#### **SYMPOSIUM**

The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States

## THE INTERNATIONAL LAW OF COLONIALISM: A COMPARATIVE ANALYSIS

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The majority of the non-European world was colonized under an international law that is known as the Doctrine of Discovery. Under this legal principle, European countries claimed superior rights over Indigenous nations. When European explorers planted flags and religious symbols in the lands of native peoples, they were making legal claims of ownership and domination over the lands, assets, and peoples they had "discovered." These claims were justified by racial, ethnocentric, and religious ideas of the alleged superiority of European Christians. This Article examines the application of Discovery by Spain, Portugal, and England in the settler societies of Australia, Brazil, Canada, Chile, New Zealand, and the United States. The comparative law analysis used in this Article demonstrates that these three colonizing countries applied the elements of the Doctrine in nearly identical ways against Indigenous peoples. Furthermore, the six settler societies analyzed here continue to apply this law today to restrict the human, property, and sovereign rights of Indigenous nations and peoples. This Article concludes that basic fairness and a restoration of the self-determination rights of Indigenous peoples mandates that these countries work to remove the vestiges of the Doctrine of Discovery from their modern day laws and policies.

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#### I. INTRODUCTION

The majority of the non-European world was colonized under an international legal principle that is known today as the Doctrine of Discovery. The Doctrine is one of the very first international law principles and allegedly authorized European, Christian countries to

<sup>&</sup>lt;sup>1</sup> See, e.g., ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010) [hereinafter MILLER ET AL., DISCOVERING INDIGENOUS LANDS]; ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 1-2 (2006) [hereinafter MILLER, NATIVE AMERICA]; STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (2008); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert J. Miller, American Indians, the Doctrine of Discovery, and Manifest Destiny, 11 WYO. L. REV. 329 (2011); Robert J. Miller & Micheline D'Angelis, Brazil, Indigenous Peoples, and the International Law of Discovery, 37 BROOK, J. INT'L L. (forthcoming 2011); Robert J. Miller, Christianity, American Indians, and the Doctrine of Discovery, in REMEMBERING JAMESTOWN: HARD QUESTIONS ABOUT CHRISTIAN MISSION 51 (Amos Yong & Barbara Brown Zikmund eds., 2010); Robert J. Miller, The Doctrine of Discovery in American Indian Law, 42 IDAHO L. REV. 1 (2005); Robert J. Miller, Lisa LeSage & Sebastián López Escarcena, The International Law of Discovery, Indigenous Peoples, and Chile, 89 NEB. L. REV. 819 (2011) [hereinafter Miller et al., International Law of Discovery]; Blake A. Watson, The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand, 34 SEATTLE U. L. Rev. 507 (2011).

explore and claim the lands and rights of peoples outside of Europe. When European countries set out to exploit new lands in the fifteenth through twentieth centuries, and planted their flags and crosses in "newly discovered" lands, they were undertaking the well-recognized procedures and rituals of Discovery to make claims to these territories and over Indigenous peoples.<sup>2</sup> In fact, the Doctrine provided that Europeans automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the Indigenous inhabitants without their knowledge or consent.<sup>3</sup> This legal principle was created and justified by religious, racial, and ethnocentric ideas of European and Christian superiority over other peoples and religions.

The Doctrine is still international and domestic law today, and is being actively applied against Indigenous peoples and nations. For example, American, Canadian, New Zealand, Australian, and international courts have struggled with questions regarding Discovery and Indigenous land titles in recent decades. And in 2007 and 2010, Russia and China evoked the Doctrine by planting their flags on the seabeds of the Arctic Ocean and the South China Sea to claim commercial and sovereign rights. In addition, the Doctrine has been featured prominently in the international news in recent years, as Indigenous activists and some churches have worked to repudiate it.

 $<sup>^2</sup>$  See Miller et al., Discovering Indigenous Lands, supra note 1, at 97–105, 174–82, 209–21; Miller, Native America, supra note 1, at 38–53, 122–28, 131–36, 142–44, 153–57; Patricia Seed, Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640, at 9 & n.19, 69–73, 101–02 (1995).

<sup>&</sup>lt;sup>3</sup> See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74, 588–97 (1823).

<sup>&</sup>lt;sup>4</sup> See generally City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005); Mabo v Queensland (No. 2) (1992) 175 CLR 1 (Austl.); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.); Guerin v. The Queen, [1984] 2 S.C.R. 335 (Can.); Att'y-Gen. v Ngati Apa [2003] 3 NZLR 643 (CA); Te Runanganui o Te Ika Whenua Inc Soc'y v Att'y-Gen. [1994] 2 NZLR 20 (CA); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>&</sup>lt;sup>5</sup> William J. Broad, *China Explores a Rich Frontier, Two Miles Deep*, N.Y. TIMES, Sept. 12, 2010, at A1; Robert J. Miller, *Finders Keepers in the Arctic?*, L.A. TIMES, Aug. 6, 2007, at A19. Canada and Denmark have also argued over the ownership of Han Island under international law. *See Canada Island Visit Angers Danes*, BBC NEWS (July 25, 2005, 15:17 GMT), http://news.bbc.co.uk/2/hi/europe/4715245.stm.

See, e.g., Tonya Gonnella Frichner, The "Preliminary Study" on the Doctrine of Discovery, 28 PACE ENVIL. L. REV. 339 (2010); Robert J. Miller, Will Others Follow Episcopal Church's Lead?, INDIAN COUNTRY TODAY, Aug. 12, 2009, at 5; Steven Newcomb, More on the Vatican's Response, INDIAN COUNTRY TODAY, June 9, 2010, at 5; Gale Courey Toensing, Indigenous Delegates Ask Pope to Repudiate Doctrine of Discovery, INDIAN COUNTRY TODAY, Dec. 23, 2009, at 1; Rob Capriccioso, Thirteen Grandmothers theVatican, TRIBE (Aug. 12, 2008, http://people.tribe.net/adamapollo/blog/00dde464-99ec-4b61-8821-c528438b4c6a; UN Permanent Forum on Indigenous Issues Considers the Effects of the Doctrine of Discovery, NATIVE AMERICA, DISCOVERED AND CONQUERED BLOG (June 15, 2010, 11:16 AM), http://lawlib.lclark.edu/blog/native\_america/?p=3800.

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fact, in 2012, the United Nations Permanent Forum on Indigenous Issues will address the Doctrine.<sup>7</sup>

In the fifteenth to twentieth centuries, European countries utilized Discovery in their explorations and claims over Indigenous peoples in the Americas and Oceania. These colonial/settler societies used Discovery principles and ethnocentric ideas of superiority to stake legal claims to the lands and rights of native peoples. Understanding Discovery and how it became the law of colonialism around the world is crucial to understanding and addressing the modern-day status and situations of Indigenous peoples and nations. One American professor aptly stated the importance of comprehending and examining the Doctrine:

Detailed reassessment of early history may seem unnecessary to a present understanding of Native Americans. Some may think it enough to acknowledge the fallaciousness of the notion of "discovery," with all it implies in the way of colonial arrogance. But the fact that "discovery" became part of the institutional structure of America means that America consists of a continual reaffirmation of colonialism. The nature of this colonialism explains much of the present scene.<sup>8</sup>

In this Article, by comparing and contrasting the law of colonialism and Discovery in the nine countries of Australia, Brazil, Canada, Chile, England, New Zealand, Portugal, Spain, and the United States, I hope to demonstrate that these countries and their modern day legal systems reflect "a continual reaffirmation of colonialism" regarding Indigenous nations and peoples.

Part II briefly sets out the definition of Discovery, how it was developed over several centuries in Europe, and the ten elements that I argue constitute the Doctrine. Part III analyzes and compares, element by element, how Spain, Portugal, and England, and then the colonies of Australia, Brazil, Canada, Chile, New Zealand, and the United States, applied Discovery against the Indigenous peoples in the Americas and Oceania. Part IV concludes that all of these countries are still applying the Doctrine of Discovery against their Indigenous citizens today and that the vestiges of the feudal, religious, racial, and ethnocentric Doctrine are reflected in the national laws of those countries. This Article recommends that these countries reexamine their use of Discovery against their Indigenous citizens and attempt to cease using the Doctrine.

The value of this Article lies in its comparative methodology and the resulting conclusion that the Doctrine of Discovery permeates the legal histories of numerous countries in the Americas and Oceania. A comparative approach allows us to see the pervasiveness of this historical

<sup>&</sup>lt;sup>7</sup> 'The Doctrine of Discovery' Special Theme for UN Permanent Forum 2012, GALDU (May 27, 2011), http://www.galdu.org/web/index.php?odas=5255&giella1-eng.

<sup>&</sup>lt;sup>8</sup> Peter d'Errico, *Native Americans in America: A Theoretical and Historical Overview, in* American Nations: Encounters in Indian Country, 1850 to the Present 481, 487 (Frederick E. Hoxie et al. eds., 2001).

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legal precedent and the major ramifications it has produced for Indigenous peoples and nations living in European-colonized countries.

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#### II. THE DOCTRINE OF DISCOVERY

The Doctrine of Discovery is well defined in the very influential 1823 United States Supreme Court decision of Johnson v. M'Intosh. In that case, the Supreme Court held that the Doctrine of Discovery was an established legal principle of European and American colonial law, and was also the law of the American state and federal governments. 10 Johnson has been cited and relied on by Australian, New Zealand, and Canadian courts.11

The U.S. Supreme Court interpreted Discovery to mean that when European, Christian nations discovered lands unknown to Europeans, they automatically gained sovereign and property rights in the lands. This was so, even though Indigenous people were already occupying and using the lands. 12 The real-property right Europeans acquired, however, was a future right: a title held by the discovering European country in the lands, but subject to the continuing use and occupancy rights of the Indigenous peoples.<sup>13</sup> In addition, the discoverer also gained sovereign governmental powers over the native peoples and their governments, which restricted tribes' international political, commercial, and diplomatic powers. 14 This transfer of rights was accomplished without the knowledge or consent of native peoples.

In Johnson, the Supreme Court defined the exclusive property rights that a discovering European country acquired: "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." Accordingly, European discoverers gained real-property rights in the lands of Indigenous peoples by merely walking ashore and planting a flag. Native rights were "in no instance,

<sup>&</sup>lt;sup>9</sup> 21 U.S. (8 Wheat.) 543 (1823) (the case involved land purchases made by British citizens in 1773 and 1775). One law professor calls Johnson v. M'Intosh "perhaps [the] most important Indian law Supreme Court decision." Matthew L.M. Fletcher, The Original Understanding of the Political Status of Indian Tribes, 82 St. John's L. REV. 153, 175 (2008).

Johnson, 21 U.S. (8 Wheat.) at 584–85.

See, e.g., Milirrpum v Nabalco Pty. Ltd. (1971) 17 FLR 141, 214 (N.T. Sup. Ct.) (Austl.); Guerin v. The Queen, [1984] 2 S.C.R. 335, 377-78 (Can.); Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC) 77–78 (N.Z.).

Johnson, 21 U.S. (8 Wheat.) at 573–74.
 Id. at 573–74, 584–85, 588, 592, 603. See also Meigs v. M'Clung's Lessee, 13 U.S. (9 Cranch) 11, 18 (1815); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139–43 (1810).

Johnson, 21 U.S. (8 Wheat.) at 574.

Id. at 573. Accord id. at 574, 584, 588, 603; id. at 592 ("The absolute ultimate title has been considered as acquired by discovery . . . . ").

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entirely disregarded; but were necessarily, to a considerable extent, impaired."<sup>17</sup> This was so, the Court claimed, because while the Doctrine recognized that natives still had the legal rights to possess, occupy, and use their lands as long as they wished, their right to sell their lands to whomever they wished and for whatever price they could negotiate was destroyed: "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."<sup>18</sup> Indigenous nations were thus preempted from selling their lands to anyone except the discovering European country. The discovering country thus acquired an exclusive option to purchase tribal lands whenever tribal governments consented to sell. <sup>19</sup>

Obviously, Discovery diminished the economic value of land for natives and greatly benefited European countries and colonists. Moreover, Indigenous sovereign powers were greatly affected by the Doctrine because their national sovereignty and independence were considered to have been limited by Discovery since it restricted Indigenous nations' international diplomacy, commercial, and political activities to only the discovering European country.<sup>21</sup>

#### A. The Elements of Discovery

I have identified ten distinct elements or factors that constitute the Doctrine.<sup>22</sup> I state them here so readers can more easily follow the development of Discovery in European law and the application of the elements and the Doctrine by Spain, Portugal, and England in their colonies in the Americas and Oceania.

1. <u>First discovery</u>. The first European country to discover lands unknown to other Europeans acquired property and sovereign rights over the lands and Indigenous peoples. First discovery

<sup>&</sup>lt;sup>17</sup> *Id.* at 574.

<sup>18</sup> Id.

<sup>&</sup>lt;sup>19</sup> *Id.* at 574, 579, 592. *See also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139–43 (1810).

<sup>&</sup>lt;sup>20</sup> See Eric Kades, The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands, 148 U. PA. L. REV. 1065, 1078, 1110–31 (2000). See generally Terry L. Anderson & Fred S. McChesney, Raid or Trade? An Economic Model of Indian-White Relations, 37 J.L. & ECON. 39 (1994).

<sup>&</sup>lt;sup>21</sup> Johnson, 21 U.S. (8 Wheat.) at 574 ("[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."). See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831) (An attempt by another country "to form a political [connection] with [American Indian tribes] would be considered by all as an invasion of our territory, and an act of hostility."); Johnson, 21 U.S. (8 Wheat.) at 584–85, 587–88 (The English government and then the American government "asserted a title to all the lands occupied by Indians" and "asserted also a limited sovereignty over them.").

<sup>&</sup>lt;sup>22</sup> See MILLER, NATIVE AMERICA, supra note 1, at 3–5.

alone, however, was often considered to create only an incomplete title.

- 2. Actual occupancy and current possession. To turn first discovery into a recognized title, a European country had to permanently occupy and possess discovered lands. This was usually accomplished by building forts or settlements.<sup>23</sup> Physical possession had to be accomplished within a reasonable amount of time after first discovery.
- 3. <u>Preemption/European title</u>. A discovering European country gained the property right of preemption; the sole right to buy the land from the Indigenous peoples. This is a valuable property right analogous to an exclusive option to purchase land. The government that held the preemption right could prevent or preempt any other European government or individual from buying the land.
- 4. Native title. After first discovery, Indigenous nations were considered by European legal systems to have lost full property rights in their lands. They only retained the rights to occupy and use the lands. Nevertheless, these rights could last forever if natives never consented to sell. If they did choose to sell, native nations were only supposed to sell to the European government that held the preemption right.
- 5. <u>Indigenous limited sovereign and commercial rights</u>. Indigenous nations and peoples were also deemed to have lost aspects of inherent sovereignty and rights to international trade and diplomatic relations. They were only supposed to interact with their discoverer.
- 6. Contiguity. This element provided that Europeans had a claim to a significant amount of land contiguous to their actual discoveries and settlements. This element became important when European countries had settlements somewhat close together. In that situation, each country was deemed to hold rights over the lands to the halfway point between their settlements. Contiguity also meant that the discovery of a river mouth created a claim over all the lands drained by that river, even if that was thousands of miles.<sup>24</sup>
- 7. <u>Terra nullius</u>. This phrase literally means a land that is void or empty. If lands were not possessed or occupied by any person, and even if they were occupied but were not being used in a

 $<sup>^{23}</sup>$  Id. at 112; EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 294–95 (1933) (In 1503, Portugal built "a wooden fort and garrisoned it to safeguard the factory and protect their ally. This was a first step towards dominion . . . .").

<sup>&</sup>lt;sup>24</sup> Compare the boundaries of the Louisiana Territory and the Oregon Country in the United States. *Territorial Growth of the United States*, 1783–1867, MAPS ETC (2009), http://etc.usf.edu/maps/pages/6200/6207/6207.htm.

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- fashion European legal systems recognized or approved, then the lands were "empty" and available for Discovery claims.
- 8. <u>Christianity</u>. Non-Christians were deemed not to have the same rights to land, sovereignty, and self-determination as Christians.
- 9. <u>Civilization</u>. European ideas of what constituted civilization and the belief of European superiority over Indigenous peoples were important parts of Discovery. Europeans thought that God had directed them to bring civilization, education, and religion to natives, and to exercise paternalistic and guardian powers over them.
- 10. <u>Conquest</u>. Europeans could acquire title to Indigenous lands by military victories. Conquest was also used as a term of art to describe the property and sovereign rights Europeans claimed automatically just by making a first discovery.

#### B. The Development of Discovery in Europe

The Doctrine of Discovery is one of the earliest examples of international law, that is, the accepted legal norms and principles that control the conduct of states versus other states. Discovery was specifically developed to control European actions and conflicts regarding exploration, trade, and colonization of non-European countries, and it was used to justify the domination of non-Christian, non-European peoples. It was developed in Europe over many centuries by the Church, England, Spain, Portugal, and France. Europeans rationalized that the Discovery Doctrine was permitted under the authority of the Christian God, and the ethnocentric idea that Europeans had the right to claim the lands—as well as the sovereign and commercial rights—of Indigenous peoples around the world. The states of the earliest examples of the earliest exampl

In discussing Discovery, one is forced to use a comparative analysis to examine how the legal regimes of England, Spain, and Portugal developed the international law of European expansion and colonization, and then how they applied the Doctrine in Australia, Brazil,

<sup>&</sup>lt;sup>25</sup> Johnson, 21 U.S. (8 Wheat.) at 572–73; WILLIAMS, supra note 1, at 7–8, 325–28. See also Antonio Truyol y Serra, The Discovery of the New World and International Law, 3 U. Tol. L. Rev. 305, 308 (1971) (arguing that the New World confronted Europeans "with the problem of the law of colonization, and from this point of view it finally became necessary to pose the problem of the law of nations in a global perspective").

MILLER, NATIVE AMERICA, *supra* note 1, at 9–21; ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500–C.1800, at 8, 24, 126 (1995); WILLIAMS, *supra* note 1, at 14. *See generally* JAMES A. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER (1969); THE EXPANSION OF EUROPE: THE FIRST PHASE (James Muldoon ed., 1977) [hereinafter EXPANSION OF EUROPE].

<sup>&</sup>lt;sup>27</sup> PAGDEN, *supra* note 26, at 24, 126 (civilized countries had to be Christian); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, Johnson v. McIntosh, *and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 316 (1993) ("Christians simply refused to recognize the right of non-Christians to remain free of Christian dominion.").

Canada, Chile, New Zealand, and the United States.<sup>28</sup> A comparative approach is especially worthwhile in this field, for it offers the opportunity "to make enlightening comparisons with contemporary developments in other former European colonies."<sup>29</sup> As one author stated, "a hemispheric focus" allows one "to see an over-all picture of parallel colonial experiences."<sup>30</sup>

Historians and legal scholars trace the development of the Doctrine to early medieval times, and in particular, to the Crusades to the Holy Lands in 1096–1271. In justifying the Crusades, the Church established the idea of a worldwide papal jurisdiction which "vested a legal responsibility in the pope to realize the vision of the universal Christian commonwealth." This papal responsibility and power led to the idea of justified holy wars by Christians against Infidels. 33

In 1245 the canon lawyer Pope Innocent IV wrote a legal commentary on the rights of non-Christians that was very influential in the development of the Discovery Doctrine.<sup>34</sup> In his commentary, Innocent IV concluded that it was legal for Christians "to invade a land that infidels possess."<sup>35</sup> Thus, the Crusades were "just wars" fought for the "defense" of Christianity and to reconquer lands that had once belonged

<sup>&</sup>lt;sup>28</sup> See Pagden, supra note 26, at 44 (contrasting English and Spanish imperialism). Moreover, since Spain seized control of the crown of Portugal from 1580 to 1640, to some extent Portuguese colonization policies and laws in Brazil were united with Spanish laws and policies, and comparing these regimes helps explain some aspects of both. See Boris Fausto, A Concise History of Brazil 40 (Arthur Brakel trans., 1999); 1 A.H. De Oliveira Marques, History of Portugal 332 (1972).

<sup>&</sup>lt;sup>29</sup> DAURIL ALDEN, ROYAL GOVERNMENT IN COLONIAL BRAZIL, at vii–viii (1968).

Comm. on Comp. European Colonization in Am., *Preface, in Attitudes of Colonial Powers Toward the American Indian (Howard Peckham & Charles Gibson eds., 1969)* [hereinafter Attitudes of Colonial Powers] (quoting Silvio Zavala).

WILLIAMS, *supra* note 1, at 14. *See also* Brundage, *supra* note 26, at 24–25, 136–38; Carl Erdmann, The Origin of the Idea of Crusade 155–56 (Marshall W. Baldwin & Walter Goffart trans., Princeton Univ. Press 1977) (1935); Expansion of Europe, *supra* note 26, at 3–4, 186; Pagden, *supra* note 26, at 8, 24, 126; *Journey of Friar John of Pian de Carpine to the Court of Kuyuk Khan, in* The Journey of William of Rubruck to the Eastern Parts of the World, 1253–55 (William W. Rockhill ed., 1900), *reprinted in* Expansion of Europe, *supra* note 26, at 155–57.

WILLIAMS, *supra* note 1, at 29. *Accord* J.H. Burns, Lordship, Kingship and Empire: The Idea of Monarchy 1400–1525, at 100 (1992) (philosophers interpreting *monarchia* and the teachings of Aristotle say it was only possible to see the world as a single system comprised of Christendom); Pagden, *supra* note 26, at 24–30 (arguing that under Roman and natural law, non-Christians were not defined as part of the world); Brian Tierney, The Crisis of Church & State 1050–1300, at 152–56, 195–97 (1964).

 $<sup>^{\</sup>rm 33}$  Brundage, supra note 26, at 19–26, 192–94; Erdmann, supra note 31, at 155–56; Williams, supra note 1, at 29–30.

<sup>&</sup>lt;sup>34</sup> WILLIAMS, supra note 1, at 13; see Innocent IV, Commentaria Doctissima in Quinque Libros Decretalium (1581), in EXPANSION OF EUROPE, supra note 26, at 191 (James Muldoon, trans.).

<sup>&</sup>lt;sup>35</sup> Innocent IV, *supra* note 34, at 191–92.

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to Christians.<sup>36</sup> Innocent IV focused on the legitimate authority of Christians to dispossess pagans of their dominium—their sovereignty and property—but conceded that pagans had some natural law rights to property and self-government that Christians had to recognize.<sup>37</sup> But he also stated that the rights of non-Christians were limited by the papacy's divine mandate.<sup>38</sup> Since the Pope was in charge of the spiritual health of all humans, he had a voice in the secular affairs of all humans.<sup>39</sup>

In justifying the invasion of non-Christian countries, Innocent IV borrowed from the writings on holy war by St. Augustine. 40 Augustine claimed that Christians had the right to wage war on nations that practiced cannibalism, sodomy, idolatry, and human sacrifice as a defense of Christianity and a work of justice.<sup>41</sup>

Thereafter, the development of Discovery continued most significantly in the early 1400s, in a dispute between Poland and the Teutonic Knights over non-Christian Lithuania. 42 This conflict again raised the question of the legality of seizing the lands and rights of non-Christians under papal sanctions and the existence of the dominium of Infidels.<sup>43</sup> The Council of Constance of 1414 was called to settle this dispute and held that the Church and Christian princes had to respect the natural law rights of pagans to property and self-government, but not if they strayed too far from European normative views. 44

#### 1. Portuguese and Spanish Development of the Doctrine

Portugal and Spain began to clash over explorations, trade, and colonization in the eastern Atlantic islands beginning in the mid-1300s. 45

WILLIAMS, *supra* note 1, at 44–45.

<sup>&</sup>lt;sup>37</sup> *Id.* at 13–14, 14 n.4, 45, 49; Burns, *supra* note 32, at 18, 98–100, 161–62; Silvio ZAVALA, THE POLITICAL PHILOSOPHY OF THE CONQUEST OF AMERICA 26 (Teener Hall trans., 1953); see also Henry Wheaton, Elements of International Law § 166, at 241– 42 (Richard Henry Dana, Jr., ed., 8th ed. 1866).

<sup>&</sup>lt;sup>38</sup> WILLIAMS, *supra* note 1, at 13–14, 45; ZAVALA, *supra* note 37, at 26.

<sup>&</sup>lt;sup>39</sup> WILLIAMS, *supra* note 1, at 13–17, 45–47.

<sup>40</sup> Id. at 44-45; see also Erdmann, supra note 31, at 8-11. See generally John Mark MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR (2006).

<sup>&</sup>lt;sup>41</sup> MATTOX, *supra* note 40, at 46–51, 60, 74; PAGDEN, *supra* note 26, at 98; WILLIAMS, supra note 1, at 14, 44.

WILLIAMS, supra note 1, at 59–60. See generally Expansion of Europe, supra note 26, at 105-24. The Knights were a crusading priestly order who believed pagans could be deprived of property and lordship under the authority of papal bulls directed at the holy lands. WILLIAMS, *supra* note 1, at 60.

WILLIAMS, *supra* note 1, at 60.

<sup>&</sup>lt;sup>44</sup> WILLIAMS, *supra* note 1, at 62–66; *see also* JAMES MULDOON, POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD 1250-1550, at 119 (1979); THE EXPANSION OF EUROPE, *supra* note 26, at 187.

<sup>45</sup> Miller et al., International Law of Discovery, supra note 1, at 830; see also THE EXPANSION OF EUROPE, supra note 26, at 47-49. See generally C.R. BOXER, THE PORTUGUESE SEABORNE EMPIRE 1415–1825, at 21–29 (1969); 1 ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 142,

Portugal first claimed the Canary Islands in 1341 based on "priority of discovery and possession against any other European power" and "the right of conquest of the rest of the Canaries." Subsequently, Portugal also discovered and claimed the Azore and Cape Verde island groups, and Madeira island. Spanish competition for the Canary Islands, however, led to attacks on Canary Islanders and even on converted Christians. The Church became involved and Pope Eugenius IV banned all Europeans from the Canaries in 1434. King Duarte of Portugal, however, appealed the ban and argued that Portugal's explorations and conquests were on behalf of Christianity. Duarte stated that he had commenced his "conquest of the islands, more indeed for the salvation of the souls of the pagans of the islands than for his own personal gain, for there was nothing for him to gain." The king asked the Pope to give the Canary Islands to Portugal to carry out the Church's guardianship duty to the Infidels.

Pope Eugenius IV concluded that the islanders had *dominium* under Roman international law (*ius gentium*) but that the papacy possessed indirect jurisdiction over their secular actions.<sup>54</sup> The Pope's lawyers agreed he had the authority to deprive Infidels of property and lordship if they failed to admit Christian missionaries or violated natural law.<sup>55</sup>

This situation led to a refinement of the Doctrine. The new argument for European and Christian domination was based on Portugal's rights of discovery and conquest that stemmed from the alleged need to protect Indigenous peoples from the oppression of others and the need to convert them. A pope could hardly disagree with the value of converting pagans to Christianity. Consequently, in 1436, Eugenius IV issued the papal bull *Romanus Pontifex* and authorized Portugal to convert the Canary Islanders and to control the islands on behalf of the papacy. This bull was reissued several times in the fifteenth century, each time expanding Portugal's authority to exercise jurisdiction

<sup>144, 146, 155–56, 171–72, 189 (</sup>Cooper Square Publishers, Inc. 1962) (1918); Prestage, *supra* note 23, at 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02.

<sup>&</sup>lt;sup>46</sup> 1 MERRIMAN, *supra* note 45, at 144.

<sup>&</sup>lt;sup>47</sup> 2 Merriman, *supra* note 45, at 172. *Accord* Boxer, *supra* note 45, at 21; Prestage, *supra* note 23, at 5.

BOXER, supra note 45, at 26–27; EXPANSION OF EUROPE, supra note 26, at 48; 1 MERRIMAN, supra note 45, at 142–46; PRESTAGE, supra note 23, at 35, 38–39, 41, 48–50, 141–42.

