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Brazil, Indigenous Peoples, and the International Law of Discovery

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INTRODUCTION

Portugal utilized the Doctrine of Discovery ("the Doctrine") when it discovered, claimed, and settled the territory that is now known as Brazil. The Doctrine is the international law principle that European countries and settlers used to make legal claims to own the lands, assets, and human rights of Indigenous peoples all over the world in the fifteenth through twentieth centuries.[1] The Doctrine provided that newly

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1. In Part I.A–B, the Author builds upon prior scholarship from his book, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*. This universal history of the European perspective on discovery and exploration,

arrived Europeans automatically acquired specific property rights in the lands of Indigenous peoples, and various sovereign, political, and commercial powers over them without their knowledge or consent.[2] When Europeans planted flags and religious symbols in "newly discovered" lands, they were engaging in the well-recognized legal procedures and rituals of international law to make legal claims over the lands and peoples.[3] As this Article later demonstrates, this principle was created and justified by feudal, religious, racial, and ethnocentric ideas of European and Christian superiority over other cultures, religions, and races of the world.[4]

Portugal and Brazil also used the elements of the Doctrine in their colonial dealings with the Indigenous peoples that inhabited the areas that today comprise Brazil. Furthermore, the modern-day government of Brazil continues to enforce aspects of this legal principle against Indigenous peoples.[5] Brazil is not the only country to still apply this Doctrine. Discovery is part of international law today and is still being used in Aus-

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as set out in the book, provides a full foundation for the later arguments in this Article pertaining to the specific case of Portugal and Brazil. ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 9–23 (2006) [hereinafter MILLER, NATIVE AMERICA]; ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 3–6 (2010) [hereinafter MILLER, DISCOVERING INDIGENOUS LANDS]; Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 8–21 (2005) [hereinafter Miller, *The Doctrine of Discovery*]; Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819, 822–50 (2011); 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, 852–57 (2009).

2. Johnson v. M'Intosh, 21 U.S. 543, 588–97 (1823).

3. PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, at 9, 9 n.19, 69–73, 101–02 (1995). The principle of intertemporal law examines territorial titles from the perspective of the international law "in force at the time the title[s were first] asserted and not by the law of today." JOHN DUGARD, INTERNATIONAL LAW—A SOUTH AFRICAN PERSPECTIVE 128 (3d ed. 2005).

4. ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE c. 1500-c. 1800, at 8 (1995); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–28 (1990); MILLER, NATIVE AMERICA, *supra* note 1, at 1–2; *see generally* STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (2008) (discussing the influence of Christian doctrines on United States foreign policy); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005) (discussing the history of *Johnson v. M'Intosh* and the impact of discovered lands in America).

5. *See infra* Part II.C.

tralia, Canada, Chile, New Zealand, and the United States, as well as in other settler/colonial societies.[6] Very recently, China and Russia evoked the Doctrine when they planted flags on the floors of the South China Sea and the Arctic Ocean to claim sovereign rights and economic assets.[7] Canada and Denmark have also contested claims to an island off Greenland by planting flags and using other Discovery rituals.[8] In addition, the Doctrine has been featured prominently in the international news in recent years as activists and religious denominations work to repeal it.[9]

This Article employs a comparative law approach to some extent in addressing Portugal's and Brazil's use of Discovery. As explained below, the Doctrine was developed primarily by Portugal, Spain, and England, so in discussing Discovery one is forced to compare and contrast how these countries and their legal regimes developed the international law of European expansion and colonization.[10] Using a comparative approach to study Brazil's colonial experience is also worthwhile "for the opportunity that offers to make enlightening comparisons with contem-

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6. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 20 (Austl.); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.); *Att'y-Gen. v Ngati Apa* [2003] 3 NZLR 643 (CA), at para. 47 (N.Z.); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 143–45 (6th ed. 2003); Miller, Lesage & Escarcena, *supra* note 1, at 820–23.

7. 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, *available at* http://articles.latimes.com/2007/aug/06/news/OE-MILLER6.

