal the 2004 Foreshore and Seabed Act and substitute its own version, doing so with only six weeks of public consultation, whose results have yet to be released⁶. The new version (the Marine and Coastal Area (*Takutai Moana*) Bill) followed the general lines of the 2003 Court of Appeal ruling, recognising both customary use rights and the stronger economic ownership rights that are consequent on the new 'customary marine title'. Under the latter, *iwi* economic dominium would extend to the 12 mile territorial limit, with extensive veto and development rights, while entitlement could be negotiated with the government. If the alternative of going to court was followed, the onus would equally be on the government to prove that customary title did not exist.

As part of their public relations campaign to align media opinion, the government estimated that only 10% of the coastline would be allocated under customary title. However, the frame of reference was established for further relaxation of the criteria and Maori lost no time in publicly signalling intent to pursue such objectives following the 2011 general election. The likely coalitional outcome of the latter has implicitly been recognised by the opposition Labour party, which in turn announced that it would not be opposing the new legislation. Their advertised reason was that it was 'not much different' from their own 2004 legislation; which hardly

⁶ Very recently it has been released, in the wake of a request under the Official information Act by former MP Muriel Newman. It would appear that the bulk of submissions opposed the proposed Act.

explains the furore that followed the latter, let alone the sea change implicit in the 2010 customary marine title and its implied economic ownership. Evidently, this will become a repeated economic game, with a replay to follow the forthcoming 2011 election.

References

Becker, G. S. (1985) Public policies, pressure groups, and dead-weight costs, *Journal of Public Economics*, 28(3), 329-347.

Besley, T.J. and A. Prat (2002) Handcuffs for the grabbing hand: media capture and government accountability, London: CEPR Discussion paper 3132.

Bishin, B.G. (2009) *Tyranny of the minority: the subconstituency politics theory of representation*, Philadelphia: Temple University Press 2009.

Buchanan, J.M. and G. Tullock (1962) *The calculus of consent: logical foundations of constitutional democracy*, Ann Arbor: University of Michigan Press.

Kalai, E. and Smorodinski, M. (1975) Other solutions to Nash's bargaining problem, *Econometrica*, 43, 513-518

Kalai, E. (1977) Proportional solution to bargaining problems: interpersonal utility comparisons, *Econometrica*, 43, 1023-1030.

Krueger, A. O. (1974) The political economy of the rent-seeking society, *American Economic Review* 64, 291-303.

Mueller, D. C. (2003) *Public Choice III*, Cambridge: University Press.

Nash, J.F. (1950) The bargaining problem, *Econometrica*, 18, 155-162.

Olson, M. Jr. (1971) *The logic of collective action* 2nd ed., Cambridge: Harvard University Press.

Peltzman, S. (1998) *Political participation and government regulation*, Chicago and London: Chicago University Press.

Petrova, M. A. (2008) *Political economy of media capture*, Ph.D. thesis, Harvard University. Pro Quest AAT 3312488.

Shughart, W.F. II and R.D. Tollison (1998) Interest groups and the courts, *George Mason Law Review*, 6, 953-969.

Shughart, W.F. II (2008) Public choice, in *The concise encyclopedia of economics* 2nd ed., Library of Economics and Liberty.

Stigler, G. (1971) The theory of economic regulation, *Bell Journal of Economics and Management Science* 2:3-21.

Tullock, G. (1989) *The economics of special privilege and rent seeking*, Boston & Dordrecht: Kluwer Academic Publishers.

Tullock, G. and A. Seldon (2002) *Government failure: a primer in public choice* Gordon L. Brady Cato Institute.

Tullock, G. (2008) 'Public choice', in *The New Palgrave Dictionary of Economics* 2nd ed., S. N. Durlauf and L. E. Blume eds, Palgrave Macmillan, online at <http://www.dictionaryofeconomics.com/dictionary>

Wilmshurst, J.M , A. J. Anderson, T. F. G. Higham, and T. H. Worthy (2008) Dating the late prehistoric dispersal of Polynesians to New Zealand using the commensal Pacific rat, *Proc. National Academy of Science US*, 105 (22) 7676-7680.