EXPANSION OF EUROPE, *supra* note 26, at 54.

 $<sup>^{50}\,</sup>$  Muldoon, supra note 44, at 120–21; Expansion of Europe, supra note 26, at 48.

 $<sup>^{51}</sup>$  See Letter from King Duarte I of Portugal to Pope Eugenius IV (1436), in Expansion of Europe,  $\it supra$  note 26, at 54.

<sup>&</sup>lt;sup>52</sup> *Id.* at 55.

<sup>&</sup>lt;sup>53</sup> *Id.* at 56.

<sup>&</sup>lt;sup>54</sup> WILLIAMS, *supra* note 1, at 70–72.

<sup>&</sup>lt;sup>55</sup> *Id.* at 71–72; MULDOON, *supra* note 44, at 126–27.

<sup>&</sup>lt;sup>56</sup> WILLIAMS, *supra* note 1, at 72.

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and economic rights in Africa.<sup>57</sup> In addition, in 1455, Pope Nicholas V granted Portugal title to the lands of Indigenous peoples in Africa that Portugal had "acquired and that shall hereafter come to be acquired," and authorized Portugal "to invade, search out, capture, vanquish, and subdue all Saracens and pagans" and place them into perpetual slavery and to seize all their property.<sup>58</sup> These bulls demonstrated the definition of Discovery at that time because they recognized the papacy's "paternal interest" to bring all humans "into the one fold of the Lord," authorized Portugal's conversion work, and granted Portugal title and sovereignty over lands "which have already been acquired and which shall be acquired in the future."

Under the papal orders granted solely to Portugal, Catholic Spain had to look elsewhere for lands to exploit. Consequently, Christopher Columbus's plan for a westward passage to the Indies interested King Ferdinand and Queen Isabella. Isabella agreed to sponsor the venture but her contract with Columbus demonstrates that she had far more on her mind than just finding a new route to the spices of Asia. The contract she and Ferdinand signed with Columbus ordered him "to discover and acquire certain islands and mainland" and agreed to make him the admiral of any lands he "may thus discover and acquire." <sup>60</sup>

After Columbus claimed the lands that he encountered in the New World, Isabella and Ferdinand sought papal ratification of their ownership of these lands. In May 1493, Pope Alexander VI issued the bull *Inter caetera* ordering that the lands, which "hitherto had not been discovered by others," and were now found by Columbus, belonged to Ferdinand and Isabella, along with "free power, authority, and jurisdiction of every kind." The Pope also granted Spain any lands it might discover in the future provided they were not "in the actual".

<sup>&</sup>lt;sup>57</sup> Id. See Bull "Romanus Pontifex" of Pope Nicholas V Granting the Territories Discovered in Africa to Portugal (Jan. 8, 1455) [hereinafter Bull "Romanus Pontifex" of Pope Nicholas V], in Church and State Through the Centuries 144, 145, 149–50 (Sidney Z. Ehler & John B. Mortall trans. & eds., 1967); The Bull Romanus Pontifex (Nicholas V) (Jan. 8, 1455), in European Treaties Bearing on the History of the United States and its Dependencies 9, 23 (Frances Gardiner Davenport ed., 1917) [hereinafter European Treaties].

<sup>&</sup>lt;sup>58</sup> Bull Romanus Pontifex, supra note 57, at 23–24.

 $<sup>^{59}\;</sup>$  Bull "Romanus Pontifex" of Pope Nicholas V, supra note 57, at 146, 150.

Ferdinand and Isabella: Capitulations with Columbus (1492), *in* The Spanish Tradition In America 27, at 32–33 (Charles Gibson ed., 1968) [hereinafter Spanish Tradition] (translating April 1492 documents); *see also* Samuel Eliot Morison, Admiral of the Ocean Sea: A Life of Christopher Columbus 105 (1942) [hereinafter Morison, Admiral of the Ocean Sea]; Samuel Eliot Morison, The European Discovery of America: The Southern Voyages A.D. 1492–1616, at 43 (1974) [hereinafter Morison, European Discovery].

The Bull Inter Caetera (Alexander VI) (May 3, 1493), in European Treaties supra note 57, at 56, 61–63 [hereinafter Bull Inter Caetera] (English translation); accord Bull Inter Caetera (May 4, 1493), in Spanish Tradition, supra note 60, at 36–38.

temporal possession of any Christian owner."<sup>62</sup> The Pope also exercised his universal guardianship authority and placed the Indigenous peoples in these lands under Spanish guardianship.<sup>63</sup>

Portugal, however, immediately claimed the lands Columbus discovered in the Caribbean under the Discovery element of contiguity. Dom João II (King John II) relied on contiguity and claimed that Portugal already owned the islands in the Caribbean because they were located near the Azore Islands that Portugal possessed. Portugal and Spain were worried that they had received contradictory papal bulls, so Spain requested another bull to clearly delineate its ownership of the lands Columbus had discovered, and might yet discover, in the New World. Pope Alexander VI then issued *Inter Caetera II*, drawing a line of demarcation from the north pole to the south pole, 100 leagues west of the Azore Islands, and granted Spain title to all the lands "discovered and to be discovered" west of the line and jurisdiction over the Indigenous peoples, and granted Portugal the same rights east of the line. This bull also assigned Spain and Portugal the duty to contribute to "the spread of the Christian rule" in their areas of the globe.

In 1494, Portugal and Spain signed the Treaty of Tordesillas (Tordesilhas in Portuguese) and moved the line of demarcation further west, "370 leagues west of the Cape Verde Islands," to ensure that Portugal received part of the New World and to protect Portugal's southern Atlantic trade routes to India. Thus, Portugal's right to colonize the landmass of Brazil was recognized, by Spain at least, because it lay east of the Tordesillas demarcation line. <sup>69</sup>

<sup>&</sup>lt;sup>62</sup> Bull Inter Caetera, supra note 61, at 62.

<sup>&</sup>lt;sup>63</sup> WILLIAMS, *supra* note 1, at 79; *Bull* Inter Caetera, *supra* note 61, at 62–63.

<sup>&</sup>lt;sup>64</sup> Prestage, *supra* note 23, at 237; *see also* 2 Merriman, *supra* note 45, at 199; Morison, European Discovery, *supra* note 60, at 97–98; H.V. Livermore, *Portuguese History, in* Portugal and Brazil: An Introduction 48, 61 (H.V. Livermore ed., Oxford Univ. Press 1963) (1953) [hereinafter Portugal and Brazil.].

<sup>&</sup>lt;sup>65</sup> Prestage, *supra* note 23, at 237; Regina Johnson Tomlinson, The Struggle for Brazil: Portugal and "The French Interlopers" (1500–1550), at 7 (1970).

<sup>&</sup>lt;sup>66</sup> Bull "Inter Caetera Divinae" of Pope Alexander VI Dividing the New Continents and Granting America to Spain (May 4, 1493), in Church and State Through the Centuries, supra note 57, at 153, 156–57 [hereinafter Bull "Inter Caetera Divinae" of Pope Alexander VI]; accord Bull Inter Caetera (May 4, 1493), in Spanish Tradition, supra note 60, at 38; see also Morison, Admiral of the Ocean Sea, supra note 60, at 370.

<sup>&</sup>lt;sup>67</sup> Bull Inter Caetera (May 4, 1493), in Spanish Tradition, supra note 60, at 36–37.

Treaty Between Spain and Portugal Concluded at Tordesillas (June 7, 1494), in 3 Foundations of Colonial America: A Documentary History 1684, 1685 (W. Keith Kavenagh ed., 1973) [hereinafter Foundations of Colonial America]; accord Treaty Between Spain and Portugal, Concluded at Tordesillas, June 7, 1494, in European Treaties, supra note 57, at 84, 95; Treaty of Tordesillas, in Spanish Tradition, supra note 60, at 42, 44. See also C.H. Haring, The Spanish Empire in America 7 n.7 (Harbinger Books 1963) (1947); For maps showing the demarcation lines, see Lines in the Sea 3 (G. Francalanic & T. Scovazzi, eds., 1994).

<sup>&</sup>lt;sup>69</sup> See, e.g., H.V. Livermore, A New History of Portugal 131 (2d ed. 1976); Morison, European Discovery, supra note 60, at 98; Prestage, supra note 23, at 277.

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By 1494, under canon law and the emerging international law, as defined by the Church, Portugal, and Spain, the Doctrine of Discovery stood for four points. First, the Church possessed the authority to grant Christian kings title and sovereignty over Indigenous peoples and their lands; second, European exploration, conquest, and colonization was designed to assist the papacy in exercising its guardianship over the entire earthly flock; third, Portugal and Spain held exclusive rights over other European countries to colonize the world;<sup>70</sup> and fourth, the mere discovery of lands by Portugal or Spain in their respective spheres of influence, and engagement in symbolic acts of possession on these lands, was sufficient to establish their ownership rights.<sup>71</sup>

Into this ongoing development of the law of colonialism stepped the Spaniard Francisco de Vitoria, a Dominican priest, University of Salamanca professor, and royal advisor. He is recognized today as one of the earliest writers on international law. In 1532, he concluded in his *De Indis* lectures—not published until 1557—that the Indians of the

<sup>70</sup> See Morison, Admiral of the Ocean Sea, supra note 60, at 368–69; Muldoon, supra note 44, at 139; Pagden, supra note 26, at 31–33.

England, France, and Holland usually insisted on occupation and possession of lands before they accepted another country's claim of ownership. When the opposite served their interests, though, they also claimed lands based only on symbolic possession via Discovery rituals. See Fred Anderson, Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754–1766, at 25–26 (2000) (recounting how France sent an expedition throughout the Ohio valley in North America in 1749 to renew its seventeenth-century Discovery claims by "bur[ying] small lead plates . . . 'as a monument' . . . 'of the renewal of possession'"); Pagden, supra note 26, at 81 (recounting how France claimed Tahiti in 1768 based on symbolic possession); Von der Heydte, supra, at 460–61 (quoting George III's instructions to Captain Cook that upon finding uninhabited lands he should "take possession of it for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors."); id. at 460 (recounting how, in 1642, Holland ordered an explorer to take possession of lands by hanging posts and plates "and declar[ing] an intention . . . to establish a colony").

Portugal and Spain often argued that their discovery of new lands and performance of symbolic-possession rituals established their legal claims. *Compare Seed, supra* note 2, at 9 & n.19, 69–73, 101–02, and James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 Pol. Sci. Q. 111, 113–14, 117–18, 120–24 (1938), with Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 831, 870 (The Hague 1928) (holding that the United States' claim to own an island in the Philippines based on Spanish first discovery that was never followed by actual occupation had created only an inchoate title), and Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 Am. J. Int'l L. 448, 450–54 (1935) (explaining that symbolic possession was almost never accepted to have granted ownership and that a country needed actual possession).

<sup>&</sup>lt;sup>72</sup> *See* PAGDEN, *supra* note 26, at 46–47.

<sup>&</sup>lt;sup>73</sup> See WILLIAMS, supra note 1, at 96–97, 97 & n.135; see also PAGDEN, supra note 26, at 46. See generally Felix S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, 31 GEO. L.J. 1 (1942).

Americas possessed natural legal rights as free and rational people.<sup>74</sup> He agreed with Pope Innocent IV and others that Infidels possessed property and sovereign rights, or *dominium*.<sup>75</sup> He thus concluded that Spain's title in the New World could not be based solely on papal grants because the papacy could not give away the Infidels' natural law rights and property since Indians were free men and the owners of their lands.<sup>76</sup>

But Vitoria also concluded that if Indians violated the natural law principles of the law of nations, as defined by Europeans, then a Christian nation was justified in conquering and establishing an empire in the Americas. According to Vitoria, Indians had natural law duties to allow Spaniards to travel wherever they wished; to engage in free commerce, trade, and profits wherever they traveled; and to collect and trade common items, such as fish, animals, and precious metals. Vitoria also stated that Europeans could engage in just and holy wars if natives violated any of these European natural laws:

If the Indian natives wish to prevent the Spaniards from enjoying any of their . . . rights under the law of nations . . . [,] Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force . . . . Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so. <sup>79</sup>

Vitoria also argued that Spain could engage in these actions based on its Christian guardianship duty to civilize barbarian peoples and its obligation to preach the gospel. 80

### 2. Other European Countries

England, France, and Holland also used international law and claimed the rights of first discovery, sovereign and commercial rights, and title to lands in various parts of the world. I will only focus here on how their efforts and legal arguments added to the definition of the international law of colonialism.

<sup>&</sup>lt;sup>74</sup> See Franciscus de Victoria, De Indis et de Ivre Belli Relectiones 115, 123, 125–28 (Ernest Nys ed., John Pawley Bate trans., 1917); see also Williams, supra note 1, at 97.

VICTORIA, *supra* note 74, at 123.

<sup>&</sup>lt;sup>76</sup> *Id.* at 129–31, 135–39 (noting that lands that were truly empty, *terra nullius*, could be claimed by the first occupant: "that what belongs to nobody is granted to the first occupant").

<sup>&</sup>lt;sup>77</sup> *Id.* at 151–154; *see also* J.H. Parry, The Age of Reconnaissance: Discovery, Exploration and Settlement 1450 to 1650, at 305–06 (Praeger Publishers 1969) (1963); Williams, *supra* note 1, at 97.

<sup>&</sup>lt;sup>78</sup> VICTORIA, *supra* note 74, at 151–54; *see also* Anthony Pagden, Spanish Imperialism and the Political Imagination 23–24 (1990); Williams, *supra* note 1, at 100–03.

VICTORIA, *supra* note 74, at 154. *See generally* Lewis Hanke, The Spanish Struggle for Justice in the Conquest of America 133–46, 156–72 (1949); Arthur Nussbaum, A Concise History of the Law of Nations 80–82 (rev. ed. 1954); Seed, *supra* note 2, at 88–97.

<sup>&</sup>lt;sup>80</sup> VICTORIA, *supra* note 74, at 156–57, 160–61.

<sup>81</sup> See, e.g., MILLER, NATIVE AMERICA, supra note 1, at 12–23, 44–48, 120–26, 131–36.

France and England were both Catholic countries in 1493 and faced a common problem regarding developing colonies and trade in the New World. They were very concerned about infringing the papal bulls issued to Portugal and Spain—and being excommunicated as a result. But they were also anxious to acquire new territories and assets. Therefore, legal scholars in England and France analyzed canon law, the papal bulls, and history, to develop new theories of Discovery that allowed their countries to colonize and trade in the New World. One of the new theories held that Catholic King Henry VII of England would not violate the bulls if his explorers only claimed lands that had not yet been discovered by any Christian prince. Consequently, when Henry VII chartered John Cabot from 1496–1498 to explore and claim the east coast of North America, he ordered Cabot to "discover... countries, regions, or provinces of the heathen and infidels... which before this time have been unknown to all Christians."

This new definition of Discovery was further refined by the Protestant Queen Elizabeth I and her advisers when they demanded that Spain and Portugal actually occupy and possess non-Christian lands if they wanted to prevent England making Discovery claims. Elizabeth I directed Sir Walter Raleigh, for example, "to disco[v]er...remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People." Her successor, James I (also a Protestant) expressly enforced this element against Spain, and ordered his explorers to discover and colonize lands unknown to all Christians and "which are not now actually possessed of any *Christian* Prince or People." It is interesting to note that these

<sup>&</sup>lt;sup>82</sup> See WILLIAMS, supra note 1, at 74, 81.

<sup>&</sup>lt;sup>83</sup> See generally WILLIAMS, supra note 1, at 121–225.

<sup>84</sup> See id. at 121.

<sup>&</sup>lt;sup>85</sup> Letters Patents of Henry VII Granted to John Cabot (March 5, 1496/97), in 1 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 68, at 18.

Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest 132 (1975) ("'[P]ossession' instead of just 'discovery' [is] the basis of Christian right."); Von der Heydte, *supra* note 71, at 450–54, 458–59; *see also id.* at 452 ("At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation.").

<sup>&</sup>lt;sup>87</sup> Charter to Sir Walter Raleigh (Mar. 25, 1583/4), in 3 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 1694; see also Letters Patent to Sir Humphrey Gilbert (June 11, 1578), in 3 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 1690

PARRY, *supra* note 77, at 186 (In 1604, James I made peace with Spain and "was willing to respect Spanish monopolistic claims in all territories effectively occupied by Spain, but that he recognized no Spanish rights in unoccupied parts of America.").

<sup>&</sup>lt;sup>89</sup> First Charter of Virginia (Apr. 10, 1606), *in* 3 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 68, at 1698. *See also* Patent of New England Granted by James I (Nov. 3, 1620), *in* 1 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 68, at 22; Patent of the Council for New England (Nov. 3/13, 1620), *in* SELECT CHARTERS AND OTHER

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Protestant monarchs complied with the emerging secular international law of Discovery even though they did not fear excommunication and the papal bulls.

Thereafter, John Cabot's voyages gave England a first discovery claim to parts of modern-day Canada and the United States. <sup>90</sup> England then used other elements of Discovery to argue against Dutch and Swedish settlements in North America in the 1640s because England claimed "first discovery, occupation and the possession" of the lands due to its colonial settlements. <sup>91</sup> France, in turn, contested England's claims of first discovery in North America and argued instead that French explorers had discovered those areas first and had possessed them and established France's first discovery claim. <sup>92</sup>

Holland also used the law of colonialism to make claims in North America and Brazil. Holland adopted the idea that actual occupation and possession of Indigenous lands was the crucial element, and since England was not in possession of the lands Holland settled in North America, they were available for Dutch Discovery claims. England argued, however, that due to its first discovery of North America and the element of preemption, the Dutch could not buy land from American

DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 23, 24–25 (Fred B. Rothman & Co. 1993) (William MacDonald ed., 1906) [hereinafter Select Charters].

<sup>&</sup>lt;sup>90</sup> See Pagden, supra note 26, at 90; Patent of the Council for New England, supra note 89, at 25.

<sup>&</sup>lt;sup>91</sup> English Answer to the Remonstrance of the Dutch Ambassadors (May 5, 1632), *in* 7 Early American Indian Documents: Treaties and Laws, 1607–1789, at 31–32 (Alden T. Vaughan gen. ed., 1979–1998) [hereinafter Early American Indian Documents].

See, e.g., Pagden, supra note 26, at 34. See also, e.g., Pierre Biard, Relation of New France, of its Lands, Nature of the Country, and of its Inhabitants (1616), reprinted in 3 The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610–1791, at 25, 33, 39, 41 (Reuben Gold Thwaites ed., John Cutler Covert et al. trans., 1959) [hereinafter Jesuit Relations]; Joseph Jouvency, An Account of the Canadian Mission (1710), reprinted in 1 Jesuit Relations, supra, at 195, 205; Marc Lescarbot, Last Relation of What Took Place in the Voyage Made by Sieur de Poutrincourt to New France, Twenty Months ago (1612), reprinted in 2 Jesuit Relations, supra, at 125, 127; Paul Ragueneau, Relation of What Occurred in the Mission of the Fathers of the Society of Jesus Among the Hurons, a Country of New France, in the Years 1648 and 1649 (1650), reprinted in 34 Jesuit Relations, supra, at 71, 217–19; A Relation of Occurrences in the Mission of New France During the Years 1613 and 1614 (1618), reprinted in 2 Jesuit Relations, supra, at 195, 203; Letter from Father Pierre Biard to the Rev. Father Provincial, at Paris (Jan. 31, 1612), in 2 Jesuit Relations, supra, at 5, 33.

<sup>&</sup>lt;sup>93</sup> See Regulation of Trade with Indians, Erection of Fences, and Control of Livestock (July 1, 1647), in 2 Foundations of Colonial America, supra note 68, at 1260; Jennings, supra note 86, at 133; Howard R. Berman, Perspectives on American Indian Sovereignty and International Law, 1600 to 1776, in Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution 125, 136, 140 (Oren Lyons & John Mohawk eds., 1992); Simsarian, supra note 71, at 111, 113, 115–17; West India Company to the States General: the Dutch Define Indian Land Ownership (May 5, 1632), in 7 Early American Indian Documents, supra note 91, at 30–31.

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Indians or trade with them. <sup>94</sup> Moreover, Holland made similar Discovery claims against Portugal and targeted Brazil for trade and settlement because Portugal was unable to actually occupy that enormous land. In 1621, the Dutch West India Company was created with the specific goal of occupying and exploiting Brazil. <sup>95</sup> The French were also interested in colonizing Brazil and established settlements in places that the Portuguese had not occupied. <sup>96</sup>

England and France also developed another element of Discovery: *terra nullius*, or vacant lands.<sup>97</sup> This element stated that lands that were possessed by no one, or which were occupied but not being used in a manner European legal systems recognized, were empty and available for European Discovery claims.<sup>98</sup> England, Holland, France, and the United States relied on this element at different times to claim that lands actually occupied and used by Indigenous nations were legally vacant or *terra nullius*, and open for appropriation.<sup>99</sup>

 $<sup>^{94}\,</sup>$  English Answer to the Remonstrance of the Dutch Ambassadors,  $\it supra$  note 91, at 31–32.

<sup>&</sup>lt;sup>95</sup> William Fredric Harrison, A Struggle for Land in Colonial Brazil: The Private Captaincy of Paraiba do Sul, 1533–1753, at 1, 10–12, 38 (June 1970) (unpublished Ph.D. dissertation, University of New Mexico) (on file with University Microfilms); *see also* Boxer, *supra* note 45, at 87, 112; Eduardo Bueno, A Coroa, a Cruz e a Espada: Lei, Ordem e Corrupção no Brasil Colonia [The Crown, the Cross, and the Sword: Law, Order and Corruption in Colonial Brazil] 162 (2006); Ralph Davis, The Rise of the Atlantic Economies 74, 80 (1973); Livermore, *supra* note 69, at 169–70; Marques, *supra* note 28, at 358; J.F. De Almeida Prado, São Vicente e as Capitanias do Sul do Brasil: As Origens (1501–1531) [Saint Vincent and the Captaincies of the South of Brazil: The Origins] 227 (1961).

Marques, supra note 28, at 358; see also Bueno, supra note 95, at 162; Davis, supra note 95, at 74, 80–82; Alida C. Metcalf, Go-Betweens and the Colonization of Brazil 1500–1600, at 118 (2005); Prado, supra note 95, at 227; Harrison, supra note 95, at 28–29.

<sup>&</sup>lt;sup>97</sup> See PAGDEN, supra note 26, at 91 (Spain and Portugal did not need terra nullius arguments because they had papal grants; England and France did not.).

<sup>&</sup>lt;sup>98</sup> COLIN G. CALLOWAY, CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783–1815, at 9 (1987); ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY 20 (1982). *Terra nullius* is a doctrine that essentially ignored the title of original inhabitants based on subjective assessments of their level of civilization. The term has two meanings: "a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all." HENRY REYNOLDS, THE LAW OF THE LAND 12 (1987).

<sup>&</sup>lt;sup>99</sup> See, e.g., HANKE, supra note 79, at 24; MILLER, NATIVE AMERICA, supra note 1, at 21, 27–28, 49, 56, 63–64, 156, 159–60; SPANISH TRADITION, supra note 60, at 9. See also United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) ("[T]he whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land . . . ."); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409 (1842) ("The English possessions in America were not claimed by right of conquest but by right of discovery. . . . [T]he territory [the Indigenous peoples] occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants."); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595 (1823).

In light of the foregoing, the Doctrine of Discovery, the international law of colonialism, was fairly well defined by the time European countries began establishing colonies in the Americas and Oceania.

# III. THE DOCTRINE OF DISCOVERY IN AUSTRALIA, BRAZIL, CANADA, CHILE, ENGLAND, NEW ZEALAND, PORTUGAL, SPAIN, AND THE UNITED STATES

A comparative analysis demonstrates that England, Spain, and Portugal applied the Doctrine of Discovery in their colonization of the modern-day countries of Australia, Brazil, Canada, Chile, New Zealand, and the United States. Those ex-colonies also used Discovery principles and continue to do so today in their relationships with Indigenous peoples and nations. I will examine and contrast in this Part how these European countries and colonial powers used the ten elements of the Doctrine.

#### A. First Discovery

Spain, Portugal, and England used the first-discovery element of international law throughout the world in making claims over Indigenous nations and their lands. <sup>100</sup> Initially, the papal bulls expressly granted Spain and Portugal first-discovery rights over the entire globe in 1493. <sup>101</sup> Thereafter, Spain and Portugal relied on the bulls and on first-discovery claims made by their explorers.

Columbus and other Spaniards, for example, claimed numerous islands and mainlands in the Caribbean for Spain based on first discovery. Subsequently, Balboa crossed modern-day Panama in 1513, proclaimed himself the first discoverer of the Pacific Ocean, and claimed the entire sea and all its adjoining lands for Spain due to his first discovery. When Ferdinand Magellan's expedition circumnavigated the globe, he was the first European to discover and claim the area that is

<sup>&</sup>lt;sup>100</sup> See MILLER ET AL., DISCOVERING INDIGENOUS LANDS, supra note 1, at 13, 17, 20, 79; MILLER, NATIVE AMERICA, supra note 1, at 14–17, 20–21; Miller et al., International Law of Discovery, supra note 1, at 834, 846, 849; Miller & D'Angelis, supra note 1 (manuscript at 40).

<sup>&</sup>lt;sup>101</sup> See The Bull Dudum Siquidem (Alexander VI) (Sept. 26, 1493), in European Treaties, supra note 57, at 79, 82–83; Bull "Inter Caetera Divinae" of Pope Alexander VI, supra note 66, at 157–58.

<sup>&</sup>lt;sup>102</sup> See MORISON, EUROPEAN DISCOVERY, supra note 60, at 63, 68, 74, 80, 104–05, 148–49, 152–54, 184–209, 249, 253, 256–57 (listing Spanish discoveries).

<sup>&</sup>lt;sup>103</sup> *Id.* at 203; 1 WILLIAM H. PRESCOTT, HISTORY OF THE CONQUEST OF PERU 194–95 (Boston, Phillips, Samson & Co. 1859); *see also* WASHINGTON IRVING, VOYAGES AND DISCOVERIES OF THE COMPANIONS OF COLUMBUS 185–86 (Philadelphia, Carey, Lea & Blanchard 1835); 4 MERRIMAN, *supra* note 45, at 166 (discussing that in 1561, the Spanish explorer Vallafane traveled up the east coast of the modern day United States and made first discovery claims for Spain).

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now called the Straits of Magellan in southern Chile.<sup>104</sup> Magellan had been authorized by the Spanish king to discover and take possession of lands in the king's name, and he was granted jurisdiction and authority over the lands and seas he discovered.<sup>105</sup>

Spanish explorers also made first-discovery claims to what is now modern-day Chile. In 1534, King Charles V authorized Diego de Almagro to travel to this territory and licensed him "to conquer, pacify, and settle the described territory in the name of the King and of the Crown of Castile." The king also conferred upon Almagro various governmental powers, territorial jurisdiction, and lands, ordering him to conquer and occupy land. <sup>107</sup> In 1539, Charles V granted another commission to Pedro Sancho de Hoz to make discoveries and to conquer and govern lands and islands in southern Chile and the territory south of the Straits of Magellan. 108 Ultimately, the expedition under this commission was led by Pedro de Valdivia and when he reached the valley of Copiapo in modernday Chile, the land "was solemnly taken possession of in the name of the king of Spain." The expedition pressed on to the present-day site of Santiago and founded that city on February 12, 1541 with all the royally prescribed ceremonies. 110 Valdivia later sent Spaniards further south with express orders to make first-discovery claims.<sup>111</sup> In the 1880s, the Republic of Chile also made first-discovery claims to lands around the Straits of Magellan and to Rapa Nui (Easter Island). 11

Similarly, Portugal made first-discovery claims around the world. Portugal claimed the island groups off the Iberian peninsula and points along the west coast of Africa based on first discovery. Furthermore,

See L.E. Elliot, Chile Today and Tomorrow 116–18 (1922).

See Morison, European Discovery, supra note 60, at 337, 394–97; Testimonio del Interrogatorio (May 23, 1524), in 2 Coleccion de Documentos Inéditos para la Historia de Chile Desde el Viaje de Magallanes Hasta la Batalla de Maipo 1518–1818, at 1, 2, 14 (J.T. Medina ed., Santiago, Imprenta Ercilla 1888) [hereinafter Coleccion de Documentos para la Historia de Chile].

 $<sup>^{106}</sup>$  1 Miguel Luis Amunátegui, La Cuestion de Limites Entre Chile I la Republica Arjentina 22, 34 (Santiago, Imprenta Nacional 1879) (reprinting the capitulacion to Almagro) (author's translation).

<sup>&</sup>lt;sup>107</sup> See Julio Perez Canto, Chile: An Account of its Wealth and Progress 134 (1912); 3 Merriman, *supra* note 45, at 571; H.R.S. Pocock, The Conquest of Chile 16–17, 28 (1967).

 $<sup>^{108}</sup>$  POCOCK, *supra* note 107, at 49–52; 1 AMUNÁTEGUI, *supra* note 106, at 128–29 (reprinting the 1539 capitulacion to de Hoz).

<sup>&</sup>lt;sup>109</sup> 3 MERRIMAN, *supra* note 45, at 591; *see also* SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE, 1808–2002, at 7 (Herbert S. Klein ed., 2d ed. 2004).

<sup>&</sup>lt;sup>110</sup> 3 MERRIMAN, *supra* note 45, at 591.

POCOCK, supra note 107, at 108–10.

JOSE BENGOA, HISTORIA DEL PUEBLO MAPUCHE (SIGLO XIX Y XX) 280 (2d ed. 1987); Miller et al., *International Law of Discovery, supra* note 1, at 878–83.

<sup>&</sup>lt;sup>113</sup> See LIVERMORE, supra note 69, at 127–30; PARRY, supra note 77, at 131, 134 ("The Portuguese Crown claimed a monopoly of the Guinea trade, on the grounds

Pedro Cabral claimed Brazil for Portugal by his first discovery of April 22, 1500. 114 In 1501, King Manoel of Portugal reported to the king of Spain that Cabral's discovery of Brazil was a first discovery. 115 Thereafter, Portugal, colonial officials, and the independent country of Brazil made multiple claims to the lands and rights of Indigenous people based on first discovery. 116

Moreover, England and its colonies also relied on first discovery. For centuries, England argued that John Cabot's 1496-1498 explorations and his alleged first discoveries of the east coast of North America from modern-day Newfoundland to Virginia gave it priority over any other European country. 117 In fact, Henry VII had ordered Cabot to "discover...countries, regions, or provinces of the heathen and infidels...which before this time have been unknown to all Christians."118 England later contested Dutch settlements and trade with Indians in North America due to England's "first discovery, occupation and the possession" of its colonial settlements. 119 Captain James Cook was expressly ordered to make first discovery claims to lands he discovered during his three world voyages. The Admiralty ordered him in 1776:

You are also with the consent of the Natives to take possession, in the Name of the King of Great Britain, of convenient Situations in such Countries as you may discover, that have not already been discovered or visited by any other European Power, and to

both of prior discovery, and of papal bulls of 1454 and 1456 . . . . "); see also MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 5; PRESTAGE, *supra* note 23, at 5, 9.

LIVERMORE, supra note 69, at 138–39; MORISON, EUROPEAN DISCOVERY, supra note 60, at 222-27. Cabral spent ten days exploring the Brazilian coastline, named the harbor of Porto Seguro, and named the new land Vera Cruz ("faithful cross"), which was later changed to the Land of the Holy Cross, and even later to Brazil. LIVERMORE, supra note 69, at 138–39; MORISON, EUROPEAN DISCOVERY, supra note 60, at 223 - 24

PRESTAGE, *supra* note 23, at 285.

 $<sup>^{116}</sup>$  See, e.g., Mathias C. Kiemen, The Indian Policy of Portugal in the AmazonREGION, 1614-1693, at 54 & n.23 (1954); ALEXANDER MARCHANT, FROM BARTER TO SLAVERY: THE ECONOMIC RELATIONS OF PORTUGUESE AND INDIANS IN THE SETTLEMENT OF BRAZIL, 1500-1580, at 13-14 (1942); 1 MARQUES, supra note 28, at 218, 252, 356; MORISON, EUROPEAN DISCOVERY, supra note 60, at 5, 223, 280–81; PRESTAGE, supra note 23, at 243, 277-81. Portuguese explorers mapped and named physical land features to reinforce their first discovery claims. 1 MARQUES, supra note 28, at 218; SEED, supra note 2, at 9 & n.19, 69-73, 101-02.

PAGDEN, supra note 26, at 90; WILLIAMS, supra note 1, at 161, 170, 177-78. England asserted its rights in America by "right of discovery," a basis established by Richard Hakluyt. WILLIAMS, supra note 1, at 161, 170, 177-78; see also English Answer to the Remonstrance of the Dutch Ambassadors, *supra* note 91, at 31–32.

Letters Patents of Henry VII Granted to John Cabot, *supra* note 85, at 18.

<sup>119</sup> English Answer to the Remonstrance of the Dutch Ambassadors, supra note 91, at 31–32; see also WILLIAMS, supra note 1, at 161, 170, 177–78.

distribute among the Inhabitants such Things as will remain as Traces and Testimonies of your having been there.<sup>120</sup>

The United States also relied on first-discovery claims. The English colonies in America, and later the independent states of the United States, made first discovery claims to own land. 121 In addition, the United States argued for more than four decades that it had made the first discovery of the Oregon Country and thereby owned that region. United States Presidents, Secretaries of State, and diplomats, including James Monroe, John Quincy Adams, James Polk, James Buchanan, and many others, were involved in negotiations with England, Spain, and Russia on this issue.<sup>122</sup> All sides claimed the Oregon Country based on first discovery. 123

Similarly, the British applied first-discovery principles in New Zealand. Even though England signed a treaty of cession with many Maori tribes, 124 the British believed that they had first discovered the lands and thus had acquired sovereign rights over the lands and people whether a treaty was signed or not. In 1847, a New Zealand court claimed that first discovery had granted England title against all other Europeans. 125 Moreover, in 1877, the New Zealand Supreme Court expressly applied this Discovery element to New Zealand because under international law, jure gentium, certain rights "vest in and devolve upon the first civilised occupier."126

It also appears correct to state that England used first discovery to claim the continent of Australia and the lands that became modern-day Canada. Even though Captain James Cook was not the first European or even the first Englishman to land in Australia, he did claim the east coast

<sup>&</sup>lt;sup>120</sup> The Journals of Captain James Cook on His Voyages of Discovery: The VOYAGE OF THE RESOLUTION AND DISCOVERY 1776–1780, at ccxxiii (J. C. Beaglehole ed., Cambridge University Press 1967) [hereinafter JOURNALS OF THE RESOLUTION AND DISCOVERY (reprinting Cook's instructions).

<sup>&</sup>lt;sup>121</sup> In 1638, Maryland enacted a law to control Indian land sales and based its legal authority on the Crown's "right of first discovery" in which the King "became lord and possessor" of Maryland. Act for Trade with the Indians (1638), reprinted in 2 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 1267. See also Arnold v. Mundy, 6 N.J.L. 1, 12 (1821) (opinion of Kirkpatrick, C.J.) ("Charles II took possession of this country, by his right of discovery . . . . "); Thompson v. Johnston, 6 Binn. 68, 78 (Pa. 1813) (opinion of Brackenridge, J.) ("[T]he king's right was... founded . . . on the right of discovery . . . . ").

BERNARD DEVOTO, THE COURSE OF EMPIRE 323–28 (1952); MILLER, NATIVE AMERICA, supra note 1, at 121-27, 131-44, 146-49, 153-57. See also 1 CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789–1829, at 376, 381, 386, 401–03, 405– 07, 415, 423, 439-40, 484-85, 496, 501 (Noble E. Cunningham, Jr., ed., 1978) [hereinafter Circular Letters]; 2 Circular Letters, supra, at 571; 3 Circular LETTERS, *supra*, at 1047.

<sup>&</sup>lt;sup>123</sup> See MILLER, NATIVE AMERICA, supra note 1, at 131–44.

 $<sup>^{\</sup>scriptscriptstyle{124}}$   $\,$  See Treaty of Waitangi Act 1975, sched. 1 (N.Z.).

 $<sup>^{125}~</sup>$  R v Symonds (1847) NZPCC 387, 390–91 (SC).

 $<sup>^{126}</sup>$  Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC) 77.

of the continent for England, and England thereafter asserted its ownership of the land based on Cook's discovery. 127

Moreover, first discovery was also applied in Canada. For example, the 1670 royal charter granted to the Hudson's Bay Company enabled the Company to explore and discover the northwest of Canada to find "Trade for Furs, Minerals, and other considerable Commodities, and by such their Undertaking, have already made such Discoveries as do encourage them to proceed further... by means whereof there may probably arise very great Advantage to [King Charles II] and Our Kingdom." The charter expressly recognized first-discovery rights because it prevented the Company from trading in any lands "actually possessed by any of our Subjects, or by the Subjects of any other Christian Prince or State." 129

It is evident that the first-discovery element of the Doctrine was applied in almost exactly the same manner, even under varying circumstances, by Spain, Portugal, and England, and then by the colonial and independent governments of Australia, Brazil, Canada, Chile, New Zealand, and the United States.

#### B. Actual Occupancy and Current Possession

As already mentioned, England and France developed the element that a European country had to be in actual possession of Indigenous lands to prevent another country from claiming those lands. Spain and Portugal vehemently disagreed, but they of course realized the practical importance of actually occupying and possessing Indigenous lands to establish their permanent claims. The papacy, in fact, also recognized this principle. In the papal bulls of 1493, Alexander VI stated that if another European monarch had already occupied and was in possession of lands within the areas of the globe he exclusively granted to Spain or Portugal, the pre-existing claims established by actual occupancy were

MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 171–72, 174–75. The first recorded landing of a European on Australian soil was Captain Dirk Hartog in October 1616 at Cape Inscription on the west coast of Australia. To memorialize his discovery, he left an inscribed pewter plate that was allegedly found in 1697 by his countryman Willem de Vlamingh. William Dampier was the first British person to explore Australia when he visited the north coast in 1688 and in 1699. He published *A Voyage to New Holland* in 1703 giving the first written account of what later become known as Australia. *Id.* at 171–72.

Royal Charter of the Hudson's Bay Company (May 2, 1670), available at Hudson's Bay Co. Heritage, http://www.hbc.com/hbcheritage/collections/archival/charter/charter.asp.

<sup>&</sup>lt;sup>129</sup> *Id*.

<sup>&</sup>lt;sup>130</sup> See LIVERMORE, supra note 69, at 155–56 (The French and English challenged Portuguese monopoly in Africa because they claimed their "ships traded only in places not frequented by the Portuguese.").

 $<sup>^{131}</sup>$  WILLIAMS, *supra* note 1, at 133–34; Miller & D'Angelis, *supra* note 1 (manuscript at 34–35).

valid. 132 Thereafter, Spain and Portugal worked to actually occupy the Indigenous lands they wanted to claim. 133 They also engaged in what can be called acts of symbolic possession to try to establish occupancy and possession.

One of the most important goals of the Spanish government was to ensure that newly discovered lands were occupied and settled by Spaniards as soon as possible. In 1538, for example, Charles V ordered "the discovery, conquest, and settlement of the islands in the Southern Sea." In other examples, the Viceroy of Mexico demanded the speedy occupation of Florida, and the king concurred because he feared that if settlements were not quickly established there was a great risk of French settlements being established. In fact, Spain argued to France that Florida belonged to Spain based on "the bull of Alexander VI and the Tordesillas Line, as well as by right of priority in discovery and colonization." In occupying Chile, the viceroy of New Castile and King Philip ordered that forts be built in the Straits of Magellan to establish Spanish occupation.

The Crown also enacted laws demonstrating the importance of actually occupying the lands it claimed by first discovery. In 1573, King Philip II issued ordinances "to facilitate the performance of the discoveries, the establishment of new settlements and the pacification of the lands and provinces still to be discovered in the Indies and to do so for the service of God and Ourselves and for the benefit of the natives." He also ordered that individual Spanish discoverers were responsible "for populating the discovered land." In fact, Philip ordered that he would not approve any new discovery expeditions until after the lands already discovered "shall be settled."

In the 1840–50s, the independent Republic of Chile also engaged in acts of symbolic possession and actual occupation, for example, to claim the Straits of Magellan. 141 Chile was increasingly concerned about

Bull "Inter Caetera Divinae" of Pope Alexander VI, supra note 66, at 157–58.

See Miller et al., International Law of Discovery, supra note 1, at 853, 855.

<sup>&</sup>lt;sup>134</sup> 3 Merriman, *supra* note 45, at 453–54 (internal quotation marks omitted).

<sup>&</sup>lt;sup>135</sup> 4 MERRIMAN, *supra* note 45, at 163–64.

<sup>&</sup>lt;sup>136</sup> *Id.* at 175–76.

<sup>&</sup>lt;sup>137</sup> *Id.* at 184.

<sup>&</sup>lt;sup>188</sup> Ordinances of His Majesty for the New Discoveries, Conquests, and Pacifications (1573) [hereinafter Ordinances of Philip II], *translated in Spanish Laws Concerning Discoveries*, Pacifications, and Settlements Among the Indians 1, 1 (S. Lyman Tyler ed., 1980) [hereinafter Spanish Laws].

<sup>&</sup>lt;sup>139</sup> *Id.* at 8, 11.

<sup>&</sup>lt;sup>140</sup> Bk. 4, Tit. 1, Law 1, RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS (1681) [hereinafter RECOPILACIÓN 1681], *translated in Spanish Laws*, *supra* note 138, at 62, 62; *see also* Ordinances of Philip II, *supra* note 138, at 1, 11.

George v. Rauch , Conflict in the Southern Cone: The Argentine Military and the Dispute with Chile, 1870-1902, at  $21,\,27\,(1999)$ ; José Bengoa, *Chile* Mestizo,

potential English and French claims in the Straits, and thus began a campaign to occupy the southern part of the country based on the territorial title formerly claimed by Spain. In 1842, President Manuel Bulnes ordered an expedition to take possession of the Straits of Magellan and to build and occupy a fort in the Straits to solidify Chile's claim. Captain Juan Guillermos then took formal possession of the Straits: In the presence of everyone I took possession of the Straits of Magellan and these territories with the customary formalities in the name of the Republic of Chile . . . . "144

Chile also realized the importance of occupying native lands to expand its territory. In the 1880s, the Secretary of Interior ordered an expedition to occupy Araucanian (Mapuche) territory. The Secretary also ordered forts built "to make occupation efficient and a reduction of the [Araucanian] territory, [so] that...time and development could prosper a significant population."

Portugal also frequently argued actual occupancy to establish its claim to Brazil. One of the most important goals of the Portuguese Crown was to see that the newly discovered lands in Brazil were occupied and settled as soon as possible. Immediately upon hearing of the discovery of Brazil, the Crown authorized an expedition in 1501 to investigate the region's economic potential and to chart the coast. The king authorized private entrepreneurs to exploit and occupy Brazil and required them to explore 300 leagues of coastline each year and to build forts and trading posts, or *feitorias*.

Chile Indígena, in Manifest Destinies and Indigenous Peoples 119, 128 (David Maybury-Lewis et al. eds., 2009).

- <sup>144</sup> Annique R., *supra* note 143, at 40 (author's translation).
- $^{145}$  Bengoa, supra note 112, at 280.
- <sup>146</sup> *Id.* at 282 (author's translation).
- <sup>147</sup> See 1 Marques, supra note 28, at 148, 152; Parry, supra note 77, at 147.
- See ALDEN, supra note 29, at 31; see also James Lang, Portuguese Brazil: The King's Plantation 23 (1979). See generally John L. Vogt, Jr., Portugese Exploration in Brazil and the Feitoria System, 1500–1530: The First Economic Cycle of Brazilian History (June 1967) (unpublished Ph.D. dissertation, University of Virginia) (on file with University Microfilms).
- <sup>149</sup> MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 280–81. *See also* PRESTAGE, *supra* note 23, at 290; Vogt, *supra* note 148, at 45, 57, 63–64, 70–71.
- 150 1 MARQUES, *supra* note 28, at 252; PRESTAGE, *supra* note 23, at 290, 294–95; Vogt, *supra* note 148, at 65, 90. The colonization of Brazil initially followed the pattern created by Portugal in Asia and Africa of building *feitorias*, or trading posts, along the coast. LANG, *supra* note 148, at 23. European countries had long built forts and trading posts in non-European lands as "an extension of sovereignty for

Robert D. Talbott, *The Chilean Boundary in the Strait of Magellan*, 47 HISP. AM. HIST. REV. 519, 520 (1967).

OVIDIO LAGOS, CHILOÉ: A SEPARATE WORLD 106–08 (Elizabeth Birks trans., n.d.), available at www.ovidiolagos.com/chiloe%20a%20separate%20world.pdf; Talbott, supra note 142, at 520–21. See generally NICOLAS ANRIQUE R., DIARIO DE LA GOLETA "ANCUD" 50–57 (1901) (reproducing journal of the ship sent to take possession of the Straits).

The merchants were not successful in settling Brazil, and the growing menace of Dutch and French trade there induced the king "systematically to promote the colonisation of Brazil." Portugal began to defend Brazil militarily and the king tried to occupy and settle Brazil by naming private captaincies, giving them enormous land grants, and ordering them to occupy, cultivate, and colonize Brazil for the Crown. 152 Most of the captaincies failed, however, and many advisors warned the Crown about the vulnerability of the Portuguese position in Brazil due to the lack of actual occupation. 153 The Crown finally realized that it had to personally direct and fund the occupation and colonization of Brazil because other European countries were trading along the coast and establishing colonies so that Portuguese "colonies must be planted at once." In 1549, the king appointed the first governor-general of Brazil and sent a large expedition to erect a fortified capital, establish the royal government, and strengthen the existing Portuguese settlements and build new ones. 155 Thereafter, the Crown made many land grants in Brazil to Portuguese citizens and required them to build towns, churches, and houses within five to six years or else their grants would lapse. 156

Moreover, in the seventeenth and eighteenth centuries, Portugal and Spain expressly applied the Discovery element of actual occupation and possession to their dispute over lands in the south of Brazil and modern-day Uruguay.<sup>157</sup> In 1680, Portugal attempted to occupy the lands

commercial purposes" and as "a first step towards dominion." MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 43; PRESTAGE, *supra* note 23, at 295.

BOXER, supra note 45, at 86; accord Harrison, supra note 95, at 12.

See Bueno, supra note 95, at 29–30; Kiemen, supra note 116, at 8; 1 Marques, supra note 28, at 254; Morison, European Discovery, supra note 60, at 587; Prestage, supra note 23, at 287; Dauril Alden, Black Robes Versus White Settlers: The Struggle for "Freedom of the Indians" in Colonial Brazil, in Attitudes of Colonial Powers, supra note 30, at 19, 22; Harrison, supra note 95, at 3, 9. See generally Bailey W. Diffie, The Legal "Privileges" of the Foreigners in Portugal and Sixteenth Century Brazil, in Conflict & Continuity in Brazilian Society 1 (Henry H. Keith & S.F. Edwards eds., 1969); História do Brasil, Lusoafrica, http://www.lusoafrica.net/v2/index.php?option=com\_content&view=article&id=87&itemid=108.

See Alden, supra note 29, at 31; Bueno, supra note 95, at 30; Kiemen, supra note 116, at 12; Lang, supra note 148, at 25; Marchant, supra note 116, at 80–81; Harrison, supra note 95, at 24–25. See also 3 História da Colonização Portuguesa do Brasil [History of the Portuguese Colonization of Brazil] 259 (Carlos Malheiro Dias et al. eds., 1924); H.B. Johnson, Jr., The Donatary Captaincy in Perspective: Portuguese Backgrounds to the Settlement of Brazil, 52 Hisp. Am. Hist. Rev. 203, 211–12 (1972).

ROY NASH, THE CONQUEST OF BRAZIL 88 (1926). *Accord* MARCHANT, *supra* note 116, at 80–81; 1 MARQUES, *supra* note 28, at 253; PARRY, *supra* note 77, at 258; PRADO, *supra* note 95, at 242.

 $<sup>^{155}</sup>$  Alden,  $\it supra$  note 29, at 31; Boxer,  $\it supra$  note 45, at 86; 1 Marques,  $\it supra$  note 28, at 364.

<sup>&</sup>lt;sup>156</sup> See 1 Marques, supra note 28, at 255; Eulalia Maria Lahmeyer Lobo, Conflict and Continuity in Brazilian History, in Conflict & Continuity in Brazilian Society, supra note 152, at 268, 269–70; Harrison, supra note 95, at 105–06.

<sup>&</sup>lt;sup>157</sup> See ALDEN, supra note 29, at 59.

and establish its claims to the region using the Discovery element of contiguity. Portugal built and occupied the settlement of Nova Colônia do Santíssimo Sacramento across the River Plate from Buenos Aires with the intention of gradually expanding Portuguese settlements in southern Brazil southwards towards Colônia. In fact, the Portuguese Conselho Ultramarino (Overseas Council), the administrative body that managed the colonies, advised the king to establish other colonies southwards towards Colônia to solidify his claim to the unoccupied (by European standards) lands of modern-day Uruguay. 159

After decades of fighting and arguing over these lands, and where exactly the 1494 Tordesillas line of demarcation fell, Portugal and Spain decided to ignore the strict application of the line and instead adopted the principle of *uti possidetis* or *ita possideatis*, actual possession, or "he who owns in fact owns by right."<sup>160</sup> A series of treaties culminated in the Treaty of Madrid in 1750 and allowed Portugal to retain the lands it already occupied in South America, even though some of those lands were clearly beyond the Tordesillas line.<sup>161</sup> This made *de jure* the *de facto* occupation by Portugal of the lands that became the southern part of Brazil, and demonstrates the use of this element of Discovery by Spain and Portugal to acquire recognized ownership of lands in Brazil.<sup>162</sup> "[E]ffective possession rather than prior discovery or earlier treaty rights thus became the primary basis for determining their common colonial boundaries."<sup>163</sup>

Portugal, Spain, and England also sometimes claimed that performing symbolic acts of possession and certain ceremonies on newly discovered lands established their possession and ownership of the land under international law. Other European governments and the United States also engaged in acts of symbolic possession and claimed ownership of lands that they were not able to actually occupy. The Spanish, Portuguese, and English Crowns expressly ordered explorers to perform these kinds of acts to prove where they had traveled and to establish claims of ownership. Portuguese explorers, for example, were ordered to erect stone monuments known as *padrãos* along the west coast of Africa to mark their discoveries and to serve "as emblem[s] of Portuguese

<sup>&</sup>lt;sup>158</sup> *Id.* at 66–70.

<sup>&</sup>lt;sup>159</sup> *Id.* at 75–76.

Alexander Marchant, Colonial Brazil, in Portugal and Brazil, supra note 64, at 283, 284; see also Black's Law Dictionary 1686 (9th ed. 2009) (defining uti possidetis).

<sup>&</sup>lt;sup>161</sup> ALDEN, *supra* note 29, at 84–88; BUENO, *supra* note 95, at 167, 176, 179; Marchant, *supra* note 160, at 284, 293.

Luiz Eniani Caminha Giorgis, *The Madrid Treaty – 1750*, TERRAGAÚCHA, http://www.terragaucha.com.br/tratado\_de\_madri\_eng.htm (last visited Nov. 27, 2011).

<sup>&</sup>lt;sup>163</sup> ALDEN, *supra* note 29, at 88.

<sup>&</sup>lt;sup>164</sup> See, e.g., SEED, supra note 2, at 9 & n.19, 69–73, 101–02.

See supra note 71. See also Seed, supra note 2, at 9 & n.19, 69–73, 101–02; Miller et al., International Law of Discovery, supra note 1, at 820. See generally Arthur S. Keller et al., Creation of Rights of Sovereignty Through Symbolic Acts 1400–1800 (1938).

sovereignty."<sup>166</sup> The Portuguese also used other procedures to claim new lands, such as erecting crosses, celebrating mass in new lands, and bringing home symbolic items, commonly a handful of dirt, to present to the king. They used all of these procedures in Brazil to proclaim "Portuguese sovereignty" over the area. <sup>168</sup>

Spain also often argued that when it merely spied new lands in its Tordesillas area of the globe and performed various ceremonies on that land that it was sufficient to establish the "possession" that Discovery required. 169 We have already noted that Spanish explorers Columbus and Balboa, and Magellan and Almagro in what are now parts of Chile, engaged in acts of symbolic possession by planting flags and crosses, and erecting stone monuments to establish Spain's claim, even though they could not then physically and permanently occupy the lands. <sup>170</sup> In fact, Spanish kings ordered their explorers to engage in this activity. In 1573, the Crown enacted a law that ordered its discoverers to "take possession of those lands, provinces or parts where they arrive or disembark, in Our Name by performing the required solemnities and acts." The Crown ordered its explorers to name the lands, provinces, mountains, and rivers they found and to name the villages and towns they established. <sup>172</sup> In 1568, Philip II ordered his subjects to, when discovering a new island or land, "take possession in Our name, observing appropriate formalities, publicly and in an authentic way."17

MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 227. "A practice was begun... of bringing from Portugal some stone pillars with a cross and leaving them with the royal arms and a chronological inscription at important capes or rivers as marks of the Portuguese presence." I MARQUES, *supra* note 28, at 219. One inscription read: "powerful prince king João II of Portugal ordered this land to be discovered and these monuments to be put." *Id.* at 219–20; *see also* MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 63, 151; PAGDEN, *supra* note 26, at 81.

PEDRO CALMON, HISTORIA DA FUNDACAO DA BAHIA [HISTORY OF THE FOUNDATION OF BAHIA] 226 (1949); SEED, supra note 2, at 9 & n.19, 69–73, 101–02.

See, e.g., 2 Pero de Magalhães, The Histories of Brazil 21–22 (John B. Stetson, Jr., ed. & trans. 1922) (1576) (mass); Morison, European Discovery, supra note 60, at 227 (mass and wooden cross); Prestage, supra note 23, at 281, 283 (wooden cross); José Augusto Alegria, Presença da Romana Cantilena no Brasil, 20 Brasil-Europa: Correspondência Euro-Brasileira (1992), available at http://www.revista.akademie-brasil-europa.org/CM20-01.htm (mass); Maria Adelina Amorim, Frei Henrique de Coimbra: Primeiro Missionário em Terras de Vera Cruz [The First Missionary in the Lands of Vera Cruz], Camões, Jan.—Mar. 2000, at 72 (2000) (mass).

See 4 MERRIMAN, *supra* note 45, at 166 (discussing that in 1561 the Spanish explorer Villafañe traveled up the east coast of the modern day United States to South Carolina, "and formally took possession in the king's name").

See, e.g., supra notes 102–12 and accompanying text.

Ordinances of Philip II, *supra* note 138, at 4; *accord* Bk. 4, Tit. 2, Law 11, RECOPILACIÓN 1681, *supra* note 140, at 76. *See also supra* notes 106–11 and accompanying text regarding southern Chile.

Ordinances of Philip II, *supra* note 138, at 5.

 $<sup>^{\</sup>tiny 173}$  Bk. 4, Tit. 2, Law 11, Recopilación 1681, supra note 140, at 76.

Acts of symbolic possession were also undertaken in Chile. When Pedro de Valdivia arrived in Copiapo, "he went through the solemn ceremonies of taking possession of his province in the name of the Spanish monarch," and he named the Copiapo valley and the entire territory. 174 He was also aware of the importance and urgency for Spain to occupy the entire coast and he wanted to push Spanish occupancy to the Magellan Straits before another country arrived. 175 In fact, in 1544, Valdivia ordered Juan Bautista de Pastene to sail along the coast of Chile to the Straits with "authority to take possession of the country in the name of the King and his Governor, Pedro de Valdivia" and to use Valdivia's personal secretary "to provide a record of all that took place on the voyage." Around the 41st latitude, Jeronimo de Alderete, working under Pastene, in the presence of a dozen Indians, "declared that he claimed and took possession of the land" and had the secretary record his speech to "certify in such a manner as shall be credited by His Majesty... how I now in his name and on behalf of Pedro de Valdivia do take and seize tenure, possession and ownership of these natives and of all this land and province, and its surroundings."

The English Crown primarily developed the principle that European countries had to actually occupy the lands they claimed within a reasonable amount of time after a first discovery. Obviously, then, England agreed with and utilized this element. As already noted, Elizabeth I and James I demanded that other European countries be in actual possession of the lands they claimed or else England would claim and occupy the lands. The English Crown claimed its colonies in Australia, Canada, New Zealand, and the United States by actual occupation. But on a few occasions England relied on symbolic acts of possession to allege its ownership of new lands under Discovery. Captain James Cook was ordered by the Admiralty in 1768 and 1776: "[i]f you find the country *uninhabited*, take possession of it for His Majesty by

POCOCK, *supra* note 107, at 64.

<sup>&</sup>lt;sup>175</sup> *Id.* at 108.

<sup>&</sup>lt;sup>176</sup> *Id.* at 108–09.

 $<sup>^{177}</sup>$   $\emph{Id.}$  at 109–10. He performed two more similar ceremonies on his return trip.  $\emph{Id.}$  at 110.

MILLER, NATIVE AMERICA, *supra* note 1, at 18.

See JENNINGS, supra note 86, at 132 (asserting that "'possession' instead of just 'discovery' [is] the basis of Christian right"); Von der Heydte, supra note 71, at 450–54 ("At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation."); see also Charter to Sir Walter Raleigh, supra note 87, at 1694; Letters Patent to Sir Humphrey Gilbert, supra note 87 at 1690.

The Crown claimed it had acquired lands by "actual possession of the Continent," directed colonists to seek out lands "not actually possessed or inhabited," and granted lands that "were not then actuall[y] possessed or inhabited." Charter of the Massachusetts Bay (Mar. 4, 1628/29), in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 45, 46, 49; Patent of New England Granted by James I, supra note 89, at 23, 28–29; see also Simsarian, supra note 71, at 113–18, 120–24; Von der Heydte, supra note 71, at 458–60; English Answer to the Remonstrance of the Dutch Ambassadors, supra note 91, at 31–32.

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setting up proper marks and inscriptions as first discoverers and possessors." 181

In Australia, Britain had no real rivals to claim the continent. That might be one reason why England never signed treaties or agreements with Aboriginal peoples about land, sovereignty, or commercial issues. 182 But Britain was aware that its claim to possess the whole continent was blatantly false. Thus, royal and colonial officials undertook actions to possess and occupy the continent by symbolic means. First, in 1803, England established two penal colonies in Tasmania, the island south of the continent, and one in Port Phillip, near modern-day Victoria. These actions were no doubt undertaken to thwart any French ambitions to those areas. 183 Second, in 1824, England discovered that parts of the Torres Strait were not within the boundaries of New South Wales so it took steps to annex them. In that same year, British settlements were established on the west coast of Australia. 184 Third, officials feared France's intentions in Australia, so steps were taken to assert British sovereignty over the entire continent. Britain undertook symbolic actions of possession by proclaiming to annex the continent. In January 1827, Major Lockyer proclaimed Britain's annexation of the continent and two years later a Captain, authorized by the Crown, claimed "all that part of New Holland which is not included within the territory of New South Wales."185

In New Zealand, the British were also worried about the intentions of the French. The British were especially concerned about a French presence on the east coast of the South Island. Consequently, in May 1840, the British Lieutenant-Governor claimed sovereignty of the South Island on the basis of first discovery rather than by treaty cessions as the Crown had done with the Treaty of Waitangi and the North Island. <sup>186</sup>

England and the United States also relied on this element in their arguments over four decades as they tried to establish their claims to the Oregon Country in the Pacific Northwest and resolve who owned the territory under international law. They argued in diplomatic exchanges about the significance of the Lewis and Clark expedition, John Jacob Astor's fur post at Astoria, and the activities of the English fur companies

 $<sup>^{181}</sup>$  MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 174–75 (citing Vanessa Collingridge, Documents of Australian History 16–17 (2008)); Von der Heydte, *supra* note 71, at 460–61.

MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 177.

<sup>&</sup>lt;sup>183</sup> *Id.* at 177–78.

 $<sup>^{184}</sup>$  Castles,  $\it supra$  note 98, at 20, 26; Miller et al., Discovering Indigenous Lands,  $\it supra$  note 1, at 177–78.

<sup>&</sup>lt;sup>185</sup> CASTLES, *supra* note 98, at 27.

<sup>&</sup>lt;sup>186</sup> See Waitangi Tribunal, The Ngai Tahu Report 215–16 (1991), available at http://www.waitangi-tribunal.govt.nz/reports/ (search for Wai No. 0027).

and the Hudson's Bay trading post at present day Vancouver, Washington. <sup>187</sup>

Thomas Jefferson, for example, realized the significance of actual occupancy under the international law of Discovery and he argued in 1813 and 1816 that America's claim to the Oregon Country was based on the United States' permanent occupancy of the region once John Jacob Astor constructed Astoria in 1811. Other American politicians, including President James K. Polk in 1845, and in the 1820s and 1830s, Senators Thomas Hart Benton and Lewis Linn, Congressman Caleb Cushing, and others, argued that the United States owned the Oregon Country because it had occupied the territory first. Specifically, Cushing told the House of Representatives that America's title relied on the Law of Nations principle "that priority of discovery, followed in a reasonable time by actual occupation, confers exclusive territorial jurisdiction and sovereignty."

There appears to be little evidence of Canada using this Law of Nations principle to argue its rights against other countries. Perhaps this is due to the lack of competition England and Canada faced after France ceded its claims in North America after the French and Indian War. The Crown demonstrated, however, its knowledge and use of this element of Discovery in Canada in 1670, when it issued a charter to the Hudson's Bay Company. The charter expressly recognized the element of occupancy and possession in Canada because it prevented the Company from trading in any lands "actually possessed by any of our Subjects, or by the Subjects of any other Christian Prince or State."

All of these countries understood the strategic and legal importance of actually occupying and possessing the Indigenous lands they had discovered and wanted to claim and colonize. There is ample evidence

<sup>&</sup>lt;sup>187</sup> See MILLER, NATIVE AMERICA, supra note 1, at 74–75.

See Letter to John Jacob Astor, Esq. (Nov. 9, 1813), in 13 The Writings of Thomas Jefferson 432, 432–33, (Andrew A. Lipscomb & Albert Ellery Bergh eds., Library ed. 1903) [hereinafter Writings of Thomas Jefferson (Library ed.)]; Letter to John Melish (Dec. 31, 1816), in 15 Writings of Thomas Jefferson (Library ed.), supra, 93, 93–94; Opinion on Georgian Land Grants (May 3, 1790), in 5 The Writings of Thomas Jefferson 165, 166 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895) [hereinafter Writings of Thomas Jefferson (Ford ed.)]; see also Miller, Native America, supra note 1, at 122.

See, e.g., 1 Reg. Deb. 699–700, 705, 711–13 (1825); 37 Annals of Cong. 679 (1820); 1 Thomas Hart Benton, Thirty Years' View: A History of the Working of the American Government for Thirty Years, From 1820–1850, at 14, 52, 54 (New York, D. Appleton & Co. 1865); William Nisbet Chambers, Old Bullion Benton: Senator from the New West 82–84 (1956); Where Rolls the Oregon: Prophet and Pessimist Look Northwest 42, 97, 101 (Archer Butler Hulbert ed., 1933); 3 Circular Letters, supra note 122, at 1047, 1059, 1082, 1138, 1158, 1267, 1284, 1295, 1300, 1326, 1344; Charles H. Ambler, The Oregon Country, 1810–1830: A Chapter in Territorial Expansion, 30 Miss. Valley Hist. Rev. 3, 16–17 (1943).

<sup>&</sup>lt;sup>190</sup> CONG. GLOBE, 25TH CONG., 2D SESS. 566 (1838).

<sup>&</sup>lt;sup>191</sup> Royal Charter of the Hudson's Bay Company, *supra* note 128.

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that all of these countries (except, perhaps, for Canada and New Zealand) consistently relied on the Discovery element of actual occupancy and possession to establish legal claims.

#### C. Preemption/European Title

The countries analyzed in this Article applied preemption in somewhat different ways. This happened mostly due to the different factual settings the countries encountered. Spain and Chile, for example, do not appear to have used the preemption element directly against other European rivals. This was no doubt due to the very limited competition other European governments presented in Chile. But Spain and Chile did exercise the Discovery claims of preemption and ownership of the land in Chile against their own citizens and against Indigenous peoples and did exercise the rights of their alleged European title.

From the very beginning of its New World colonization, the Spanish Crown considered the lands, waters, minerals, and Indian labor to be the property of the Crown. Spanish laws controlled the distribution of lands, assets, and labor. In a very specific example of the use of preemption against Indians and Spaniards, Philip II ordered in 1571: When the Indians sell their real estate and movable property, in accordance with what is permitted them, they shall be announced for public auction in the presence of the Justicia.... Consequently, under the preemption element, the central royal government controlled the sales of native lands just as England and the English colonies did in North America, and as the United States, Canada and most of the colonial countries we are examining still do to this day.

In the colony of Chile, Pedro de Valdivia and the Assembly of Santiago exercised the Crown's preemption powers and European title when they distributed lands and Indian labor to the explorers and settlers. <sup>197</sup> The Republic of Chile also exercised preemptive control over the purchases and uses of Indigenous lands. In 1852, for example, Chile

 $<sup>^{192}</sup>$  See Miller et. al., International Law of Discovery, supra note 1, at 857.

<sup>&</sup>lt;sup>193</sup> See Haring, supra note 68, at 5, 31; Spanish Laws, supra note 138, at 59.

See Bk. 4, Tit. 12, Law 1, RECOPILACIÓN 1681, supra note 140, at 155; Bk. 6, Tit. 8, Law 1, RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS (1681) [hereinafter RECOPILACIÓN 1681], translated in The Indian Cause in the Spanish Laws of the Indies 71, 196 (S. Lyman Tyler ed., 1980) [hereinafter Indian Cause]; Ordinances of Philip II, supra note 138, at 11; 2 Amunátegui, supra note 106, at 22–24, 128–29 (reprinting the 1534 capitulacion to Almagro and the 1539 capitulacion to de Hoz granting them lands and encomiendas in Chile); Spanish Laws, supra note 138, at 59.

<sup>&</sup>lt;sup>195</sup> Bk. 6, Tit. 1, Law 27, RECOPILACIÓN 1681, *supra* note 194, at 83.

 $<sup>^{196}</sup>$  See, e.g., 25 U.S.C. § 177 (2006); Indian Act, R.S.C. 1985, c. I-5, § 37(1) (Can.); see also Miller, Native America, supra note 1, at 27, 31–35, 44–45.

<sup>&</sup>lt;sup>197</sup> 3 MERRIMAN, *supra* note 45, at 593, 618–19; *see also* Cabildo de 26 de Julio de 1549, *reprinted in* 1 COLECCION DE HISTORIADORES DE CHILE Y DOCUMENTOS RELATIVOS A LA HISTORIA NACIONAL 192, 195 (1861) [hereinafter COLECCION DE HISTORIADORES].

enacted a law that authorized the President to regulate Indigenous peoples, their property, and their governance. Furthermore, the government issued rules that required the government to approve all Indian land transactions. Similarly, in 1855, the government regulated [a]ll purchase of terrains made in the province of Valdivia from the Indigenous ... through the intervention of the Superintendent of Valdivia or the Governor. Any such sales made without the intervention of the Superintendent of Valdivia or the designated functionary, are null. In 1873, 1874, and 1883, the government forbade private citizens from buying lands from Indians and prevented Indians from selling or mortgaging their lands. The government also enacted legislation in 1866 and 1874 to regulate the purchase of Indian lands, and in 1927, 1960, 1972, and 1979 passed laws to control Mapuche property rights.

The Portuguese Crown also asserted its exclusive ownership of the land and assets in Brazil and used the element of preemption to control all acquisitions of land from native peoples.<sup>204</sup> The first royal governor-

Ley de 2 de Julio de 1852, reprinted in Recopilacion de Legislacion del Estado Chileno para los Pueblos Indigenas 1813–2006, at 21 (Mylene Valenzuela Reyes & Sergio Oliva Fuentealba eds., 2007) [hereinafter Recopilacion de Legislacion 1813–2006].

Decreto No. 109, Marzo 14, 1853, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 22. In 1855 the decreto was extended to the Province of Valdivia. Decreto de 4 de Diciembre de 1855, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 24. In 1856 it was extended to the colonized territory of Llanquihue. Decreto de 9 de Julio de 1856, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 28. See also Kevin J. Worthen, The Role of Indigenous Groups in Constitutional Democracies: A Lesson from Chile and the United States, in The Human Rights of Indigenous Peoples 235, 245–46 (Cynthia Price Cohen ed., 1998).

Decreto de 4 de Diciembre de 1855, art. 1, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 24, 24 (author's translation).

<sup>&</sup>lt;sup>201</sup> *Id*. art. 5

<sup>&</sup>lt;sup>202</sup> See Ley de 20 de Enero de 1883, art. 1, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 45, 45–46; Ley de 4 de Agosto de 1874, art. 6, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 40, 41–42; Decreto de 29 de Octubre de 1873, reprinted in RECOPILACION DE LEGISLACION 1813–2006, supra note 198, at 39. See also Worthen, supra note 199, at 249.

See Decreto con Fuerza de Ley No. 65, Enero 14, 1960, art. 7, reprinted in Recopilación de Legislación 1813–2006, supra note 198, at 127, 130–31; Collier & Sater, supra note 109, at 96, 217, 337. See generally Worthen, supra note 199, at 240–57 (discussing numerous Chilean laws and governmental actions over nearly 100 years that controlled and limited Mapuche land and water rights).

See Alden, supra note 29, at 31–32; Boxer, supra note 45, at 22; 1 Marques, supra note 28, at 255; Diffie, supra note 152, at 1; Miller & D'Angelis, supra note 1 (manuscript at 57); Foral de Duarte Coelho (Sept. 24, 1534), reprinted in 3 História DA Colonização Portuguesa do Brazil, supra note 153, at 312; Regimento de Tomé de Sousa (Dec. 17, 1548), available at http://educacao.uol.com.br/historia-brasil/brasil-colonia-documentos-2-regimento-de-tome-de-sousa-1548.jhtm. See also Alden, supra note 29, at xxiv (a regimento was a list of "instructions... duties, powers,

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general forbade purchases of Indigenous lands or encroachment onto those lands without express authorization from the government.<sup>205</sup> Colonists could not purchase lands directly from natives because the Crown held the right of preemption over those lands, and every relationship between the Portuguese and the native tribes was controlled through royal officers and clergy.<sup>206</sup>

After independence, Brazil continued to assert its rights under Discovery to control the sales and uses of Indigenous lands and to exercise its preemption right against its citizens and Indigenous peoples. The Brazilian constitutions of the twentieth century exercised the preemption power over native lands, and the current Constitution of 1988 still prevents sales of Indian lands without the permission of the federal government.207

The English Crown and its colonies also used preemption against American Indians from the beginning of colonial settlement in North America. For over 150 years, each of the thirteen American colonies enacted numerous laws to regulate the purchase and leasing of Indian lands because the colonial governments alleged that they held the preemptive authority.<sup>208</sup> In 1763, however, King George III asserted his sole ownership through the preemption power over Indian-land purchases west of the Allegheny and Appalachian Mountains in the Royal

and restrictions" given to a "particular official"); BUENO, supra note 95, at 30, 53. The Regimento is considered by some legal historians to be the first Brazilian constitution because it set out a detailed plan for the military occupation and colonial exploitation of Brazil, established judicial, administrative, and fiscal policies, and a new Indian policy. BUENO, supra note 95, at 85, 92.

- <sup>205</sup> See Regimento de Tomé de Sousa, supra note 204.
- BOXER, *supra* note 45, at 22; BUENO, *supra* note 95, at 225; KIEMEN, *supra* note 116, at 6.
- <sup>207</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 20 (Braz.); CONSTITUIÇÃO FEDERAL [C.F.] of 1967, art. 186 (Braz.); CONSTITUIÇÃO FEDERAL [C.F.] of 1946, arts. 5 & 216 (Braz.); CONSTITUIÇÃO FEDERAL [C.F.] of 1937, art. 154 (Braz.); CONSTITUIÇÃO FEDERAL [C.F.] of 1934, art. 129 (Braz.).
- <sup>208</sup> See, e.g., An Act for the Regulating of the Purchase of Lands from Indians (Conn. June 1, 1687), reprinted in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 194; Laws of Massachusetts General Court Relating to Indians (1633–1648), reprinted in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 413; The Duke's Laws: Trade with Indians (N.Y. Mar. 1, 1664/65), reprinted in 2 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 1282; Regulation of the Purchase of Indian Lands by Rhode Island (Nov. 4, 1651), reprinted in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 601; Law to Christianize Indians and Regulate Land Sales (Va. Mar. 10, 1656), reprinted in 15 EARLY AMERICAN INDIAN DOCUMENTS, supra note 91, at 47, 48; Law to Allow Northampton County to Purchase Indian Lands (Va. Nov. 20, 1654), reprinted in 15 EARLY AMERICAN INDIAN DOCUMENTS, supra note 91, at 46; REPORT OF THE COMMITTEE EXAMINING LAND CLAIMS IN PAMUNKEY NECK (Va. June 1699), reprinted in 4 EARLY AMERICAN INDIAN DOCUMENTS, supra note 91, at 110; Remonstrance of the Inhabitants of East New Jersey and Response of the Proprietors (1700), reprinted in 2 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 925; see also Thomas Jefferson, Notes on Virginia, in 2 WRITINGS OF THOMAS JEFFERSON (Library ed.), supra note 188, at 187–89 (stating that tribal lands were only sold by the General Assembly if the "Indian title" had been purchased).

Proclamation of 1763.<sup>209</sup> In this document, which still applies in Canada today, the king expressly forbade all purchases of Indian lands without royal permission because those lands were reserved to the Crown under preemption.<sup>210</sup>

When the United States acquired independence from England, the new thirteen states immediately assumed the powers of preemption over Indian lands. Many of the thirteen states drafted constitutions and laws in which they expressly claimed preemption. Congress then issued a proclamation on September 22, 1783 (that nearly mirrored the one issued by George III in 1763) to exercise its right of preemption over Indian lands. The proclamation stated that no one could settle on or purchase Indian lands "without the express authority and directions of the United States in Congress assembled" and "that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void."

In 1790, the first Congress under the new U.S. Constitution expressly used the word "pre-emption" in a law that applied the element of preemption to Indian lands and restricted tribal real-property rights and sales of land to any person or entity other than the United States. <sup>214</sup> This law was reauthorized and amended by Congress many times over the intervening years and is still federal law today. <sup>215</sup>

In 1792, Secretary of State Thomas Jefferson perfectly defined this element of Discovery. First, he explained America's preemption right in a private letter: "our States, are inhabited by Indians holding justly the right of occupation, and leaving . . . to us only the claim of excluding other nations from among them, and of becoming ourselves the

The Proclamation of 1763 (Oct. 7, 1763), reprinted in Documents of American History 47, 49 (Henry Steele Commager ed., 8th ed. 1968).

<sup>&</sup>lt;sup>210</sup> Id

See, e.g., Ga. Const. of 1798, art. I, § 23; N.Y. Const. of 1777 art. XXXVII; N.C. Declaration of Rights. of 1776, art. XXV; An Act for Well-Ordering and Governing the Indians in this State (Conn.), reprinted in The First Laws of the State of Connecticut 101–02 (John D. Cushing ed., 1982); Act of Feb. 25, 1784, Digest of the Laws of Ga., No. 286, reprinted in 1 The First Laws of the State of Georgia 288 (John D. Cushing ed., 1981); Laws of N.C. (Gen. Assemb. Apr. 18, 1783), ch. 2, reprinted in 2 The First Laws of the State of North Carolina 446 (John D. Cushing ed., 1984); Public Acts of Va. (Gen. Assemb. Oct. 5, 1778), ch. 25, reprinted in The First Laws of the State of Virginia 103–04 (John D. Cushing ed., 1982).

Proclamation of the Continental Congress (Sept. 22, 1783), reprinted in Documents of United States Indian Policy 2 (Francis Paul Prucha ed., 3d ed. 2000). See also Calloway, supra note 98, at 9; 18 Early American Indian Documents, supra note 91, at 278.

<sup>&</sup>lt;sup>213</sup> Proclamation of the Continental Congress, *supra* note 212, at 3.

Trade and Intercourse Act of 1790 (Indians), ch. 33, § 4, 1 Stat. 137, 138; see also Act of May 28, 1830, ch. 148, 4 Stat. 411. In this Act to remove eastern tribes west of the Mississippi, Congress expressly required that the "Indian title" to the western lands be "extinguished" before moving eastern Indians there. *Id.* 

<sup>&</sup>lt;sup>215</sup> See 25 U.S.C. § 177 (2006).

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purchasers of such portions of land, from time to time, as they may choose to sell." Second, he clearly stated the definition of the American preemption against England and the Indian nations when he told the English ambassador that the United States had a "right of preemption of [Indian] lands, that is to say, the sole & exclusive right of purchasing from them whenever they should be willing to sell. . . . We consider it as established by the usage of different nations into a kind of Jus gentium [international law] for America . . . . ." 217

As already mentioned, England applied its preemption right in Canada through the Royal Proclamation of 1763. The proclamation is still valid law in Canada today. Also, the 1985 Indian Act of Canada requires Crown consent before Indian people in Canada can sell or lease their lands on their reserves. <sup>219</sup>

In New Zealand, the English expressly claimed this exact Discovery right. In Article 2 of the Treaty of Waitangi, signed by many Maori tribal governments, the British Crown negotiated for the right of preemption and the Maori expressly ceded this power to the Crown. In 1847, a New Zealand court enforced the Queen's preemptive right and stated that she acquired this right independent of the Treaty of Waitangi because preemption was regarded as integral to the assertion of Crown sovereignty. In the 1860s, though, the Crown waived its preemption right in New Zealand and established a court system to regulate land sales between Maori and settlers.

England and Australia did not utilize the element of preemption in that country because they did not recognize that Aboriginal communities owned any property rights.<sup>223</sup> In one instance, however, the government claimed a type of preemption right when it denied an Australian citizen's attempt to buy land directly from Aboriginal people. In 1835, John Batman purchased land in the southeastern part of the continent near present day Victoria directly from Aboriginals.<sup>224</sup> He signed what he called a treaty with eight representatives of an Aboriginal nation. Batman then attempted to get the British authorities to recognize this transaction.<sup>225</sup> Instead, the colonial government issued a proclamation asserting the full force of British sovereignty and, in reality, the power of

Letter to Messrs. Carmichael & Short (Oct. 14, 1792), in 8 Writings of Thomas Jefferson (Library ed.), supra note 188, at 416, 416–17.

Notes of a Conversation with Mr. Hammond (June 3, 1792), *in* 1 Writings of Thomas Jefferson (Ford ed.), *supra* note 188, at 193, 197.

See supra notes 209–10 and accompanying text.

Indian Act, R.S.C. 1985, c. I-5,  $\S$  37(1) (Can.); see also Miller et al., Discovering Indigenous Lands, supra note 1, at 145.

<sup>&</sup>lt;sup>220</sup> Treaty of Waitangi Act 1975, sched. 1.

 $<sup>^{221}</sup>$  See R  $\stackrel{'}{v}$  Symonds (1847) NZPCC 387 (SC).

<sup>&</sup>lt;sup>222</sup> See, e.g., Native Lands Act 1862 (N.Z.).

<sup>&</sup>lt;sup>223</sup> MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 179–82.

 $<sup>^{224}</sup>$  Id. at 178 (citing COLLINGRIDGE, supra note 181, at 46).

 $<sup>^{225}</sup>$  Id

preemption when it stated: "any bargain or contract made with the Aboriginal natives of New Holland... will be held to be null and void as against the rights of the Crown." The proclamation asserted "the right of the Crown of England to the Territory in question and the absolute nullity of any grant... made by any other party."

In sum, there is no question that these nine countries applied, and still apply today, the Discovery element of preemption. The actual means and methods of applying the element differed somewhat due to the circumstances each country encountered.

### D. Native Title

The papal bulls assumed that native title was a nullity since they granted Spain and Portugal ownership of the lands of Indigenous peoples. Not surprisingly, Portugal assumed from the beginning of colonization in Brazil that Indigenous peoples had very little or no property rights in the lands they farmed and used for hunting and gathering activities. Portuguese colonial officials often acted as if native title amounted to nothing because they continually granted rights to settlers in Indigenous lands, and most colonists felt no need to negotiate with the natives and just trespassed on their lands. The entire course of Portuguese colonization demonstrated a very limited view of native title.

One historian, however, states an opposing view when describing lands the Portuguese governor-generals granted to Indian tribes who were brought to live in Jesuit-established villages. In that situation, the lands granted to Indians could not be transferred from their ownership unless Indians willingly agreed. This same author states that Indians were considered the owners of their cultivated lands and even of their forests, and that these could not just be taken from them. Accordingly, a 1677 amendment of a 1663 law stated that the Indians were owners of their property and land [in the Jesuit villages], just as they had been in the interior, and that their lands and fields could not be taken without their consent since the Indians were the first and natural lords of all these lands.

Other laws also show some Portuguese recognition of native title. In the *alvara* (royal decree) of 1680, natives were recognized as the primary

CASTLES, *supra* note 98, at 29.

<sup>&</sup>lt;sup>227</sup> *Id*.

<sup>&</sup>lt;sup>228</sup> See supra notes 45–71 and accompanying text.

<sup>&</sup>lt;sup>229</sup> BUENO, *supra* note 95, at 228; *see also* Miller & D'Angelis, *supra* note 1 (manuscript at 60).

<sup>&</sup>lt;sup>230</sup> Kiemen, *supra* note 116, at 6, 143.

<sup>&</sup>lt;sup>231</sup> *Id.* at 6.

<sup>&</sup>lt;sup>232</sup> *Id.* at 143.

<sup>&</sup>lt;sup>233</sup> *Id*.

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and natural owners of the lands in Brazil.<sup>234</sup> This law was reissued in 1755 and Indians were continued to be recognized as the legal owners of their lands.<sup>235</sup>

In modern times, native title has been recognized in Brazil. In 1823, José Bonifácio de Andrade e Silva, the father of Brazilian independence, and a central figure in Brazil's first constitutional convention, stated that the official Brazilian position on natives "presumed" that Indians were "the first and true owners of the land." Thereafter, several versions of the Brazilian constitution addressed the idea of a limited native title to land. The Constitution of 1934 recognized Brazil's power of preemption and also the fact that there is native title: "The possession of the lands by the Indians that are permanently found in them must be respected, however, they are prohibited from alienating them." Thus, Indians in Brazil could occupy and use their original lands but they were not allowed to sell them. This continues to be the law under the current version of the constitution of Brazil.

By comparison, the Spanish Crown recognized some rights of Indian land ownership and ostensibly protected those rights from outright confiscation in several colonial-era laws.<sup>240</sup> But the evidence also shows that Spain assumed from the beginning of its entry into the New World and into modern-day Chile that Indigenous land rights were subject to Spain's overriding title and control. Thus, Spanish law considered that Indigenous titles were limited ones and did not represent the full ownership of land. Various Spanish laws specifically limited and affected Indian real-property rights in the New World and in Chile.<sup>241</sup> As early as

<sup>&</sup>lt;sup>234</sup> CELSO RIBEIRO BASTOS, CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] 496 (1998); Alipio Bandeira, Discurso de Installação do Serviço de Protecção aos Indios, no Amazonas (2d ed.) [Speech at the Installation of the Service of Protection of the Amazon Indians], *in* COLLECTANEA INDIGENA 10 (1929).

Lei de 6 de Junho de 1755 (Port.), *available at* http://iuslusitaniae.fcsh.unl.pt/imagens\_livros/30\_colleccao\_legislacao\_portugueza/01\_legislacao\_1750\_1762/0369.jpg; Bastos, *supra* note 234, at 496.

<sup>&</sup>lt;sup>236</sup> See João Pacheco de Oliveira, "Wild Indians," Tutelary Roles and Moving Frontier in Amazonia: Images of Indians in the Birth of Brazil, in MANIFEST DESTINIES AND INDIGENOUS PEOPLES, supra note 141, at 85, 98–100.

 $<sup>^{\</sup>rm 237}$  Constituição Federal [C.F.] [Constitution] of 1934, art. 129 (Braz.) (author's translation).

<sup>&</sup>lt;sup>238</sup> See Constituição Federal [C.F.] of 1967, art. 186 (Braz.); Constituição Federal [C.F.] of 1946, art. 216 (Braz.); Constituição Federal [C.F.] of 1937, art. 154 (Braz.). The Brazilian Constitutions of 1937, 1946, and 1967 recognized and guaranteed Indians these identical rights.

<sup>&</sup>lt;sup>239</sup> CONSTITUIÇÃO FEDERAL [C.F.] art. 20 (Braz.).

 $<sup>^{240}</sup>$  See e.g., Bk. 4, Tit. 12, Law 18, Recopilación 1681, supra note 140, at 166; Bk. 6, Tit. 1, Laws 23, 30, Recopilación 1681, supra note 194, at 81, 84–85; Bk. 6, Tit. 3, Law 9, Recopilación 1681, supra note 194, at 111; Bk. 6, Tit. 16, Law 21, Recopilación 1681, supra note 194, at 353.

<sup>&</sup>lt;sup>241</sup> See, e.g., Bk. 4, Tit. 7, Law 9, Recopilación 1681, supra note 140, at 117; Bk. 6, Tit. 1, Law 27, Recopilación 1681, supra note 194, at 83; Bk. 6, Tit. 3, Law 1, Recopilación 1681, supra note 194, at 108; Bk. 6, Tit. 16, Law 38, Recopilación 1681,

1550, the Assembly of Santiago began to legislate regarding Indian land rights and assigned lands to settlers and even to Indians.<sup>242</sup>

In 1852, Chile enacted a law granting the President the authority to control native lands and "to dictate the ordinances" he thought necessary.<sup>243</sup> Obviously, the government thought that the Indigenous peoples and their land rights were not free from Chilean control. In 1866, Chile officially recognized some Indian rights in land, but far less than full ownership rights, and it began granting Indian communities titles of "mercy" to signify their limited ownership rights, and that Chile was doing Indians a favor. The "títulos de merced," which were "held in the name of the Republic" and were "of possession only," were granted for lands on "reducciones" or reservations and were considered to be only rights of occupation and not total ownership.244 In 1868, Chile acknowledged that the Mapuches (Araucanians) held a kind of ownership right to their lands and the state enacted a law that it had to purchase those rights from the Mapuches.<sup>245</sup> Chile continued to do almost anything it pleased, however, with the property rights of Indigenous peoples. In 1928, the President was authorized "to expropriate Indigenous terrains located in the Maquegua, Province of Cautin or to include them with others."246

supra note 194, at 366; Ordinances of Philip II, supra note 138, at 35–36, 41; see also 3 Merriman, supra note 45 at 618–19; Spanish Laws, supra note 138, at 59.

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 $<sup>^{242}</sup>$  See Cabildo de 5 de Noviembre de 1550, reprinted in 1 Coleccion de Historiadores, supra note 197, at 260.

Ley de 2 de Julio de 1852, *supra* note 198, at 21 (author's translation).

LEGISLACION 1813–2006, *supra* note 198, at 32, 33 (titled "The Foundation of Population in the Indigenous Territories and Norms for the Privatization of this Territory" (author's translation)). *See also* Decreto de 19 de Mayo de 1910, *reprinted in* RECOPILACION DE LEGISLACION 1813–2006, *supra* note 198, at 63 (continuing the 1866 program of granting mercy titles of possession); BENGOA, *supra* note 112, at 329 (After the defeat in 1881, "[t]he Araucania [Mapuche territory] was declared government land and it proceeded to colonize the land so as to put the land into production . . . . The Mapuches were placed into the rigor of the civilization; they received small mercy [pieces] of land, they were enclosed in their "reducciones" [reservations], they were obligated to transform into farmers." (author's translation)); Fernando Casanueva, *Indios Malos en Tierras Buenas: Visión y Concepción del Mapuche Según las Elites Chilenas* (*Siglo XIX*), *in* COLONIZACIÓN, RESISTENCIA Y MESTIZAJE EN LAS AMÉRICAS (SIGLOS XVI–XX) 291, at 322 (Guillaume Boccara ed., 2002).

<sup>&</sup>quot;In 1868, to legally affirm the presence of the State in the Indigenous territories recently conquered and to prevent injustices and fraud against the Indigenous, Cornelio Saavedra proposed to purchase of their [Mapuche] lands by the State, assuring in them a possession that guarantees their stay. In this way, the Government could sell, take back or colonize said lands with own nationals or foreigners that would work to the benefit of the country." Casanueva, *supra* note 244, at 322 (author's translation).

Ley 4.332, Junio 21, 1928, reprinted in Recopilacion de Legislacion 1813–2006, supra note 198, at 71 (author's translation).

England also recognized and respected the limited native title element of Discovery. For example, in the Admiralty instructions of 1768 to Captain James Cook for his first voyage and in 1776 for his third expedition, he was ordered: "You are also with the consent of the Natives to take possession, in the Name of the King of Great Britain, of convenient Situations in such Countries as you may discover . . . . "247 This shows that England had some respect for the native title and land rights of Indigenous peoples. Furthermore, the Crown and colonists recognized the land titles of North American natives during colonization, as demonstrated by the treaties the Crown and colonies signed with tribes to buy land.<sup>248</sup> Moreover, in the Royal Proclamation of 1763, which is still the law in Canada today, and was also law in the American colonies for over a decade, George III demonstrated his understanding of the restricted Indian title to land, and that he would have to buy these property rights before he could acquire the possession and use rights of Indian lands.<sup>249</sup> The thirteen American colonial governments also understood this principle. They all enacted numerous statutes that demonstrated their recognition of Indian title, and in which they exercised their alleged preemption power to authorize sales of Indian lands.250

After the Revolutionary War, the new American state governments also recognized native titles to land and imposed restrictions on the purchase of lands from Indians and Indian nations. The Continental Congress organized under the Articles of Confederation also issued a proclamation on September 22, 1783 that recognized Indian titles to land. The United States government under the 1789 Constitution also recognized Indian title. In 1792, Thomas Jefferson explained that "our States, are inhabited by Indians holding justly the right of occupation." American Indians were considered to have only retained the rights to occupy and use their lands, as *Johnson v. M'Intosh* would later agree, but nevertheless that is still a real property right that has to be respected and purchased.

In comparison to the United States, New Zealand established a unique land-title system. While the English language version of the 1840 Treaty of Waitangi guaranteed to the Maori "full exclusive and

JOURNALS OF THE RESOLUTION AND DISCOVERY, supra note 120, at ccxxiii.

<sup>&</sup>lt;sup>248</sup> See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831). See generally MILLER, ET AL., DISCOVERING INDIGENOUS LANDS, supra note 1, at 107–13, 209–14.

See The Proclamation of 1763, supra note 209, at 49.

See supra note 208.

See supra note 211.

See supra note 212.

<sup>&</sup>lt;sup>253</sup> See supra notes 214–15.

Letter to Messrs. Carmichael & Short, *supra* note 216, at 416–17.

<sup>&</sup>lt;sup>255</sup> See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574, 592 (1823).

undisturbed possession of their Lands and Estates Forests Fisheries and other properties,"<sup>256</sup> the Maori language version states they retained sovereignty over their property. In reality, however, the British Crown severely limited Maori property rights, although native title still retained some strength. For the first twenty years after the Treaty, Maori could only sell, lease, or gift their land to the Crown. In the 1860s, the colonial government waived its right of preemption to allow Maori to freely alienate their land to settlers. The catch was that Maori first had to obtain a certificate of title from the newly established Maori Land Court. Once they had a written title, they could sell, lease, or gift their land to whomever they wished. Since 1993, New Zealand has encouraged the retention of land by Maori and has adopted stringent alienation rules.

In contrast to all these countries, Australia never recognized native title or any ownership rights in land by Aboriginal peoples and nations until the 1992 Australian Supreme Court case of *Mabo* struck down *terra nullius*. <sup>261</sup> Before *Mabo*, English and Australian officials assumed that the continent had been *terra nullius*, legally empty, when the English claimed it and that Aboriginal peoples had no title to land. <sup>262</sup>

Consequently, it is clear that the limited right of land ownership defined as "Indian title" and "native title" was recognized and applied by England, Spain, and Portugal, and thereafter was used in varying ways in Brazil, Canada, Chile, New Zealand, and the United States. It took until 1992 for Australia to recognize the limited form of land ownership that constitutes native title. This element of Discovery is still the law today in the settler/colonial countries we have examined.

# E. Indigenous Limited Sovereign and Commercial Rights

The elements of preemption and native title discussed above are clearly limitations on Indigenous sovereign and commercial rights. In this Part, though, I focus exclusively on the other limitations that Europeans and the Doctrine of Discovery imposed on Indigenous rights. I conclude that the nine countries we are studying plainly limited Indigenous sovereign and commercial rights as part of the law of Discovery.

In the papal bulls of 1493, Pope Alexander explicitly granted Spain and Portugal authority over governmental relations, diplomacy, trade,

<sup>258</sup> See supra notes 220–22 and accompanying text.

Treaty of Waitangi Act 1975, sched. 1 (N.Z.) (English text).

<sup>&</sup>lt;sup>257</sup> *Id.* (Maori text).

<sup>&</sup>lt;sup>259</sup> See Native Lands Act 1862, §§ 12–21 (N.Z.); Native Lands Act 1865, § 21 (N.Z.).

<sup>&</sup>lt;sup>260</sup> See Te Ture Whenua Maori Act (Maori Land Act) 1993, §§ 145–150D (N.Z.).

 $<sup>^{261}</sup>$  See Mabo v Queensland (No. 2) (1992) 175 CLR 1, 57–58 (Austl.) (opinion of Brennan, J.).

MILLER, ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 179–82.

and economic activities with Indigenous peoples and governments around the world.<sup>263</sup> The bulls in fact authorized Spanish and Portuguese attacks on pagans around the world, the capture of their goods and territories, and ordered that they be placed into "perpetual slavery."<sup>264</sup>

While the Spanish Crown and papacy spoke often and in eloquent language about converting native peoples and working for their welfare, most conquistadors and colonial officers had other ideas. As Ferdinand Pizarro told an Incan chief, he had come "to assert his master's *lawful supremacy* over [Peru]." The Crown repeatedly demonstrated its overriding interest in ruling the New World and acquiring the economic assets of the Indigenous governments and peoples. The Crown directed that Indians were to be persuaded to recognize the "Lordship and Universal Jurisdiction that We have over the Indies" and must pay tributes "in order to comply with the responsibilities to which they are obligated." The Crown directed that Indians were to comply with the responsibilities to which they are

The most obvious example of the governmental and commercial powers Spain and Chile assumed they obtained under Discovery was the authority to extract enforced labor from native peoples, and to relocate natives to perform these labors. The Crown considered Indians its subjects and vassals, and it enacted laws regulating their existence, relocating them, and ordering them to pay tribute through enforced labor and cash payments. Columbus first enacted this regime called *encomienda*, and it spread throughout the Spanish New World. The *encomienda* entailed groups of Indians being commended, or given, to Spaniards to be, in essence, slaves. Encomienda was also imposed in Chile.

See Bull "Inter Caetera Divinae" of Pope Alexander VI, supra note 66, at 158 ("[B]y this our donation . . . we strictly forbid any persons . . . to approach, for the purpose of trade or for any other reason, the islands and mainlands found or to be found, already discovered or to be discovered" without a license from the Spanish Crown.).

Bull "Romanus Pontifex" of Pope Nicholas V, supra note 57, at 149; accord BOXER, supra note 45, at 21.

<sup>&</sup>lt;sup>265</sup> 1 PRESCOTT, *supra* note 103, at 274 (citing Spanish authorities); *accord* 3 MERRIMAN, *supra* note 45, at 547–48; *see* HANKE, *supra* note 79, at 7; *see also* EXPANSION OF EUROPE, *supra* note 26, at 5 (stating that "[r]eligious motivation" was never Spain's sole interest, "economic and social motives were inextricably associated" with religion).

See, e.g., Ordinances of Philip II, supra note 138, at 2 (commanding the King's explorers "to discover the land with commercial and trading purposes" and to find out about land values and assets); SPANISH LAWS, supra note 138, at 59; see also HANKE, supra note 79, at 6–7 (quoting the conquistador Pizarro as explaining that he had "come to take away from them their gold").

Ordinances of Philip II, supra note 138, at 41.

Indian Cause, supra note 194, at xv; 2 Merriman, supra note 45, at 230; 3 Merriman, supra note 45, at 619; see e.g., Bk. 6, Tit. 5, Law 1, Recopilación 1681, supra note 194, at 144; Ordinances of Philip II, supra note 138, at 15.

 $<sup>^{269}</sup>$  See, e.g., BOXER, supra note 45, at 88, 92–96 (demonstrating that the Spanish pursued the same interests in all their New World colonies and enslaved Indians

In the regions of Chile where the Spanish were powerful enough to take over, the rights of the native peoples and the powers of the Indigenous governments were severely restricted. Spanish law, however, did continue to recognize and support some of the sovereign powers of *caciques* (native leaders), and thus the Indigenous governments did continue to exercise some of their original authority. Spanish kings decreed that native leaders in Chile and elsewhere would continue in office and exercise their original criminal and civil jurisdiction over many aspects of native affairs. In fact, the Crown authorized the elections of *caciques* to govern Indian towns, in Chile and elsewhere, and even incorporated some native legal customs into the Spanish laws for the Indies.

From the arrival of Valdivia in Chile onwards, the colonial government assumed criminal and civil jurisdiction and commercial control over Indians and assigned lands and natives to individual Spaniards. Natives were forced to relocate and to work nine months of the year for pay, allegedly, in mines, farms, and at other jobs, and to pay the royal tribute. They were also required to give the Spanish fifteen days of free labor a year. These provisions were obviously severe limitations on Indigenous commercial rights and replaced the governmental rights and powers of Indigenous communities with Spanish rule. In addition, while Spanish law differentiated between slavery and the *encomienda* forced labor system, it is hard to see any real difference.

By signing treaties with native governments, Spain explicitly recognized the sovereign existence and authority of Indigenous governments.<sup>276</sup> In the Treaty of Quilîn in 1641, in which the Araucanian tribes agreed to become allies of the Spanish and to resist settlements of other Europeans, Spain recognized "the almost complete independence

through the *encomienda* system); HANKE, *supra* note 79, at 24; Miller et al., *International Law of Discovery, supra* note 1, at 836.

<sup>&</sup>lt;sup>270</sup> 3 MERRIMAN, *supra* note 45, at 593, 618.

 $<sup>^{\</sup>scriptscriptstyle 271}$  See supra notes 77–80, 193–203 and accompanying text.

<sup>&</sup>lt;sup>272</sup> Indian Cause, *supra* note 194, at xv; *see*, *e.g.*, Bk. 6, Tit. 3, Law 16, Recopilación 1681, *supra* note 194, at 115; Bk. 6, Tit. 7, Laws 1, 4, 7, 8 & 13, Recopilación 1681, *supra* note 194, at 188–91, 194; Bk. 3, Tit. 10, Law 13, Recopilación 1681, *supra* note 194, at 409 (note).

 $<sup>^{278}</sup>$  Bk. 2, Tit. 1, Law 4, Recopilación 1681, supra note 194, at 27; Bk. 5, Tit. 2, Law 22, Recopilación 1681, supra note 194, at 60.

<sup>&</sup>lt;sup>274</sup> Bk. 6, Tit. 2, Law 14, RECOPILACIÓN 1681, *supra* note 194, at 104; Bk. 6, Tit. 3, Laws 1, 10, RECOPILACIÓN 1681, *supra* note 194, at 108, 112; Bk. 6, Tit. 16, Laws 3, 9, 21, 24, 26, 38, 51, 66 & 67, RECOPILACIÓN 1681, *supra* note 194, at 343, 346, 353, 356–57, 366, 373, 382; Ordinances of Philip II, *supra* note 138, at 22; 3 MERRIMAN, *supra* note 45, at 593.

 $<sup>^{275}</sup>$  See Morison, European Discovery, supra note 60, at 136; Zavala, supra note 37, at 46–51, 54.

See Bengoa, supra note 141, at 127; see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831). This point also applies to treaties England, France, Canada, the United States, and New Zealand signed with Indigenous peoples.

of the Araucanos."<sup>277</sup> One commentator interpreted this treaty to have conserved to the Indians "absolute independence and liberty without anyone bothering them in their territory nor reduc[ing] them to slavery."<sup>278</sup> The Republic of Chile also manifested its recognition of native sovereignty by signing a treaty of friendship and commerce with the Teheulche tribe in 1844. <sup>279</sup> And in 1852, Chile enacted a law to promote contractual and commercial relations with Indians, yet at the same time the government claimed its superior right to regulate and govern the Indigenous peoples. <sup>280</sup>

Portugal engaged in similar activities in Brazil.<sup>281</sup> The Crown assumed from the beginning of colonization that it possessed exclusive authority over the native peoples, land, and resources.<sup>282</sup> As mentioned above, the Crown granted the captaincies land, sovereign authority, jurisdiction, and commercial authority.<sup>283</sup> The Crown also took steps to control the commercial and economic activities in Brazil. For example, several kings issued laws that trade could only take place in designated markets and that established a system of licenses for merchants and shipments of merchandise.<sup>284</sup> Royal laws forbade unlicensed foreign ships in any Portuguese overseas possession and prevented direct foreign trade with Brazil from 1591 to 1808.<sup>285</sup> The Crown tried to stop foreign trade with Brazilian natives and forbade Portuguese colonists from trading with

<sup>&</sup>lt;sup>277</sup> 2 MIGUEL LUIS AMUNÁTEGUI, LOS PRECURSORES DE LA INDEPENDENCIA DE CHILE 231 (Santiago, Imprenta de la Republica 1871) (author's translation).

<sup>&</sup>lt;sup>278</sup> 3 DIEGO BARROS ARANA, HISTORIA JENERAL DE CHILE 364 (Santiago, Imprenta Cervantes 1884) (author's translation).

<sup>&</sup>lt;sup>279</sup> Talbott, *supra* note 142, at 521.

See Ley de 2 de Julio de 1852, supra note 198, at 21 (Establishing the Province of Arauco and Authorizing the President of the Republic, for the Regulation of the Government of the Borders and the Protection of the Indigenous). The statute read in part: "Article 1.... The territories populated by the Indigenous will be subject to the authority and regiment that, based on the special circumstances, determines the President of the Republic.... Article 3. The President of the Republic is authorized to promulgate the ordinances that he deems convenient... for the most efficient protection of the Indigenous, to promote their prompt civilization and to arrange contracts and commercial relations with them." *Id.* (author's translation).

<sup>&</sup>lt;sup>281</sup> See Miller & D'Angelis, supra note 1 (manuscript at 65–74).

The Crown controlled many commercial items in Brazil and claimed a monopoly on trade and fishing, and the ownership of brazilwood, slaves, spices, drugs, and 20% of all precious minerals. BOXER, *supra* note 45, at 22; 1 MARQUES, *supra* note 28, at 255; Foral de Duarte Coelho, *supra* note 204, at 312–13.

See, e.g., 3 HISTÓRIA DA COLONIZAÇÃO, supra note 153, at 174; KIEMEN, supra note 116, at 8; MARCHANT, supra note 116, at 28–29; PARRY, supra note 77, at 258; Alden, supra note 152, at 22; Carta de Doação da Capitania de Pernambuco a Duarte Coelho (1534), reprinted in 3 HISTÓRIA DA COLONIZAÇÃO, supra note 153, at 309; Foral de Duarte Coelho, supra note 204, at 312; Regimento de Tomé de Sousa, supra note 204

<sup>&</sup>lt;sup>284</sup> BUENO, *supra* note 95, at 221; Regimento de Tomé de Sousa, *supra* note 204.

<sup>&</sup>lt;sup>285</sup> ALDEN, *supra* note 29, at 403–04.

Indians.<sup>286</sup> The first governor-general established in 1549 a system of regulations to control commerce between natives and colonists and prevented individual settlers from trading with Indians without a royal license.<sup>287</sup> Portuguese colonists were also prevented from traveling to Indian villages to trade.<sup>288</sup>

The Jesuits were authorized for over two hundred years to civilize and convert natives by relocating them to Jesuit controlled missions or towns called *aldeias*.<sup>289</sup> The Jesuits required natives to work to support the villages and to allegedly acquire European habits of industry.<sup>290</sup> Indians were required to pay the salary of the Jesuits and lay officials who ran the villages and exercised judicial authority.<sup>291</sup> In the 1770s, the Minister of the Kingdom ordered that natives continue to be forcibly removed to reservations and that they be managed by royal officials.<sup>292</sup>

Interestingly, the Crown did recognize some native sovereign and governmental rights. In the instructions to the first governor-general in 1548, the Crown directed the colonial government to engage in treaty-like alliances with peaceful natives and to respect their rights to continue their cultural and commercial activities in their own territories. Moreover, the Portuguese recognized some sovereign authority of native leaders and sometimes tried to rule Indigenous peoples through their own governments and chiefs. <sup>294</sup>

As with the Spanish, the most extreme assertion of Portuguese authority over Indigenous sovereign and commercial rights must be the imposition of slavery. The Portuguese colonists in Brazil sought any excuse to enslave natives. They often argued that natives were

<sup>&</sup>lt;sup>286</sup> KIEMEN, *supra* note 116, at 98; TEODORO SAMPAIO, O TUPI NA GEOGRAFIA NACIONAL [THE TUPI IN THE NATIONAL GEOGRAPHY] 155 (5th ed. 1987). *See generally* Regimento de Tomé de Sousa, *supra* note 204.

BUENO, *supra* note 95, at 117, 178–79; MARCHANT, *supra* note 116, at 58, 83.

<sup>&</sup>lt;sup>288</sup> BUENO, *supra* note 95, at 117–18 (reprinting Governor Sousa's orders); Regimento de Tomé de Sousa, *supra* note 204.

<sup>&</sup>lt;sup>289</sup> See MARCHANT, supra note 116, at 106–08.

<sup>&</sup>lt;sup>290</sup> NASH, *supra* note 154, at 120.

Kiemen, *supra* note 116, at 7–8, 52 (citing several laws and the alvará of July 25, 1638).

NASH, *supra* note 154, at 120; David Maybury-Lewis, *From Savages to Security Risks: The Indian Question in Brazil, in* THE RIGHTS OF SUBORDINATED PEOPLES 38, 39 (Oxford India Paperbacks 1996) (Oliver Mendelsohn & Upendra Baxi eds., 1994).

<sup>&</sup>lt;sup>293</sup> See BUENO, supra note 95, at 222 (the Regimento Regio required a system of cooperation and alliances between the government and Indigenous tribes).

KIEMEN, *supra* note 116, at 3–4 (citing the second *Regimento* issued to the first governor).

BOXER, *supra* note 45, at 88, 92–93 (priests repeatedly reported that settlers mistreated, killed, and enslaved Indians on any pretext); BUENO, *supra* note 95, at 163 (arguing that the Portuguese found support for enslaving natives and Africans in the biblical story of Noah and Ham); FAUSTO, *supra* note 28, at 9, 26; KIEMEN, *supra* note 116, at 97; Pacheco de Oliveira, *supra* note 236, at 94 (Father Antonio Vieira called the labor of the natives "red gold"). *See generally* Stuart B. Schwartz, *Indian Labor and* 

sufficiently paid for being enslaved by their conversion to Christianity.<sup>296</sup> The Crown took ambiguous and conflicting positions on slavery for much of the colonial period. Legally, the Crown mostly outlawed slavery although it was justified under certain circumstances and at certain times, and the Crown tolerated hundreds of years of slavery of native peoples.<sup>297</sup> Most of the colonists ignored the ineffectual bans the Crown imposed, and the Crown was well aware of it. 298 Numerous laws on the subject were enacted over hundreds of years that, for instance, allowed enslavement of Indians who had been captured in just wars.<sup>299</sup> These laws demonstrate the inconsistent policies and the Crown's conflict of interest concerning Indian slavery.<sup>300</sup> From 1755 to the end of the nineteenth century, Brazilian policy consisted of placing Indians on reservations and renting them out to Portuguese settlers to work up to six months a year for insignificant wages.

In the modern day, Indigenous peoples in Brazil are considered to possess very limited sovereignty as governments and many of their commercial activities are still regulated by the federal government. For example, the Constitution of 1988 reserves to the federal government "those lands traditionally occupied by the Indians." 302

By comparison, England and its colonies, except Australia, recognized native sovereignty to varying degrees by signing treaties and engaging in diplomacy with Indigenous groups. These countries also tried to control and benefit from Indigenous commercial activities and assets. The Crown exerted its alleged authority in North America in the charters it issued when it established colonial governments and laid out their authority, jurisdiction, and trade protocols. 303 All thirteen American colonies enacted numerous laws exercising exclusive control of the trade

New World Plantations: European Demands and Indian Responses in Northeastern Brazil, 83 AM. HIST. REV. 43 (1978).

<sup>&</sup>lt;sup>296</sup> Alden, *supra* note 152, at 31.

<sup>&</sup>lt;sup>297</sup> BOXER, *supra* note 45, at 88.

<sup>&</sup>lt;sup>299</sup> Id.; Kiemen, supra note 116, at 101 (labor-hungry colonists could create incidents to justify defensive just wars); 2 MAGALHÄES, supra note 168, at 115-16; Alden, *supra* note 152, at 28.

KIEMEN, *supra* note 116, at 118, 171; Alden, *supra* note 152, at 30, 32.

 $<sup>^{\</sup>scriptscriptstyle{301}}$  John Hemming, Red Gold: The Conquest of the Brazilian Indians 36–37 (1978); Maybury-Lewis, supra note 292, at 39.

CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 20 (Braz.).

<sup>&</sup>lt;sup>303</sup> See, e.g., Charter of the Massachusetts Bay, supra note 180, at 48; Charter to Sir Walter Raleigh, supra note 87, at 1696; First Charter of Virginia, supra note 89, at 1701; Grant of the Province of Maine by Charles I to Sir Ferdinando Gorges (Apr. 3, 1639), reprinted in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 96, 99, 106; Letters Patent to Sir Humphrey Gilbert, supra note 87, at 1692; Letters Patents of Henry VII Granted to John Cabot, supra note 85, at 18 (directing Cabot "to set up our banner and ensigns in every village, town, castle, isle, or mainland newly found . . . getting unto us the rule, title, and jurisdiction of the same ...."); Patent of New England Granted by James I, supra note 89, at 26-28.

with Indians and tribes.<sup>304</sup> England and its colonies objected vigorously to Dutch colonists trading with American Indians, and Dutch colonists in turn objected to Swedish colonists trading with Indians, all based on this element of Discovery.<sup>305</sup> In the Royal Proclamation of 1763, King George III exercised his power to control tribal sovereignty and colonial trade with tribes and Indians in what is now the United States and Canada.<sup>306</sup> The Crown mandated a licensing system to control traders and put a halt to English colonists buying land from Indians.<sup>307</sup>

The King also centralized the control of Indian affairs in his government and exercised his power of preemption to take control of the trade with Indians and any sales of tribal lands. The Proclamation drew a boundary line along the crest of the Appalachian and Allegheny mountains over which British citizens were not to cross. The King ordered that the tribes in this territory "live under *our protection*" and that it was essential to colonial security that the tribes not be "disturbed in the possession of such parts of *our dominions and territories* as, not having been ceded to or purchased by us, are reserved to them." Thus, King George expressly claimed his Discovery title to tribal lands and his sovereign authority over tribal trade and commercial rights. The King then ordered his officials to prevent any land surveys and purchases of Indian lands from tribes or Indians without royal permission. The King also took control of trade with Indians and required all traders to provide bonds and to be licensed by royal officials.

After the American Revolutionary War, the new United States' governments also tried to take complete control of tribal sovereign and commercial activities under the Articles of Confederation and later under the Constitution and federal law of 1790. Both the Articles of Confederation and the United States Congress created under the

See, e.g., Assignment and Protection of Indian Lands and Penalty for Indian Trader (Va. July 5, 1653), reprinted in 4 EARLY AMERICAN INDIAN DOCUMENTS, supra note 91, at 70; Instructions to Governor Yeardley and Council on Indian Policy (Va. Apr. 19, 1626), reprinted in 4 EARLY AMERICAN INDIAN DOCUMENTS, supra note 91, at 51.

<sup>&</sup>lt;sup>305</sup> See English Answer to the Remonstrance of the Dutch Ambassadors, supra note 91, at 31–32; Protest of Director Kieft Against the Landing and Settling of the Swedes on the Delaware (May 6, 1638), reprinted in 1 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 766.

<sup>&</sup>lt;sup>306</sup> See The Proclamation of 1763, supra note 209, at 49.

 $<sup>^{307}</sup>$  Anderson, supra note 71, at 566 (2000); Jack M. Sosin, Whitehall and the Wilderness: The Middle West in British Colonial Policy 1760–1775, at 28–31, 45–49, 51, 56 (1961).

ANDERSON, *supra* note 71, at 85, 565–66; SOSIN, *supra* note 307, at 28–31, 49.

The Proclamation of 1763, *supra* note 209, at 48 (emphasis added).

<sup>310</sup> *Id.* at 49.

<sup>&</sup>lt;sup>311</sup> *Id*.

See U.S. Const. art. I, § 8, cl. 3; Articles of Confederation of 1781, art. IX, para. 4; Trade and Intercourse Act of 1790 (Indians), ch. 33, § 4, 1 Stat. 137, 138; see also Proclamation of the Continental Congress, supra note 212, at 3; Calloway, supra note 98, at 9.

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Constitution were granted the sole authority to engage in treaty-making and commercial relations with the Indian governments. Article I of the U.S. Constitution states that only Congress has the power [t] o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. The first U.S. Secretary of State, Thomas Jefferson, demonstrated the correct definition of this element in a 1792 conversation with a British ambassador. Jefferson explained the power the United States held over the Indian nations: a "right of regulating the commerce between them and the whites." The British ambassador asked if English traders had to stay out, and Jefferson said yes.

President George Washington also utilized this element. In 1795, he urged Congress to create federal trading houses to totally control the Indian trade and to exclude private traders. Government trading houses were ultimately operated at 28 locations across the frontier from 1795–1822. Furthermore, in hundreds of treaties the federal government and tribes agreed that the United States would take "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as [the United States] think proper." The Supreme Court came to interpret these provisions as creating a trust responsibility that limited tribal sovereign powers, because they required the federal government to care for tribes in a ward–guardian relationship, and defined Indian tribes as "domestic dependent nations."

Interestingly, the colonial government in New Zealand seems to have imposed an even more stringent form of this element against Maori iwi

 $<sup>^{313}</sup>$  Article IX of the Articles of Confederation provided that the Congress "shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians." Articles of Confederation of 1781, art. IX, para. 4; see also U.S. Const. art. I,  $\S$  8, cl. 3.

U.S. Const. art. I, § 8, cl. 3. This constitutional provision placed the power to control Indian affairs "entirely with congress, without regard to any state right on the subject." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 63–64 (1831) (Thompson, J., dissenting). The Constitution freed the federal government from the "shackles" imposed on its power in Indian affairs by the Articles of Confederation. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

Notes of a Conversation with Mr. Hammond, *supra* note 217, at 197.

President Washington on Government Trading Houses (Dec. 3, 1793), in Documents of United States Indian Policy, *supra* note 212, at 16.

Robert J. Miller, Economic Development in Indian Country: Will Capitalism or Socialism Succeed?, 80 Or. L. Rev. 757, 808–09 (2001).

E.g., Treaty with the Cherokee art. IX, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18, 20; Treaty with the Choctaw art. VIII, U.S.-Choctaw, Jan. 3, 1786, 7 Stat. 21, 22; Treaty with the Chickasaw art. VIII, U.S.-Chickasaw, Jan. 10, 1786, 7 Stat. 24, 25; see also Treaty with the Wyandot, etc. art. VII, Jan. 9, 1789, 7 Stat. 28, 30 (traders need licenses from the Territorial Governor to trade with Indians).

Cherokee Nation, 30 U.S. (5 Pet.) at 17.

(tribes).<sup>320</sup> After the 1840 Treaty of Waitangi, the colonial government did not accept that Maori governments retained any sovereign, governmental, or commercial rights. Maori were simply to become British subjects as articulated in the English language version of the treaty.<sup>321</sup> This approach meant that, in contrast to Indian policies in North America, in New Zealand there was no consistent effort made to isolate Maori onto reserves or reservations. Maori were simply regarded as noble savages who could be Christianized and assimilated.<sup>322</sup>

As mentioned, Australia did not, and still to this day does not, recognize that Aboriginal groups possess any sovereign powers. Although Australian cases from 1829 and 1836 hint that Aboriginal communities might have had some natural system of law and government, cases from the 1970s state clearly that Aboriginal peoples did not have any interest in land, or any rights that could be recognized as property rights, and that on the date of English settlement there was only one sovereign. Aboriginal peoples had become subjects of the Crown.

It is clear that all of the countries we are analyzing, with the exception of Australia, recognized and protected to varying degrees Indigenous sovereign powers and commercial rights while at the same time limiting those powers under Discovery.

### F. Contiguity

The papal bulls of 1493 impliedly incorporated this element. In granting Spain and Portugal sovereign and commercial rights around the world, over places they had not even seen, the papacy adopted the idea of contiguity and expansive European claims. Thereafter, Spain, Portugal, England, and their colonial governments made contiguity claims against each other and Indigenous nations.

Spain used the Discovery element of contiguity and claimed lands contiguous to its actual discoveries and settlements in the New World. Columbus used the contiguity rights of Spanish monarchs when he claimed entire lands due to landing on a single spot in the islands and mainlands he encountered in 1492–1503. Similarly, in 1513, Balboa

<sup>&</sup>lt;sup>320</sup> See Robert J. Miller & Jacinta Ruru, An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand, 111 W.VA. L. REV. 849, 905–07 (2009).

Treaty of Waitangi Act 1975, sched. 1 (N.Z.).

Miller & Ruru, supra note 320, at 907.

 $<sup>^{323}</sup>$  Miller et al., Discovering Indigenous Lands,  $\it supra$  note 1, at 176–79, 187.

 $<sup>^{324}</sup>$  R v Murrell [1836] NSWSupC 35 (Austl.), reprinted in Bruce Kercher, R v Ballard, R v Murrell and R v Bonjon, 3 Australian Indigenous L. Rep. 410, 415 (1998); R v Ballard [1829] NSWSupC 26 (Austl.), reprinted in Kercher, supra, at 412–13.

<sup>&</sup>lt;sup>325</sup> Coe v Commonwealth (1979) 53 ALJR 403, 403 (Austl.); Milirrpum v Nabalco Pty. Ltd. (Gove Land Rights Case) (1971) 17 FLR 141, 273–74 (N.T. Sup. Ct.) (Austl.).

J.H. Elliot, Spain, Europe & the Wider World 1500-1800, at 7, 136-37 (2009).

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claimed the entire Pacific Ocean and all its adjoining lands for Spain.<sup>327</sup> In 1523, for example, the Crown granted Lucas Vásquez de Ayllón authority to establish a colony in Florida and to govern 800 leagues of coastline.<sup>328</sup> A law decreed by Philip II in 1573 also reflected contiguity ideas when he ordered that once newly acquired areas had been populated, then the discovery and settlement of the lands bordering the occupied areas could begin.<sup>329</sup>

King Charles V invoked contiguity principles in Chile when he granted Diego de Almagro the governorship and jurisdiction over lands in modern-day northern Chile that had not yet even been seen nor occupied by Spanish explorers. The King continued to use contiguity when he gave Sancho de Hoz the right to govern all the lands south of the Straits of Magellan which no Spaniard had seen. In 1541, the new Assembly of Santiago declared the territory of Chile to include almost all the lands of modern-day Chile even though the Spanish had actually seen only a small portion of those lands. Pedro de Valdivia also relied on contiguity when he assumed that Spain held rights to the lands surrounding the Straits. Valdivia also sent an expedition to southern Chile in 1544 to take symbolic possession of the country for Spain, and the group claimed the "natives and of all this land and province, and its surroundings" although they had just stepped ashore.

In its 1833 Constitution, Chile claimed the lands of the independent Mapuche peoples as being within its territory, even though Chile had no control over or possession of those lands.<sup>334</sup> Furthermore, the Chilean Minister of the Treasury, in 1868, and the Congress also defined the territory of Chile in a very expansive, and at that time unrealistic, manner.<sup>335</sup>

Chile and its citizens developed a national story that justified contiguity claims to the Straits of Magellan notwithstanding the territory and country of Indigenous Araucania that stood in the way for over 300 years. Commentators call this story Chile's "southern destiny." Identical visions of national destinies of territorial expansion based on

 $<sup>^{327}</sup>$  See supra note 103.

<sup>&</sup>lt;sup>328</sup> 3 MERRIMAN, *supra* note 45, at 524.

Ordinances of Philip II, supra note 138, at 11.

<sup>&</sup>lt;sup>330</sup> POCOCK, *supra* note 107, at 16.

<sup>&</sup>lt;sup>331</sup> Cabildo de 11 de Agosto de 1541, reprinted in 1 COLECCION DE HISTORIADORES, supra note 197, at 97, 100.

<sup>&</sup>lt;sup>332</sup> POCOCK, *supra* note 107, at 109–10, 204.

<sup>333</sup> *Id.* at  $109-\overline{10}$ .

CONSTITUCIÓN POLÍTÍCA DE LA REPÚBLICA DE CHILE [C.P.] of 1833, art. 1, available at http://www.leychile.cl/Navegar?idNorma=137535&tipoVersion=0 (last visited Dec. 3, 2011).

Casanueva, *supra* note 244, at 310.

<sup>&</sup>lt;sup>336</sup> Bengoa, *supra* note 141, at 119–20, 128.

Theodore MacDonald, *Introduction, in Manifest Destinies and Indigenous Peoples, supra* note 141, at 1, 11; *see also Bengoa, supra* note 141, at 133 (calling it Chile's "Magellanic vocation").

contiguity were used by other settler countries such as the United States, where the story is called "Manifest Destiny," and Argentina where it is known as the "Conquest of the Desert." 338

Portugal used the element of contiguity to claim lands far beyond the areas they had actually discovered and occupied. To rexample, in the 1450s to 1470s, Portuguese kings claimed islands off the Iberian coast due to their proximity to Portugal. Moreover, King John II claimed Columbus's newly discovered lands in the Caribbean because John argued that they were close or contiguous to his Azore Island colonies. In the early 1500s, Portugal granted the captaincies enormous stretches of Brazilian coastline and lands into the interior to the Tordesillas treaty demarcation line. Portugal also used contiguity arguments, especially as the demarcation line became less important, as Portuguese pioneers in the sixteenth and seventeenth centuries pushed the boundaries of present-day Brazil to the limits of the Spanish settlements and in its contest with Spain for lands that are today in Uruguay.

Portuguese and Brazilian colonists used contiguity arguments and actions to claim to possess and own the lands in Uruguay without actual possession. As already discussed, Portugal established the town of Colônia in 1679 across from Buenos Aires but far south of any Brazilian settlements. He had a contiguity argument that it already owned all the lands in between. The Crown began establishing other settlements south of São Paulo towards Colônia, such as Santa Catarina and Rio Grande in 1737. The royal Overseas Council was well aware of the legal principle of contiguity and the need to occupy land and advised the king in 1728 that a delay in founding the town of Rio Grande might prejudice Portugal's claim to the unoccupied lands south of that area. In 1730, the Council even advised building Rio Grande on the south side

See generally MILLER, NATIVE AMERICA, supra note 1, at 115–61; Claudia N. Briones & Walter Delrio, The "Conquest of the Desert" as a Trope and Enactment of Argentina's Manifest Destiny, in Manifest Destinies and Indigenous Peoples, supra note 141, at 51.

See Miller & D'Angelis, supra note 1 (manuscript at 75–78).

See Prestage, supra note 23, at 45.

 $<sup>^{341}</sup>$  1 Marques, *supra* note 28, at 222; Morison, European Discovery, *supra* note 60, at 89; Parry, *supra* note 77, at 151.

Harrison, *supra* note 95, at 12–13; see also 4 MERRIMAN, supra note 45, at 386. As defined later by England and the United States, contiguity provided a first discoverer and occupier of new lands a claim to a wide extent of land around their actual settlements, and the discovery of a river mouth created a claim to the entire drainage system of the river. See MILLER, NATIVE AMERICA, supra note 1, at 4, 15, 69–70.

See 1 MARQUES, supra note 28, at 355.

See Alden, supra note 29, at 67.

<sup>&</sup>lt;sup>345</sup> *Id.* at 69–78.

<sup>&</sup>lt;sup>346</sup> *Id.* at 72.

<sup>&</sup>lt;sup>347</sup> *Id.* at 75–77.

of the Rio Grande River so as to create a contiguity claim over the plains south and west of that river towards Colônia. 348

England and its colonies made contiguity claims, as well. In 1620, for example, James I granted the colony of New England one hundred English miles of land around its actual settlements. The royal charters also granted the colonies and colonists property rights over vast areas of land, including islands and waters surrounding their settlements. The charters granted rights as far as the head waters of many rivers and the contiguous lands. The Crown also used contiguity to claim Discovery rights over lands in modern-day Canada and the United States via the Royal Proclamation of 1763. King George III claimed preemption and sovereign rights over these lands even though no Englishman had ever set foot on most of the land. Also in Canada, the Crown relied on contiguity to grant the Hudson's Bay Company discovery and commercial rights in lands and assets it might find in what is today northwestern Canada.

Thereafter, the American colonies claimed their borders to the furthest degree possible based on contiguity. For example, English colonies objected to Dutch colonies being established in America because they were within areas the English claimed based on contiguity. Later, some independent American states relied on this element and cited the royal charters as setting their western borders at the Pacific Ocean, nearly 3,000 miles away. On the federal side, Thomas Jefferson demonstrated the use of contiguity in his research to determine the size of the Louisiana Territory. He relied on the drainage system of the Mississippi River as the borders of Louisiana and tried to

<sup>&</sup>lt;sup>348</sup> *Id.* at 76.

 $<sup>^{349}</sup>$   $\,$   $Introduction,\,in\,3$  Foundations of Colonial America,  $\it supra$  note 68, at 1675.

See, e.g., Charter of Maryland Granted to Lord Baltimore (June 20, 1632), reprinted in 2 FOUNDATIONS OF COLONIAL AMERICA, supra note 68, at 756, 757; Charter of the Massachusetts Bay, supra note 180, at 46; Charter to Sir Walter Raleigh, supra note 87, at 1696; First Charter of Virginia, supra note 89, at 1699; Grant of the Province of Maine by Charles I to Sir Ferdinando Gorges, supra note 303, at 97; Letters Patent to Sir Humphrey Gilbert, supra note 87, at 1691; Patent of New England Granted by James I, supra note 89, at 28–29.

<sup>&</sup>lt;sup>351</sup> See, e.g., Charter for the Province of Pennsylvania (Feb. 28, 1680/81), reprinted in 2 Foundations of Colonial America supra note 68, at 849; Charter of Georgia (June 9/20, 1732), in Select Charters, supra note 89, at 235, 242; Charter of Rhode Island and Providence Plantations (July 8/18, 1663), in Select Charters, supra note 89, at 125, 131; Grant of New Hampshire (Nov. 7/17, 1629), in Select Charters, supra note 89, at 50, 51.

<sup>&</sup>lt;sup>352</sup> See The Proclamation of 1763, supra note 209, at 48–49.

<sup>&</sup>lt;sup>353</sup> See Royal Charter of the Hudson's Bay Company, supra note 128.

<sup>&</sup>lt;sup>354</sup> See English Answer to the Remonstrance of the Dutch Ambassadors, supra note 91, at 31–32. See generally Simsarian, supra note 71, at 113, 115–17.

<sup>&</sup>lt;sup>355</sup> See MILLER, NATIVE AMERICA, supra note 1, at 41.

determine the course and location of the tributaries of that river. <sup>356</sup> Jefferson even hinted in his research that Louisiana gave the United States a claim as far as the Pacific Northwest. <sup>357</sup> A U.S. House of Representatives committee made that exact claim in 1804, stating that the Louisiana Territory extended America's international-law claim to the Pacific Northwest due to contiguity. <sup>358</sup>

Other American politicians also used contiguity to claim the Oregon Country. In 1825, Senator Thomas Hart Benton claimed America owned Oregon due to "[c]ontiguity and continuity of settlement and possession." By the mid-1840s, President Polk defined the Oregon Country as being the entire drainage system of the Columbia River, reaching far into present day British Columbia. American diplomats argued with England that the United States owned the entire Oregon Country on the grounds of the Discovery principle of contiguity. 361

England and Australian colonists also made expansive contiguity-type claims over the entire continent of Australia. First, Captain James Cook claimed the east coast for England when he landed at Botany Bay in April 1770, near present-day Sydney, and planted a flag and carved the details of his arrival and actions on a tree. He then sailed north to what became known as Possession Island and in August 1770 he once again asserted British authority over the entire east coast of Australia: "At six possession was taken of this country in his Majesty's name and under his colours, fired several volleys of small arms on the occasion and cheer'd three times, which was answer'd from the ship."

In 1788, when the First Fleet arrived to begin English settlement of Australia, Captain Arthur Phillip traveled north of Botany Bay to what is now the center of Sydney and engaged in a ceremony of unfurling the British flag, holding a toast, and firing a gun. These actions were deemed to be a reassertion of the authority to possess the lands that England had allegedly acquired from Cook's discovery and his contiguity claim to the entire east coast of the continent. A naval officer, who was later to become a governor of the colony, also noted in his diary that

See Thomas Jefferson, The Limits and Bounds of Louisiana, in Documents Relating to the Purchase & Exploration of Louisiana 44–45 (1904); see also Miller, Native America, supra note 1, at 70–71.

<sup>&</sup>lt;sup>357</sup> See Jefferson, supra note 356, at 45; see also MILLER, NATIVE AMERICA, supra note 1, at 70–71 (discussing Jefferson).

<sup>&</sup>lt;sup>358</sup> See 13 Annals of Cong. 1124 (1804); see also Miller, Native America, supra note 1, at 124 (discussing the committee report).

<sup>&</sup>lt;sup>359</sup> Benton, *supra* note 189, at 54; *accord* 1 Reg. Deb. 705 (1825).

Polk's election slogan was "54–40 or fight," the northern border of the Columbia River drainage. MILLER, NATIVE AMERICA, supra note 1, at 153.

<sup>&</sup>lt;sup>361</sup> See id. at 133, 154–56.

 $<sup>^{362}\,</sup>$  Miller, et al., Discovering Indigenous Lands,  $\mathit{supra}$  note 1, at 174.

<sup>&</sup>lt;sup>363</sup> *Id.* at 175.

<sup>&</sup>lt;sup>364</sup> *Id.* at 176.

<sup>&</sup>lt;sup>365</sup> *Id*.

these symbolic actions showed that all of New South Wales was "taken for His Majesty." 366

In 1824, when it was found that parts of the Torres Strait were not within the actual boundaries of New South Wales, formal steps were taken to claim the strait. Furthermore, on January 21, 1827, Major Lockyer proclaimed Britain's annexation of the whole continent. Just to make sure, two years later Captain Fremantle, under authorization from the British Crown, again claimed "all that part of New Holland which is not included within the territory of New South Wales."

In comparison, New Zealand, a relatively small island country, does not appear to have used contiguity claims. The colonial government primarily sought ownership of land via purchases from Maori iwi and individuals or made claims of ownership by discovery. Notwithstanding New Zealand, the other countries we are examining made contiguity claims as part of the international law of colonialism.

### G. Terra Nullius

Under the *terra nullius* element of Discovery, Europeans claimed title to any vacant and empty lands that they encountered, as well as any regions occupied by human societies not organized under a system of government or laws that Europeans were willing to recognize. Europeans also based *terra nullius* ideas on race. One commentator states that Europeans considered that "a land devoid of Caucasian people in areas outside Europe . . . would belong to the first nation who occupied it."

Portugal and the papacy relied on *terra nullius* and the idea that popes could grant vacant lands to Portugal. The under medieval law, popes were assumed to have the authority to dispose of unoccupied lands. Consequently, in 1434, the Portuguese Prince Henry the Navigator was granted a papal bull authorizing him to settle any of the Canary Islands that were not actually occupied. Portugal thereafter made claims to own various Canary, Azore, and Madeira islands based on the argument that they were empty, unoccupied, and unowned.

<sup>&</sup>lt;sup>366</sup> *Id*.

<sup>&</sup>lt;sup>367</sup> CASTLES, *supra* note 98, at 26–27.

<sup>&</sup>lt;sup>368</sup> *Id.* at 27.

<sup>369</sup> Id.

 $<sup>^{\</sup>it 370}$   $\it See$  Miller, et al., Discovering Indigenous Lands,  $\it supra$  note 1, at 210–14.

<sup>&</sup>lt;sup>371</sup> *See supra* notes 98–99.

PRADO, *supra* note 95, at 228–29 (author's translation).

<sup>&</sup>lt;sup>373</sup> Miller & D'Angelis, *supra* note 1 (manuscript at 79).

PRESTAGE, supra note 23, at 8.

<sup>&</sup>lt;sup>375</sup> PARRY, *supra* note 77, at 147.

 $<sup>^{376}</sup>$  See Boxer, supra note 45, at 21; Prestage, supra note 23, at 43–44; Livermore, supra note 69, at 112.

Portugal also made *terra nullius* claims in Brazil.<sup>377</sup> In the 1640s, the governor of Rio claimed the assets of vacant lands near Portuguese settlements, and in 1676 Portugal received a papal bull affirming its claim to the allegedly vacant lands north of the Rio de la Plata.<sup>378</sup> In the 1960s, Brazil continued to assume that it could encroach on Indigenous lands under *terra nullius* ideas.<sup>379</sup>

The papacy and Spain and Portugal also utilized the second definition of *terra nullius*, that Indigenous lands were available for European ownership if the governments, religions, and societies located there were ones that Europeans did not recognize as valid. A long series of papal bulls granted Portugal and Spain ownership of lands even though it was common knowledge that non-Europeans were living on and governing those lands.<sup>380</sup>

One commentator alleges, however, that Spain never made *terra nullius* arguments because all the areas it claimed in the New World were occupied by numerous peoples with well-established cultures and governments. Nonetheless, there are examples of Spain, and later Chile, using *terra nullius* and analogous ideas to claim lands. For example, in 1572, a Spanish jurist and adviser to the viceroy of Peru justified Spain's title and rule by stating: "The Indies were justly won. By the concession of the pope, or because those kingdoms were found deserted by the Spaniards." Moreover, in 1523, the regulations on colonization in the New World issued by Charles V, and later laws, ordered that sites where Spanish cities were to be established "should be vacant and capable of occupation."

See 1 MARQUES, supra note 28, at 252 (stating that because there were few Brazilian Indians, and they were sparsely distributed, vast areas of very inviting land looked deserted).

See Alden, supra note 29, at 66–67 (citing Romani Pontificis pastoralis solicitudo (Nov. 16, 1676), in 2 Bullarium Patronatus Portugalliae Regum in Ecclesiis Africae, Asiae Atque Oceaniae 167, 169 (Vicecomite de Paiva Manso ed., Olisipone ex Typographia Nationali 1870)).

In 1962, a Brazilian federal agency decided to create settlements for poor Brazilians in the "uninhabited" lands in part of the Amazon forest; the agency either ignored or did not realize that the Ka'apor, Guajá, and Tembé tribes were living there. William Balée, *Language, Law, and Land in Pre-Amazonian Brazil*, 32 Tex. INT'L L.J. 123, 126 (1997).

See, e.g., Bull Inter Caetera, supra note 61, at 61–62; Bull Romanus Pontifex, supra note 57, at 21–22; see also Valentin Y. Mudimbe, Romanus Pontifex (1454) and the Expansion of Europe, in Postcolonialisms: An Anthology of Cultural Theory and Criticism 51, 58–59 (Gaurav Desai & Supriya Nair eds., 2005); Peter Kay Stern & Daniel Towers Lewis, A History of Land Claims in the Americas, Lewisdt.com/research/landclaims.html.

<sup>&</sup>lt;sup>381</sup> See PAGDEN, supra note 26, at 91. Francisco de Vitoria wrote in the 1530s that "the possessions [in the Indies] were under a master, and therefore they do not come under the head of discovery [of vacant lands]." INDIAN CAUSE, supra note 194, at xiv.

Hanke, supra note 79, at 167 (quoting Juan Matienzo, Gobierno del Perú 13 (1910)).

POCOCK, *supra* note 107, at 70; *see also* Ordinances of Philip II, *supra* note 138, at 12.

In 1866, Chile expressly applied *terra nullius* to Mapuche lands. In a law of December 4, 1866, the president was granted the power to demarcate Mapuche lands and to grant titles to non-Indian settlers and to Mapuches. But any lands that were "non-populated" or that were not assigned by the president would be considered vacant territories. <sup>384</sup> And in 1868, the Chilean government used statutory language that sounds as if Chile considered all Mapuche lands to be vacant and available for ownership by Chile:

The State can enter to advantageously transfer the large stretches of vacant land which exist between the [Malleco River] and the Bio-Bio [River] [Mapuche territory] ... 200,000 square hectares will remain with civilized landowners, 50,000 to the indigenous inhabitants and the rest should be considered empty and therefore property of the State. \*\*SE\*\*

One commentator notes that in the second half of the 1800s, Chile considered Mapuche lands to be "empty" and "practically uninhabited" and enacted pro-immigration policies to help fill this "unoccupied territory." Consequently, while it is alleged that Spain never claimed lands in the New World on the basis of *terra nullius*, it appears that Spain and Chile occasionally relied on this element of Discovery.

As already noted, England was one of the countries that developed the element of *terra nullius*. England claimed Indigenous lands under both definitions of this element—actually empty lands, and lands that were occupied by societies that England did not consider worthy of recognition as governments. In 1768, George III and the Admiralty instructed James Cook about *terra nullius*: "[I]f you find the country *uninhabited* Take Possession for His Majesty by setting up Proper Marks and Inscriptions as first discoverers and possessors." Interestingly, though, Cook made *terra nullius* claims in Australia and Alaska even though he encountered native peoples in both places. In fact, even though Aboriginals were hostile to his presence, he claimed the land as if it were empty.

<sup>&</sup>lt;sup>384</sup> Ley de 4 de Diciembre de 1866, arts. 2, 6, *supra* note 244, at 32–33.

Casanueva, *supra* note 244, at 309–10, *translated in Miller et al.*, *International Law of Discovery, supra* note 1, at 871 (emphasis added).

<sup>&</sup>lt;sup>386</sup> Bengoa, *supra* note 141, at 129, 131.

See supra notes 97–99 and accompanying text.

Von der Heydte, *supra* note 71, at 460–61 (emphasis added); *accord* MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 174–75 (citing COLLINGRIDGE, *supra* note 181, at 16–17); *see also* PAGDEN, *supra* note 26, at 76–77.

See Journals of the Resolution and Discovery, supra note 120, at 368–69; The Journals of Captain James Cook on his Voyages of Discovery: The Voyage of the Endeavor 1768–1771, at 357, 395 (J.C. Beaglehole ed., 1968).

See Journal of the Right Hon. Sir Joseph Banks During Captain Cook's First Voyage in H.M.S. *Endeavour* in 1768–71 to Terra del Fuego, Otahite, New Zealand, Australia, the Dutch East Indies, etc. 262–69 (Joseph D. Hooker ed., London, MacMillan & Co. 1896).

alleged its ownership of the continent due to terra nullius until the 1992 *Mabo* case removed that principle from Australian law. <sup>391</sup>

The English Crown and its colonists used terra nullius to claim the lands of American Indians. The Crown claimed the authority to grant rights in the "Deserts" and in the "deserted," "waste and desolate," "hitherto uncultivated" lands "which are not inhabited already" in America.<sup>392</sup> Some English colonists also relied on terra nullius because they thought, for example, that the colony of New Jersey was "an uninhabited country found out by British subjects." 393 A 1765 history of New Jersey agreed and stated that English claims were based on first discovery, possession, and "the well known Jus Gentium, LAW OF NATIONS, that whatever waste or uncultivated country is discovered, it is the right of that prince who had been at the charge of the discovery."394

The United States used this element when it argued to England that the Pacific Northwest was a "vacant territory." The United States Supreme Court also relied on terra nullius in discussing Indian lands at least two times.<sup>396</sup> Finally, in 1895, the Republican Party injected the idea of terra nullius into its 1895 platform when it called for America to expand into "all the waste places of the earth" and noted that Cuba was only "sparsely settled."397

In contrast, the use of terra nullius in New Zealand and Canada is not clear cut. In 2003, New Zealand's Court of Appeal stated that "New Zealand was never thought to be terra nullius." Yet the 1877 Wi Parata case is filled with terra nullius reasoning representing the second meaning. For example, the Court asserted that the Maori had no form of civil government or any settled system of law, possessed few political

See MILLER, ET AL., DISCOVERING INDIGENOUS LANDS, supra note 1, at 179–80, 192–94.

<sup>&</sup>lt;sup>392</sup> Charter of Georgia supra note 351, at 236, 242; Charter of Maryland Granted to Lord Baltimore, supra note 350, at 756; Patent of New England Granted by James I, *supra* note 89, at 22–23.

<sup>&</sup>lt;sup>393</sup> Arnold v. Mundy, 6 N.J.L. 1, 83 (1821) (opinion of Rossell, J.).

<sup>&</sup>lt;sup>394</sup> SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA-CAESARIA, OR NEW-JERSEY 7–8 (Burlington, James Parker 1765).

MILLER, NATIVE AMERICA, *supra* note 1, at 133.

<sup>&</sup>lt;sup>396</sup> See Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409 (1842). "The English possessions in America were not claimed by right of conquest, but by right of discovery.... [A]ccording to the principles of international law,... the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.... [T]he territory [the aborigines] occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants." Id. See also United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) ("[T]he whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land.").

Julius W. Pratt, John L. O'Sullivan and Manifest Destiny, 14 N.Y. HIST. 213, 234 (1933).

398 Attis Comp. North Abg. [2003] 3 N.ZI. P. 643. (CA), 657

Att'y-Gen. v Ngati Apa [2003] 3 NZLR 643 (CA) 657.

<sup>&</sup>lt;sup>399</sup> Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC).

<sup>&</sup>lt;sup>400</sup> See supra note 372 and accompanying text.

relations with each other, and the Court cited with approval Lord Normanby's August 1839 dispatch that Maori were "incompetent to act, or even to deliberate in concert." In describing the Maori tribes as "incapable of performing the duties, and therefore of assuming the rights, of a civilised community,"402 the Court was relying on terra nullius. Moreover, one New Zealand commentator states that "the Crown's assumption of ownership of the foreshore and seabed in 2004 is perhaps

an example of a revived terra nullius claim."403

The colony and country of Canada do not appear to have relied on terra nullius. But the 1670 charter to the Hudson's Bay Company can be read as granting the Company rights over any vacant lands it discovered in Canada: "WE HAVE granted, and by these Presents for Us, Our Heirs and Successors, DO grant unto the said Governor and Company... any [of] the Coasts adjacent to the said Territories, Limits and Places which are not already possessed as aforesaid."404

In sum, England and Australia were the strongest advocates of terra nullius while Spain, Portugal, Chile, Brazil, and the United States used the element somewhat. It appears, however, that New Zealand and Canada barely relied on this element.

## H. Christianity

On the discovery of [North America], the great nations of Europe were eager to appropriate to themselves so much of it as they could . . . . [T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants new, by bestowing on them civilization Christianity . . . .

England, Spain, and Portugal and their colonies in the Americas and Oceania subscribed to the sentiment expressed above by the United States Supreme Court. The papal bulls expressly ordered Portugal, from 1436 onwards, and Spain, from 1493 onwards, to spread Christianity through their explorations and conquests. 406 These countries recognized the importance of religion to their colonization efforts in the Americas and elsewhere.

Wi Parata, 3 NZ Jur (NS) at 77.

 $<sup>^{\</sup>scriptscriptstyle 403}$  Miller & Ruru,  $\mathit{supra}$  note 320, at 910;  $\mathit{see}$  also Foreshore and Seabed Act 2004 (N.Z.).

<sup>&</sup>lt;sup>404</sup> Royal Charter of the Hudson's Bay Company, *supra* note 128.

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

See BOXER, supra note 45, at 21–23; Bull Romanus Pontifex, supra note 57, at 23.

Portugal, for example, justified its explorations and claims to the assets of Asia, Africa, and Brazil first and foremost through religion. Brazil's colonial officials and modern day governments also used this element to justify their domination of Indigenous peoples. We need not spend much time proving this because the evidence is overwhelming that Spain and Chile, as well as Portugal and Brazil, used religion to assert their Discovery claims over Indigenous nations and peoples.

King João III instructed the first governor-general of Brazil in 1548 that "the main cause for my motion to order the population of said lands of Brasil was that its inhabitants be converted to our sacred catholic faith." The captaincies that earlier had been granted lands in Brazil were also given a special mission to convert infidels. Brazilian colonial officials stated in laws of 1548, 1663, and 1677 that the principal purpose of the colony was to convert the natives. The Jesuits were given almost complete control over natives and had the sole authority to travel into the back country to domesticate pagans and convert them.

There is also no question that Spain and Chile relied to a great extent on religion to justify their Discovery claims over Indigenous peoples. The Crown developed the *Requerimiento*, for example, a document that all conquistadors had to read to Indigenous peoples they encountered that announced Spain's intention to convert natives to Catholicism. Furthermore, the Crown repeatedly stressed the obligation of its explorers to convert natives and preach the gospel, and enacted a multitude of regulations and laws on how to carry out this duty. Explorers were ordered to "convert the provinces of the Indies" and were required to take priests with them to teach religion to the

<sup>&</sup>lt;sup>407</sup> See William J. Entwistle, *Religion, in PORTUGAL AND BRAZIL, supra* note 64, at 82, 84; J.H. Plumb, *Introduction* to BOXER, *supra* note 45, at xxi, xxiii, xxvi (fifteenth-century Portuguese "exploitation from the very first was encased in religious zeal" and was conducted in the "service of God and profit"; killing and enslaving heathens was righteous and just).

Miller & D'Angelis, *supra* note 1 (manuscript at 82).

See id.; Miller et al., International Law of Discovery, supra note 1, at 871.

 $<sup>^{\</sup>scriptscriptstyle 410}$  Regimento de Tomé de Sousa,  $\mathit{supra}$  note 204 (author's translation).

<sup>&</sup>lt;sup>411</sup> See, e.g., Carta de Doação da Capitania de Pernambuco a Duarte Coelho, supra note 283, at 309–12.

<sup>&</sup>lt;sup>412</sup> See Kiemen, supra note 116, at 4, 143.

<sup>413</sup> See id. at 6.

 $<sup>\,^{\</sup>scriptscriptstyle 414}\,$  See Muldoon, supra note 44, at 140–41.

<sup>&</sup>lt;sup>415</sup> See, e.g., Ordinances of Philip II, supra note 138, at 35–36, 38, 42; Bk. 4, Tit. 7, Law 23, RECOPILACIÓN 1681, supra note 140, at 117–18; Bk. 6, Tit. 4, Law 15, RECOPILACIÓN 1681, supra note 194, at 130 (stating that Indians were to pay the costs of missions and religious instruction); Bk. 6, Tit. 9, Law 1, RECOPILACIÓN 1681, supra note 194, at 228 (stating that Spanish encomenderos must work for the spiritual welfare of Indians); Bk. 6, Tit. 15, Law 1, RECOPILACIÓN 1681, supra note 194, at 325; INDIAN CAUSE, supra note 194, at xvi (stating that the Crown recognized that the primary reason the 1493 papal bulls granted Spain the Indies was for religious purposes); 2 MERRIMAN, supra note 45, at 205, 230–31.

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natives, and to teach the children "the confession and the Lord's prayer," and each Indian village was to have a church and priest. 416

In the royal order granting Diego de Almagro the right to discover modern-day Chile, the king ordered him to take priests "to teach [Indians] our Catholic faith, and you may not conquer, discover, and settle the territory without them." When Pedro de Valdivia established the city of Santiago in 1541, he did so "in the name of God, and of His blessed mother, and of the Apostle St. James (Santiago)." Valdivia instructed Chilean natives that he had come to bring them the one true faith. The Assembly of Santiago stated in 1541:

It is the will of S.M. that these lands be discovered and be populated by Christians, so that the naturals [natives] be converted to our Catholic faith, and our Christian faith be increased, and its disciples take the fruit of its labor that they deserve, and S.M. find his part as the king and natural lord. 420

In 1563, the Spanish governor of Chile stated that one of the best ways to ensure that the Indians were treated well was by "bringing them to our holy Catholic faith and our servitude." Thereafter, Chilean colonization continued to emphasize conversion and the superiority of Christianity as justifications for Spanish rights. 422

To a somewhat lesser extent, England, Australia, Canada, New Zealand, and the United States also used the religion element of Discovery. James I alleged in the charter for the Virginia colony in 1606 that he had established the colony for "propagating of *Christian* Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages . . . to human Civility." He also granted the 1620 charter for the colony of New England "to advance the in Largement of Christian Religion, to the Glory of God Almighty . . . [and for] the Conversion

<sup>&</sup>lt;sup>416</sup> 4 COLECCION DE DOCUMENTOS PARA LA HISTORIA DE CHILE, *supra* note 105, at 145; 2 COLECCION DE DOCUMENTOS INEDITOS RELATIVOS AL DESCUBRIMIENTO, CONQUISTA Y ORGANIZACION DE LAS ANTIGUAS POSESIONES ESPANOLAS 156–57, 160–61, 196, 198 (reprinting instructions for Governors and officials concerning the Indies, March 20–29, 1503).

<sup>&</sup>lt;sup>417</sup> 1 Amunátegui, *supra* note 106, at 26 (author's translation).

POCOCK, supra note 107, at 69.

<sup>&</sup>lt;sup>419</sup> 2 Amunátegui, *supra* note 277, at 39 (author's translation).

<sup>420</sup> *Id.* at 98, 100, 116–17 (author's translation).

 $<sup>^{421}</sup>$  Id. at 12 (author's translation).

<sup>&</sup>lt;sup>422</sup> РОСОСК, *supra* note 107, at 28 (Almagro), 69 (Valdivia); *see, e.g.*, Bk. 6, Tit. 2, Law 14, RECOPILACIÓN 1681, *supra* note 194, at 103; Bk. 6, Tit. 3, Law 4, RECOPILACIÓN 1681, *supra* note 194, at 110; Bk. 6, Tit. 10, Law 20, RECOPILACIÓN 1681, *supra* note 194, at 260; Bk. 6, Tit. 16, Law 12, RECOPILACIÓN 1681, *supra* note 194, at 348 (Indians must pay to support their religious instructors).

First Charter of Virginia, *supra* note 89, at 1698.

and Reduction of the People in those Parts unto the true Worship of God and Christian Religion."

Thereafter, the Crown and colonists in Canada and the United States overtly used this element against Indigenous peoples. The Crown called on the Christian God's assistance and authority to colonize North America, to claim Indian lands, and to expand the Christian flock by conversions. The thirteen American colonies also relied heavily on this element to justify their attempts to control native people. Although I found little evidence of the overt use of religion in Canada to justify colonization, it was in the backdrop of English actions, and, for example, in 1884 Canada outlawed the Indigenous religious practice of potlatching.

In the 1870s, the United States even turned over the operation of many reservations and the education of Indian children to Christian denominations, and even granted tribal lands to churches. And American Indian religious beliefs and ceremonies were officially suppressed and outlawed for over one hundred years. 429

Patent of New England Granted by James I, *supra* note 89, at 22, 34.

See, e.g., Charter of Maryland Granted to Lord Baltimore, supra note 350, at 756 (remarking on the Baron of Baltimore's "pious Zeal for extending the Christian Religion"); Charter of Rhode Island and Providence Plantations, supra note 351, at 126 (noting the Rhode Island colonists' "holie Christian ffaith and worshipp... [and] the gaineing over and conversione of the poore ignorant Indian natives"); Grant of the Province of Maine by Charles I to Sir Ferdinando Gorges, supra note 303, at 98–99 ("[O]ur will and pleasure is that the religion now professed in the Church of England... shall be forever hereafter professed and, with as much convenient speed as may be, settled and established in and throughout the said province and premises....").

See, e.g., AMY E. DEN OUDEN, BEYOND CONQUEST: NATIVE PEOPLES AND THE STRUGGLE FOR HISTORY IN NEW ENGLAND 48 (2005) (explaining "conversion" as a diversionary measure to obscure colonials' own foreign characteristics and instead casting the imagined savagery of the Indians as "the thing that must be 'converted'"); id. at 174 (explaining that the "order to 'civilize' and 'Christianize' the embattled Mashantucket community" was a diversion from "the question of illegal trespass upon the reservation land").

<sup>&</sup>lt;sup>427</sup> See Catherine Bell, Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate, 17 Am. Indian L. Rev. 457, 475 (1992); Constance Backhouse, Colour-Coded: A Legal History of Racism in Canada, 1900–1950, at 63 (1999) (citing An Act further to Amend "The Indian Act, 1880," S.C. 1884, c. 27, s. 3).

 $<sup>^{428}</sup>$  See, e.g., 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 512–27, 597 (1984); 2 Prucha, supra, at 800–05, 951–53.

See, e.g., Felix S. Cohen, Handbook of Federal Indian Law 175 n.347 (photo. reprint 1971) (1942) (quoting Office of Indian Affairs, Dep't of the Interior, Circular No. 1665 (Apr. 16 1921)) ("The sun-dance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided."); id. at 176 n.347 (quoting Am. Indian Def. Ass'n, Inc., The New Day for the Indians 12 (Nash ed., 1938)) ("[C]hildren enrolled in Government schools were forced to join a Christian sect, to receive instruction in

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Similarly, in New Zealand, a significant component of colonization involved a mandate to convert Maori and included bans on Maori religious beliefs and ceremonies. In Australia, in contrast, religion was apparently not used to justify the acquisition of Discovery powers by England and the colony. Again, since Aboriginal communities were never assumed to have any sovereignty or property rights in the first place there was no reason to bother justifying the taking of those rights.

Obviously, these countries relied on the Discovery element of religion to greater and lesser extents. Australia and New Zealand, however, appear to have downplayed the issue of religion for the most part. One should not be deluded, however, that any of these countries and colonists were only interested in religious conversion. From the very beginnings of European colonial expansions, religious motivation was never the sole interest. Economic and social motives were inextricably linked with religion. <sup>432</sup>

#### I. Civilization

England, Spain, Portugal, and their colonists in the Americas and Oceania presumed that their governments, cultures, and civilizations were superior to those of Indigenous peoples and justified their conquest and domination. These colonizing countries and settler societies shared similar ethnocentric and racial viewpoints and viewed native peoples as lower-class humans who needed the paternalistic care and direction of European societies.

Portugal and its explorers and settlers believed from the beginning of the colonization of Brazil that Indigenous peoples lacked "religion,

that sect, and to attend its church. On many reservations native ceremonies were flatly forbidden . . . . In some cases force was used to make the Indians of a reservation cut their hair short."); Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 Am. INDIAN L. REV. 165, 199–204 (2001) (describing, *inter alia*, the banning or discouragement of Makah religious and cultural ceremonies).

- <sup>430</sup> See Tohunga Suppression Act 1908 (N.Z.); see also James Belich, Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century 164–69 (1996); Ani Mikaere, Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori, 8 Y.B. N.Z. Jurisprudence (Special Issue) 134, 142–43, 151–52 (2005).
- Gomes Eannes de Azurara, The Chronicle of the Discovery of Guinea (C.R. Beazley & E. Prestage eds., London, The Society 1896), *reprinted in* Expansion of Europe, *supra* note 26, at 58–59; Expansion of Europe, *supra* note 26, at 5.
  - PARRY, *supra* note 77, at 19; *supra* note 431.
- 433 C.R. BOXER, RACE RELATIONS IN THE PORTUGUESE COLONIAL EMPIRE 1415–1825, at 90, 94–96 (1963); see Miller & D'Angelis, supra note 1 (manuscript at 85–92); Miller et al., International Law of Discovery, supra note 1, at 873–76.
- <sup>434</sup> See, e.g., MILLER, NATIVE AMERICA, supra note 1, at 28, 39–40, 163–73; MILLER, ET AL., DISCOVERING INDIGENOUS LANDS, supra note 1, at 43, 49, 76–78, 87–88, 92, 107, 128, 149, 172, 175, 186, 216–18, 220–21, 250; Miller et al., International Law of Discovery, supra note 1, 873–76.

laws, or kings."<sup>435</sup> Indians were stereotyped at first as unspoiled children of Nature who needed tutelage and protection, but that conviction was quickly replaced by the image of the irredeemable savage who was without government or law. Both of these ideas, ironically, reflect the papal bulls and the guardianship duties the papacy awarded to Portuguese and Spanish kings to civilize pagans in the Canary Islands, Africa, and the New World. Portuguese priest in Brazil in the 1550s clearly expressed the negative view of natives when he wrote of the "savage nature of the Amerindians," that they were "utterly bestial and untrustworthy," and were the "most vile and miserable heathen[s] in all mankind." A Brazilian colonist also summed up this type of thinking in the 1720s when he justified the enslavement of natives due to their lack of civilization because Indians were "not true human beings, but beasts" and "savages, ferocious and most base, resembling wild animals in everything save human shape."

The Jesuits in Brazil worked to assimilate natives into Portuguese culture and religion. Jesuit historians claimed they were the "great civilizers" who combated idolatry, drunkenness, laziness, and polygamy. In the 1750s, the government of Portugal took over the task of civilizing Indigenous peoples. Under various policies and laws, assimilationist goals were continued and the eradication of native civilizations and cultures was the goal. Portuguese was imposed as the official language and native Brazilians were prevented from using their languages. These policies assumed that a Portuguese civil life would be the best school for

<sup>&</sup>lt;sup>455</sup> Alden, *supra* note 152, at 21; *accord* BOXER, *supra* note 45, at 85; MORISON, EUROPEAN DISCOVERY, *supra* note 60, at 284–85 (Amerigo Vespucci wrote about the Guarani Indians: "They have no laws or faith, and live according to nature. . . . [T]hey have among them no private property . . . [and] they have no boundaries of kingdoms and provinces . . . .").

BOXER, supra note 45, at 85; BUENO, supra note 95, at 173.

See Bull Romanus Pontifex, supra note 57; Bull Inter Caetera, supra note 66.

<sup>&</sup>lt;sup>438</sup> BOXER, *supra* note 433, at 90–91.

<sup>&</sup>lt;sup>439</sup> BOXER, *supra* note 433, at 96. The father of the United States, George Washington, also compared American Indians to animals. In a letter to the U.S. Congress in 1783, then-General Washington analogized Indians to animals when he foresaw that "the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape." Letter to James Duane (Sept. 7, 1783), *in* 27 The WRITINGS OF GEORGE WASHINGTON, 1745–1799, at 133, 140 (John C. Fitzpatrick ed., 1938).

Daniel T. Reff, *The Jesuit Mission Frontier in Comparative Perspective: The Reductions of the Rio de la Plata and the Missions of Northwestern Mexico, 1588–1700, in* Contested Ground: Comparative Frontiers on the Northern and Southern Edges of the Spanish Empire 16, 24 (Donna J. Guy & Thomas E. Sheridan eds., 1998).

Pacheco de Oliveira, *supra* note 236, at 95.

<sup>442</sup> Id

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natives, and public officials were now to be the teachers to turn Indians into citizens. 443

In more modern times, Brazil has continued to take the steps it thinks necessary to protect Indigenous peoples due to their alleged lack of sophistication and civilization. In 1911, the government recognized natives as citizens, created the Service of Protection of Indigenous Peoples, guaranteed the continued possession of any lands occupied by Indigenous peoples, and sought restitution for lands illegally taken from Indian communities. Brazil also tried to protect and control Indigenous peoples. They could only marry non-indigenous individuals in civil ceremonies, for example, if the native was assimilated and civilized. Furthermore, aboriginal peoples who committed a crime could only be charged as minors, yet crimes committed against Indigenous persons were considered aggravated offenses. A 1916 statute provided: "The savages shall remain subject to the tutelary regimen established by special laws and regulations which shall cease as they become adapted to the civilization of the country."

Today, the Indigenous peoples are still considered incapable of conducting certain legal acts and are not considered to have enough experience to defend their persons or property—but their incapacity is to last only until they adapt to civilization. Natives can only consent to certain legal acts when assisted by their curators and contracts can be voided by their guardian, the federal government. Brazil's 1988 Constitution apparently eliminated the tutelage of natives, affirmed their full civil capacity, and recognized Indian cultures and languages as integral parts of Brazil.

<sup>&</sup>lt;sup>445</sup> *Id.* at 95. The Marques de Pombal enacted the *Diretorio de Indios* (Laws of Indians) in 1755 and directed that the administration of the Jesuit/Indian villages be turned over to lay authorities and to use the Indian Directors as judges and city councilmen. *Id.* at 94.

Decreto No. 9.214, de 15 de Dezembro de 1911, reprinted in Collectanea Indigena, supra note 234, at 95, 95–98; Collectanea Indigena, supra note 234, at 71.

<sup>&</sup>lt;sup>445</sup> COLLECTANEA INDIGENA, *supra* note 234, at 75.

<sup>&</sup>lt;sup>446</sup> *Id.* at 76–77. In 1928, these provisions were reauthorized and other steps were taken so that the government could regulate Indians. Bandeira, *supra* note 234, at 10; Decreto No. 5.484, de 27 de Junho de 1928, *reprinted in Collectanea Indians without* note 234, at 83. This law also allowed teaching religious principles to Indians without the supervision of the Service. Decreto No. 5.484, de 27 de Junho de 1928, *supra*, at 83.

<sup>&</sup>lt;sup>447</sup> Código Civil do Brasil, art. 6 (1916), translated in Joseph Wheless, The Civil Code of Brazil 6 (1920).

<sup>&</sup>lt;sup>448</sup> Maria Guadalupe Moog Rodrigues, *Indigenous Rights in Democratic Brazil*, 24 Hum. Rts. Q. 487, 492–93 (2002).

Código Civil do Brasil, arts. 81–84, *supra* note 447, at 21; Valdemar P. Da Luz, Manual do Advogado 32 (12th ed. 1998); Paulo Dourado de Gusmao, Introdução ao Estudo do Direito 261 (Rio de Janeiro Forense, 21st ed. 1997). For an explanation of voidable legal acts, see Miguel Reale, Lições Preliminares de Direito [Preliminary Lessons in Law] 235–37 (1973).

<sup>&</sup>lt;sup>450</sup> Pacheco de Oliveira, *supra* note 236, at 110.

But in 1998, a well-respected Brazilian jurist justified the continued interference by the federal government in Indigenous affairs because tribal organizations are too fragile to resist the colonizers. Therefore, federal government interference is not only necessary but desirable, for among other things, to demarcate native lands and to create respect for tribal property. He argues that "one approach to the question of the Indians would be to pass laws trying to assimilate them forcefully or not." The Discovery idea that Indigenous peoples are "uncivilized" seems to still be alive in Brazil.

Spain and Chile also presumed that the superiority of their cultures and civilizations justified their conquests and jurisdiction over infidel and barbarian Indigenous peoples. One king wrote in 1591 that the Indians "seem to have been born only to serve the Spanish." Furthermore, in 1526, a royal ordinance on discoveries ordered conquistadors to inform natives that they had been sent to teach Indians "good customs, to dissuade them from vices" and other laws required teaching Indians to wear clothes and to be "taught how to be civilized" and to "live in a socially acceptable manner." The conquistadors fully subscribed to this thinking; one stated that "the Indians are servants of nature, incapable of understanding and bad by instinct, a species of beast that could not do other things than beastly things."

In 1567, the Governor of Chile repeated these same ideas when he described the uncivilized nature of the Indigenous peoples:

[T]he Indians are a divided people and beasts, they do not live together in villages and are not conforming to natural law, and between them there is no legal order nor politics . . . and that is why it is important that they be reformed to be men so that they have capacity and have the brightness of Christians. 457

The Republic of Chile repeatedly demonstrated its belief in the superiority of its civilization, culture, and laws. In 1852, the legislature authorized the president to dictate whatever ordinances he deemed necessary to protect Indigenous peoples and "to promote their prompt civilization." An 1859 newspaper editorial exemplified the widespread belief of the inferiority of Indigenous societies and cultures and that the final conquest of the Mapuches was a fight between the Chilean and

<sup>&</sup>lt;sup>451</sup> BASTOS, *supra* note 234, at 496.

<sup>&</sup>lt;sup>452</sup> *Id*.

 $<sup>^{453}</sup>$  Id. (author's translation).

<sup>&</sup>lt;sup>454</sup> 2 AMUNÁTEGUI, *supra* note 277, at 16 (author's translation).

<sup>&</sup>lt;sup>455</sup> Hanke, *supra* note 79, at 111; Ordinances of Philip II, *supra* note 138, at 38, 42; *see also* Bk. 4, Tit. 7, Law 23, Recopilación 1681, *supra* note 140, at 117; Bk. 6, Tit. 1, Law 19, Recopilación 1681, *supra* note 194, at 79; Bk. 6, Tit. 12, Law 1, Recopilación 1681, *supra* note 194, at 274; Bk. 6, Tit. 13, Law 21, Recopilación 1681, *supra* note 194, at 315.

<sup>&</sup>lt;sup>456</sup> 2 Amunátegui, *supra* note 277, at 16 (author's translation).

 $<sup>^{457}</sup>$  Id. at 78 (author's translation).

Ley de 2 de Julio de 1852, *supra* note 198, at 21 (author's translation).

Mapuche civilizations, a fight between good and evil. "This is a fight that exists since the world became the world; this is the eternal antagonism between good and evil, the vices and virtue, the knowledge and ignorance; a fight and antagonism necessary and useful [to humanity]."<sup>459</sup>

One Chilean historian has characterized the invasion and expropriation of Indigenous lands as being justified by three points that incorporated colonial voices:

- (a) The Indians are members of an inferior race, savage, impossible or very difficult to civilize.
- (b) Chile had to overcome its geographic discontinuity . . . .
- (c) The Chilean civilization, white and of European origin, and thus superior, together with the Republican order, had to be imposed in the entire national territory. 460

This language reflects the civilization element of Discovery as well as contiguity, because the majority of Chileans could not conceive of an inferior race of Indians preventing Chile from overcoming the problem of its "geographic discontinuity."

The historian José Bengoa explains that this Chilean consciousness and the perception of natives as lower than humans led easily to policies of "reducciones" (reservations) and the concentration of Indigenous peoples into small areas, as it did similarly in the United States and in other colonizer/settler societies. There is little question that the Chilean government saw its duty, just as the Spanish Crown did, to civilize Indigenous peoples. In 1873, the government stated:

It is the obligation of the State for the furtherance and civilization of the Araucanians as the most efficient system to convert them to useful citizens of the Republic and to finalize their pacification and to submit them to the laws and constituted authorities.

England and its colonies also assumed the superiority of their cultures and civilizations and "thought that God had directed them to bring civilized ways" to Indigenous peoples and "to exercise paternalism and guardianship powers over them." From the beginning of North American colonization, the Crown and colonists justified the domination of American Indians on the assumption that they possessed the superior civilization and that Indians were savage barbarians. King James I

 $<sup>^{459}</sup>$  Casanueva,  $\it supra$  note 244, at 306 (quoting the Mercury editorial of June 25, 1859) (author's translation).

<sup>&</sup>lt;sup>160</sup> *Id.* at 305 (author's translation).

<sup>&</sup>lt;sup>461</sup> *Id.* (author's translation).

<sup>&</sup>lt;sup>462</sup> Bengoa, *supra* note 141, at 130; *see also* MILLER, NATIVE AMERICA, *supra* note 1, at 163–72; MILLER, ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 61–62, 67, 76–78, 81–82, 100–03, 128, 131, 149, 172, 175, 180–82, 186, 213–16, 214–18, 220–21.

Decreto de 29 de Octubre de 1873, supra note 202, at 40 (author's translation).

MILLER, NATIVE AMERICA, *supra* note 1, at 4, 10, 28.

demonstrated this idea in 1606 when he directed his Virginia colonists to "bring the Infidels and Savages . . . to human Civility, and to a settled and quiet Government." The charters for other America colonies show the same thinking. 466

The American states and the United States also applied this Discovery element against American Indians. These governments actively attempted to destroy Indian cultures, legal systems, and governments and make them into Euro-American clones. The first president of the United States, for example, compared American Indians to animals, and called them the "Savage as the Wolf," when discussing how Indians would fade away before American expansion. Thereafter, over the centuries, the United States worked to assimilate Indians into American culture and society, and as one Indian boarding school superintendent stated: "Kill the Indian in him, and save the man."

In New Zealand, the use of the element of civilization among the Maori was inherent in many colonial actions. In 1840, for example, Captain Hobson, the first British Lieutenant-Governor of the New Zealand dependency, wrote to the Colonial Office explaining how England should proceed differently with colonizing the north and south islands: because the development of the inhabitants was "essentially different" and "with the wild savages in the Southern Islands, it appears scarcely possible to observe even the form of a Treaty." The initial British governors in Aotearoa/New Zealand also acted on the assumption that "Maori were unusually intelligent (for blacks) and that intelligence translated into the desire to become British." Between 1840 and 1860, the tools for this transformation—religion, money, law, and land—

<sup>&</sup>lt;sup>465</sup> First Charter of Virginia, supra note 89, at 1698.

<sup>466</sup> See, e.g., Charter of Maryland Granted to Lord Baltimore, supra note 350, at 54 (describing America as "partly occupied by Savages"); Charter of Georgia, supra note 351, at 236 (the "whole southern frontier... lieth open to the said savages"); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS 6 (1999) (discussing the need to transform the "heathen savages" into "civilized' human beings"); MILLER, NATIVE AMERICA, supra note 1, at 27–28 (recounting multiple leaders' descriptions of the Indians as "Savages").

<sup>&</sup>lt;sup>467</sup> See, e.g., MILLER, NATIVE AMERICA, supra note 1, at 28, 39–40, 163–72.

<sup>&</sup>lt;sup>468</sup> See, e.g., 2 PRUCHA, supra note 428, at 643–707, 790–96, 815–35, 953–57, 1041–46; see also Miller, supra note 429, at 199–204.

Letter to James Duane, supra note 439, at 140; see also MILLER, NATIVE AMERICA, supra note 1, at 28, 39–40, 45, 78.

<sup>&</sup>lt;sup>470</sup> Richard H. Pratt, *The Advantages of Mingling Indians with Whites, in* Americanizing the American Indians: Writings by the "Friends of the Indian" 1880-1900, at 260, 261 (Francis Paul Prucha ed., 1973); *see also* Miller, Native America, *supra* note 1, at 163–72.

MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 217–21, 251.

<sup>&</sup>lt;sup>472</sup> WAITANGI TRIBUNAL, *supra* note 186, at 215.

<sup>&</sup>lt;sup>473</sup> James Belich, *The Governors and the Maori (1840–72), in* The Oxford Illustrated History of New Zealand 75, 78 (Keith Sinclair ed., 2d ed. 1996).

sought to convert Maori from savages to civilization by "[m]ixing the two peoples geographically."

Furthermore, by the 1860s, the colonial government began legislatively banning the use of Maori language, customs, and laws. The Maori Land Court was established with the express purpose of civilizing the natives. The preamble to the Native Lands Act 1862 explained this system:

[W]hereas it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands . . . were assimilated as nearly as possible to the ownership of land according to British law . . . . <sup>477</sup>

In 1877, the New Zealand High Court refused to recognize the Treaty of Waitangi or native title because Maori were considered barbarians and uncivilized. <sup>478</sup> Various passages from the Court's opinion demonstrate just how heavily it relied on civilization:

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community. 479

The Court then reviewed the Land Claims Ordinance of 1841 and concluded that:

[t]hey express the well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes. It is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of *Johnson v. M'Intosh*, have given the most complete exposition of this subject . . . . <sup>480</sup>

Notice the Court's reference to *Johnson v. M'Intosh*, the United States Supreme Court case on Discovery.

In Canada, the notion of Indigenous peoples as inhuman was perpetuated, and that made it easier to denigrate their abilities and

 $^{\scriptscriptstyle 475}$   $\,$  See, e.g., Native Schools Act 1858 (N.Z.).

<sup>&</sup>lt;sup>474</sup> *Id.* at 78–80.

<sup>&</sup>lt;sup>476</sup> See Native Lands Act 1862, pmbl. (N.Z.).

<sup>&</sup>lt;sup>477</sup> *Id. See also* Native Lands Act 1865 (N.Z.).

 $<sup>^{478}</sup>$   $\,$  Wi Parata v Bishop of Wellington (1877) 3 NZ Jur. (NS) 72 (SC) 76–78.

<sup>479</sup> *Id.* at 77.

<sup>480</sup> *Id.* (footnote omitted).

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existence as communities and nations with the capacity to own property and exercise governmental authority.<sup>481</sup>

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The Doctrine of Discovery, therefore, came to be understood as a means by which to contrast and compare Indigenous and non-Indigenous humanity in order to arrive at a privileging approach to rights determination. Settler rights and settler governments, in order to rationalize the unjust 'taking' of Indigenous lands . . . had to legitimize settler authority by ostensibly delegitimizing Indigenous authority. <sup>482</sup>

An infamous Canadian case from 1929 demonstrates explicitly the use of civilization arguments to dominate Indigenous peoples. In ruling on the 1752 treaty rights of Indians in what is today the Province of Nova Scotia, the County Court expounded upon the principles inherent in the Doctrine of Discovery:

[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

Canada continues to denigrate native cultures. The 1985 Indian Act "houses historic racialized notions of settler supremacy and Indigenous inferiority." Section 74 of the Act, for example, empowers Canadian officials "to effectively 'erase' custom and traditional elections and enforce Indian Act formulated elections 'whenever he deems it advisable for the good government of a band."

The idea of the inferiority of Aborginal peoples in Australia was also used as justification for England, and later the Australian government, to dominate Indigenous peoples. The first British person to visit Australia, who visited in 1688 and again in 1699, wrote: "The Inhabitants of this Country are the miserablest People in the World. Setting aside their Humane Shape, they differ little from Brutes." James Cook reported on the sparse population in the few places he landed on the continent and he surmised that the Aboriginal people "were less technologically advanced than other Indigenous populations" the English had encountered because "[t]hey did not wear clothes," lived in "small,

 $<sup>^{481}</sup>$  MILLER ET AL., DISCOVERING INDIGENOUS LANDS, supra note 1, at 100.

<sup>&</sup>lt;sup>482</sup> *Id*.

 $<sup>^{\</sup>mbox{\tiny 483}}$  R. v. Syliboy, [1929] 1 D.L.R. 307, 313 (Can. N.S. Cnty. Ct).

MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 143.

<sup>&</sup>lt;sup>485</sup> *Id.* (quoting Indian Act, R.S.C. 1985, c. I-5, § 74(1) (Can.)).

<sup>486</sup> *Id.* at 172, 175, 186.

<sup>487</sup> Id. at 172 (quoting COLLINGRIDGE, supra note 181, at 11).

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rudimentary huts and knew 'nothing of Cultivation.'" In 1783, another Englishman proposed placing a colony in Australia and listed among its advantages that it was "peopled by only a few black inhabitants, who, in the rudest state of society, knew no other arts than were necessary to their mere animal existence."

Later statements by colonists and courts reinforced the idea that the assumed "civilization" of Europeans justified the domination of Aboriginals. For example, the Supreme Court of New South Wales stated in 1836 that Aboriginal peoples "had not attained . . . to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by law of their own." 490 And colonists often compared Aboriginal people to monkeys and saw them as the link between primates and modern man. 491 A Methodist missionary wrote in the 1830s: "It is the universal opinion of all who have seen them . . . that it is impossible to find men and women sunk lower in the scale of human society. With regard to their manners and customs, they are little better than the beasts."492 One professor comments that these views about the racial superiority of Europeans were still dominant in the 1880s and 1890s when the Australian Constitution was being drafted because "it was underpinned with the assumption that Aboriginal people, due to their inferiority and inability to cope with the onset of civilization, were a dying race."49

There is no question that all nine countries that we are examining justified claims over Indigenous peoples and their lands by using the Discovery element of civilization.

# J. Conquest

This element asserts that Indigenous lands and legal titles could be taken by Europeans through military actions. In *Johnson v. M'Intosh*, "conquest" was also used as a term of art to describe the rights Europeans gained automatically over Indigenous nations by simply making a first discovery. This was so because first discovery alone was considered to automatically grant European countries the Discovery rights we have

<sup>&</sup>lt;sup>488</sup> *Id.* at 175.

<sup>&</sup>lt;sup>489</sup> *Id*.

 $<sup>^{490}</sup>$  R v Murrell [1836] NSWSupC 35 (Austl.), reprinted in Kercher, supra note 324, at 415–16.

 $<sup>^{\</sup>tiny{491}}$  Stuart Banner, Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska 23 (2007); Miller et al., Discovering Indigenous Lands,  $\it{supra}$  note 1, at 186.

BANNER, *supra* note 491, at 23.

<sup>&</sup>lt;sup>493</sup> MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 186.

 $<sup>^{\</sup>tiny 494}$  Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590–92 (1823); see also Miller, Native America, supra note 1, at 4–5, 41.

discussed. There is ample evidence from all nine countries demonstrating that they applied both definitions of this element in exploring and colonizing the Americas and Oceania.

The papal bulls authorized Portugal and Spain to engage in wars of conquest against all pagans. Portugal engaged in its first significant overseas military conquest of the city of Ceuta in North Africa in 1415. Portugal claimed and exercised sovereign and commercial rights due to this military conquest. The Council of Portugal also argued that it had acquired rights in India due to conquest: "India had been gained with the sword, and with the sword it would be defended." Furthermore, in Brazil and elsewhere, Portugal claimed the rights of conquest based on actual warfare and with the analogy that a first discovery was the same as a military conquest.

Spain and Portugal often utilized the laws and policies of what they called "just war" to acquire Discovery rights and assets in non-European lands. Portugal used "just war" against Brazilian Indigenous peoples. Just wars were only to be waged with the permission of the king or governor-general, but permission was not necessary in exigent circumstances. The Crown enacted several laws on this subject, including one in 1595, in which the king authorized the enslavement of any Indians captured in just wars.

Portugal expressly and impliedly used the second definition of conquest. Portugal assumed that its mere arrival in non-European, non-Christian lands was the equivalent of an actual conquest and acquired Discovery powers. For example, the kings of Portugal adopted the title "Lord of the conquest, navigation, and commerce of Ethiopia, India, Arabia and Persia" immediately after Vasco da Gama made his voyage to India in 1499. But Da Gama had not militarily conquered those countries. Further, one historian alleges that the "fifteenth-century

 $<sup>^{495}</sup>$  MILLER, NATIVE AMERICA, supra note 1, at 5 (discussing Johnson, 21 U.S. (8 Wheat.) at 587–92).

The bull *Romanus Pontifex* of January 8, 1455, by Pope Nicholas V to King Afonso V of Portugal, authorized "King Alfonso . . . to invade, search out, capture, vanquish, and subdue all Saracens and pagans [as well as whatever] dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them." *Bull* Romanus Pontifex, *supra* note 57, at 23; *see also* 1 MARQUES, *supra* note 28, at 163.

<sup>&</sup>lt;sup>497</sup> 1 MARQUES, *supra* note 28, at 131.

<sup>&</sup>lt;sup>498</sup> C.R. Boxer, The Portuguese in the East 1500–1800, in PORTUGAL AND BRAZIL, supra note 64, at 185, 233.

See BOXER, supra note 433, at 2. Other countries, including the United States, borrowed the Portuguese and Spanish idea of just wars to justify conquests of Indigenous peoples. See, e.g., MILLER, NATIVE AMERICA, supra note 1, at 36, 42, 46, 64.

NASH, *supra* note 154, at 111.

<sup>&</sup>lt;sup>501</sup> KIEMEN, *supra* note 116, at 4–5.

<sup>&</sup>lt;sup>502</sup> Kiemen, *supra* note 116, at 5; Alden, *supra* note 152, at 28, 31.

<sup>&</sup>lt;sup>503</sup> See BOXER, supra note 433, at 2.

 $<sup>^{504}</sup>$  Id.; accord Giancarlo Casale, The Ottoman Age Of Exploration 30 (2010).

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voyages of discovery have often been described as a continuation of the crusades" and thus were like conquests. 505

Spain also expressly claimed the rights of actual conquest and by analogy the rights acquired by merely arriving in new lands. In 1513, King Ferdinand ordered the drafting of regulations to control future Spanish discoveries and conquests in the New World. The *Requerimiento* codified these regulations and conquistadors were required to read it to Indigenous peoples before warfare could legally ensue. The document informed natives of their natural law obligation to hear the gospel, that their territory had been donated by the pope to Spain, and that if they refused to acknowledge the Church and the Spanish king and to admit priests, then Spain was justified in waging war against them.

The Spanish Crown and later the Republic of Chile exercised these powers after engaging in war against Indigenous peoples. Spain also asserted the right that its mere arrival in the territories of Indigenous peoples was analogous to a physical conquest. Spain claimed these rights based upon first discovery and upon actual conquest justified by the principle of just war.

The Crown authorized its explorers from the Canary Islands and beyond to carry out "the right of conquest" and to "conquer, pacify, and people the region[s]." When Pedro de Valdivia arrived in Chile in 1541 he stated he had been ordered to "conquer and populate [Chile]" and he was then involved in almost constant warfare against the Indigenous peoples as he and other Spaniards tried to take the lands, assets, and labor of Indians. <sup>513</sup> But the Mapuches killed Valdivia and held off

<sup>&</sup>lt;sup>505</sup> PARRY, *supra* note 77, at 22.

<sup>&</sup>lt;sup>506</sup> See Miller et al., International Law of Discovery, supra note 1, at 876–78.

<sup>&</sup>lt;sup>507</sup> HANKE, *supra* note 79, at 33.

Requerimiento (ca. 1512), in SPANISH TRADITION, supra note 60, at 58; see also MULDOON, supra note 44, at 140–41; SEED, supra note 2, at 69–73.

See, e.g., POCOCK, supra note 107, at 16, 28 (Almagro), 69 (Valdivia). See also Bk. 4, Tit. 12, Law 1, RECOPILACIÓN 1681, supra note 140, at 155; Ordinances of Philip II, supra note 138, at 22.

See Bk. 1, Tit. 1, Law 4, RECOPILACIÓN 1681, supra note 194, at 13; Bk. 3, Tit. 4, Law 8, RECOPILACIÓN 1681, supra note 194, at 41; Bk. 4, Tit. 7, Law 23, RECOPILACIÓN 1681, supra note 140, at 117; Ordinances of Philip II, supra note 138, at 35–36; Indian Cause, supra note 194, at xiv–xv. Other countries, including the United States, borrowed the Spanish idea of just war to justify their conquests of Indigenous peoples. See, e.g., MILLER, NATIVE AMERICA, supra note 1, at 36, 42, 46, 64.

<sup>&</sup>lt;sup>511</sup> 2 MERRIMAN, *supra* note 45, at 171–72; 3 *id.*, at 529.

 $<sup>^{512}</sup>$  Carta de don Pedro de Valdivia a S.M. Carlos V, in 1 Coleccion de Historiadores,  $\it supra$  note 197, at 1 (author's translation).

 $<sup>^{513}</sup>$  See, e.g., Bengoa, supra note 141, at 132–33; 2 AMUNÁTEGUI, supra note 277, at 77, 84, 260–61.

European and Chilean expansion south of the Bio Bio River for over 300 years. 514

Spain also explicitly applied just war principles many times in Chile. Dominican priests urged governors to read the Requerimiento to the Araucanian Indians and to wage war against them so as to bring "them to the dominion of the king by peaceful methods, by good treatment and by teaching them the principles of Christianity."515 The Viceroy of Chile asked for religious advice about his rights and duties under just war principles against the Araucanians, since they had rejected his authority and allegedly left the Christian faith. 516 In 1599, Chilean Governor Alonso de Ribera thought he was sanctioned to enslave the natives due to their rebellion, and an Augustinian, Juan de Vascones, sent a petition to the court and Council of the Indies giving nine reasons for waging just war against the Araucanians. 517 On May 26, 1608, King Philip III issued a new law for Chile that granted permission to enslave all Indian males at least ten and a half years old and all females at least nine and a half years old.<sup>518</sup> The king stated that Spain had tried all peaceful means to reduce the Indians to obedience to Church and Crown "and they have failed miserably in taking advantage of these offerings, and have repeatedly broken the peace" and for "these reasons they deserved to be given as slaves." In 1609, Pope Paul V authorized a just war against the Araucanians. There is no question that Spain and Chile utilized the Discovery element of conquest and claimed the legal rights that it allegedly granted to European conquerors.

England and most of its colonies also applied the Discovery element of conquest. England and its colonies engaged in a few actual wars with American Indians and thereafter claimed the rights of conquest. The colony of Connecticut claimed to own Indian lands due to conquest after the Pequot war of 1637. In fact, the Mohegan tribe sued Connecticut in colonial and royal courts contesting the colony's claims to own Mohegan lands due to its military conquest of the Pequots, a suit which lasted for over one hundred years. And after the French and Indian War, English colonies in 1761 argued that the Indian tribes who had supported the losing French side had forfeited their lands due to the element of

 $<sup>^{514}</sup>$  Bengoa, *supra* note 112, at 37, 261, 265, 280, 283; Chile: A Country Study 25 (Rex A. Hudson ed., 3d ed. 1994); Collier & Sater, *supra* note 109, at 96; Casanueva, *supra* note 244, at 291.

<sup>&</sup>lt;sup>515</sup> HANKE, *supra* note 79, at 137.

<sup>&</sup>lt;sup>516</sup> *Id.* at 138–39.

<sup>&</sup>lt;sup>517</sup> *Id.* at 139.

<sup>&</sup>lt;sup>518</sup> *Id*.

 $<sup>^{519}\,</sup>$  Bk. 6, Tit. 2, Law 14, Recopilación 1681,  $\mathit{supra}$  note 194, at 103.

<sup>&</sup>lt;sup>520</sup> Chile: A Country Study, *supra* note 514, at xv.

<sup>&</sup>lt;sup>521</sup> DEN OUDEN, *supra* note 426, at 5, 11, 13, 40.

MILLER, NATIVE AMERICA, *supra* note 1, at 30.

conquest.<sup>523</sup> In addition, the Crown's grant of legal estates to its colonies in America and its attempt to assume control over Indian lands and governments illustrates the implied use of the second definition of this element: that its mere arrival in North America was the equivalent of conquest.

The Continental Congress under the Articles of Confederation also utilized the element of conquest after 1783–84 when federal officials told tribes that they had lost the ownership of their lands due to fighting for the British in the American Revolutionary War. Subsequently, this same Congress then expressly placed the element of conquest in the Northwest Ordinance of 1787, which stated that a "just" war can take Indian title. In 1848, the United States Congress applied the Northwest Ordinance and the element of conquest to the Oregon Country. The United States Supreme Court defined this element in 1823, and the federal courts have relied on it as part of Discovery ever since. In fact, in 1955, the United States Supreme Court stated that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that . . . . it was not a sale but the conquerors' will that deprived them of their land.

Similarly, in New Zealand, particularly in the 1860s and 1870s, the British unleashed war on North Island Maori to take land. Ironically, the colony enacted legislation to legitimize the taking of Maori lands based on conquest even in instances of British military defeats. <sup>529</sup>

In contrast, I could find little evidence that Canada or Australia used the first definition of the element of conquest. They engaged in few or no official wars with Indigenous peoples. There were massacres of Aboriginal peoples in Australia, even as late as 1930, but no claims to have won lands through warfare. Of course, England and Australia never recognized that Aboriginals owned land so there was no reason to assert conquest. But both Australia and Canada impliedly used the

 $<sup>^{523}</sup>$  Id. at 41; accord Deloria & Wilkins, supra note 466, at 5–6; see also Calloway, supra note 98, at 9–10.

See MILLER, NATIVE AMERICA, supra note 1, at 40–41. But see DELORIA & WILKINS, supra note 466, at 11. The United States ceased the policy around 1788. Report of the Sec'y at War on Indian Affairs (Oct. 27, 1787), reprinted in 34 JOURNALS OF THE CONTINENTAL CONGRESS 124–25 (1937).

<sup>&</sup>lt;sup>525</sup> See Northwest Territory Ordinance of 1787, art. III, 1 Stat. 51, 52.

 $<sup>^{526}</sup>$  Act of Aug. 14, 1848, ch. 177,  $\S$  14, 9 Stat. 323, 329 (establishing the territorial government of Oregon).

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823) ("Thus, all the nations of Europe, who have acquired territory on this continent... recognised... the exclusive right of the discoverer to appropriate the lands occupied by the Indians."); *id.* at 589 ("The title by conquest is acquired and maintained by force.").

<sup>&</sup>lt;sup>528</sup> Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955).

 $<sup>^{529}</sup>$  See generally James Belich, The New Zealand Wars and the Victorian Interpretation of Racial Conflict (1986).

MILLER ET AL., DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 183.

second meaning of the element that the mere arrival of Europeans in Indigenous lands acquired for the European countries the rights of Discovery.

In conclusion, Portugal, Spain, England, and their colonies applied conquest and "just war" principles many times to justify taking the lands and assets of native peoples. Canada and Australia, however, appear not to have made those claims in regards to actual warfare. All of these countries, however, used the second definition of conquest because they considered European arrivals in Indigenous lands to be a conquest that justified the appropriation of the lands and assets of Indigenous peoples.

#### IV. CONCLUSION

The comparative law framework used above illustrates the pervasiveness of the Doctrine of Discovery on an international scale. It is striking how similarly the nine countries we have examined used and applied the elements of Discovery throughout their histories. This analysis illustrates graphically just how deeply rooted the legal fictions of Discovery are in these European-derived legal systems. The Doctrine was applied by European colonizers in these six settler societies and is still part of the legal regimes of these countries today. While there were variations in the application of the elements, and some countries did not use a specific element or two, the different applications of Discovery mostly arose due to the specific historical, factual, and cultural contexts each settler society encountered in dealing with Indigenous nations and peoples.

Clearly, these European countries and their colonists pursued the Discovery-influenced mission, and the directions of the papal bulls, to destroy the cultures, laws, rights, and governments of Indigenous peoples. The campaign to civilize the "others" by making illegal the practice of Indigenous lifeways and governments was executed through the means of law and the Doctrine of Discovery. And of course, Discovery is not just a relic of the distant past for these countries and for the Indigenous peoples who today live in these countries. The Doctrine is still alive and evident in the laws and policies of the six settler societies that we examined. Discovery continues to play a very significant role in the lives of Indigenous peoples, and it still restricts property, governmental, and self-determination rights. In the United States, for example, the three fundamental principles of American Indian law all arose directly from the principles and theories behind the Doctrine. <sup>532</sup> Those principles continue to have significant impacts on American

<sup>&</sup>lt;sup>531</sup> In the United States, the Discovery Doctrine has been embraced by both statutory and case law. *See, e.g.*, 25 U.S.C. § 177 (2006); *Johnson*, 21 U.S. (8 Wheat.) 543. In New Zealand, the Doctrine was recently embraced by the Foreshore and Seabed Act 2004 (N.Z.).

<sup>&</sup>lt;sup>532</sup> See MILLER, NATIVE AMERICA, supra note 1, at 163–68.

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Indians and tribal governments today and thus the Doctrine of Discovery is still very relevant to the everyday life of American Indians and tribal governments. This situation is repeated in the five other settler societies that we examined and for the Indigenous peoples and nations that reside in those countries.

The cultural, racial, and religious justifications that led to the development of Discovery raise serious doubts about the validity of these six countries continuing to apply the Doctrine in their modern-day Indigenous affairs. Indigenous nations and peoples around the globe are raising this very point today. In recent years, activists and native organizations are seeking to get churches, governments, and other organizations to examine and repudiate Discovery legal principles and thinking. And the United Nations Permanent Forum on Indigenous Issues will consider the meaning, application, and impacts of Discovery at its annual meeting in 2012, in New York.

If one understands the international law Doctrine of Discovery, it makes perfect sense that Spain, Portugal, and England and their colonists applied the international legal principles against Indigenous peoples in nearly identical fashions. Europeans, and later the colonial countries, believed they possessed the only valid religions, civilizations, governments, laws, and cultures, and that Providence intended that their institutions should dominate Indigenous peoples. There is no question that these nine countries applied the international law of colonialism. As a result, the governmental, property, and human rights of Indigenous peoples were almost totally disregarded as Discovery directed European colonial expansion. In modern times, these assumptions remain dangerous legal and historical fictions.

In focusing on the Doctrine of Discovery, this Article has reinforced the statement that "legal systems develop in close contact to others: new ideas may evolve within one line of tradition and then spread quickly, with great effect on other legal systems." The similar application of Discovery around the world demonstrates the truth of that statement. The common understanding and application of the international law of colonialism was and is potent and lethal to Indigenous peoples and nations. Correcting and erasing the vestiges of Discovery from the modern-day laws and lives of settler societies illustrates the complexity that is involved in decolonizing the legal systems of these countries. But that is a task that must be undertaken and that must succeed if the legal and human rights of Indigenous nations and peoples are going to be honored around the world, and if Indigenous peoples are going to have equal rights to self-determination.

The Doctrine of Discovery' Special Theme for UN Permanent Forum 2012, supra note 7.

Nils Jansen, Comparative Law and Comparative Knowledge, in The Oxford Handbook of Comparative Law 305, 324 (Mathias Reimann & Reinhard Zimmermann eds., 2006).