8. *Canada Island Visit Angers Danes*, BBC NEWS (July 25, 2005), http://news.bbc.co.uk/2/hi/europe/4715245.stm.

9. *See, e.g.*, Tanya Gonnella Frichner, *The "Preliminary Study" on the Doctrine of Discovery*, 28 PACE ENVTL. L. REV. 339 (2010); Robert J. Miller, *UN Permanent Forum on Indigenous Issues Considers the Effects of the Doctrine of Discovery*, NATIVE AM., DISCOVERED & CONQUERED BOOK BLOG (June 15, 2010, 11:16 AM), http://lawlib.lclark.edu/blog/native_america/?p=3800; Robert J. Miller, *Will Others Follow Episcopal Church's Lead?*, INDIAN COUNTRY TODAY (Aug. 12, 2010), http://www.indiancountrytoday.com/opinion/52646107.html; Steven Newcomb, *More on the Vatican's Response*, INDIAN COUNTRY TODAY (June 9, 2010), http://www.indiancountrytoday.com/opinion/95609254.html; Gale Courey Toensing, *Indigenous Delegates Ask Pope to Repudiate Doctrine of Discovery*, INDIAN COUNTRY TODAY (Dec. 23, 2009), http://www.indiancountrytoday.com/archive/79636552.html; *Thirteen Grandmothers Take on the Vatican*, TRIBE.NET (Aug. 12, 2008, 4:49 PM), http://people.tribe.net/adamapollo/blog/00dde464-99ec-4b61-8821-c528438b4c6a.

10. PAGDEN, *supra* note 4, at 44. 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. BORIS FAUSTO, A CONCISE HISTORY OF BRAZIL 40 (Arthur Brakel trans. 1999); 1 ANTÔNIO HENRIQUE R. DE OLIVEIRA MARQUES, HISTORY OF PORTUGAL: FROM LUSITANIA TO EMPIRE 332 (1972); JOSÉ DE MATTOSO, HISTÓRIA DE PORTUGAL viii (1993).

porary developments in other former European colonies."[11] As one author stated, a hemispheric focus allows one "to see an over-all picture of parallel colonial experiences."[12]

This Article represents our initial exploration into Brazilian law and history for evidence of the use of Discovery in the colonization of the lands now known as Brazil. The authors are certain that they have found only a small portion of all the evidence that proves the application of the Doctrine in Brazil from Portuguese times to the present day.[13] The authors commence this effort with the hope that this scholarship adds to all the work that has already been undertaken, and that is currently under way, to expose the Doctrine of Discovery in international and national laws and histories, and to perhaps reverse some of its pernicious effects on Indigenous peoples.

In Section II, this Article describes the Doctrine and how it was developed in Europe primarily by Portugal, Spain, and the Catholic Church ("the Church"). Section III examines Portuguese and Brazilian law and history to investigate whether these governments applied the Doctrine to the Indigenous peoples that inhabited that area. The authors conclude in Section IV with the opinion that Brazil, just as all colonizing settler-countries, needs to recognize its use of the feudalistic, ethnocentric, racially, and religiously inspired law of Discovery against native peoples. This knowledge is valuable because modern-day attempts to create a more equal future for all Brazilians must begin with a recognition of the truth about the country's past, and must proceed with serious efforts to eradicate the vestiges of Discovery from Brazilian law and culture.

I. THE DOCTRINE OF DISCOVERY

In 1823, in a case with international law ramifications, the United States Supreme Court held in *Johnson v. M'Intosh*[14] that the Doctrine of Discovery was an established legal principle of English and European colonial law in North America and thus also the law of the United

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11. DAURIL ALDEN, ROYAL GOVERNMENT IN COLONIAL BRAZIL vii–viii (1968).

12. Comm. on Comparative Eur. Colonization in Am., *Preface* to ATTITUDES OF COLONIAL POWERS TOWARD THE AMERICAN INDIAN vii (Howard Peckham & Charles Gibson eds., 1969).

13. *See generally* FRANCIS A. DUTRA, A GUIDE TO THE HISTORY OF BRAZIL, 1500–1822: THE LITERATURE IN ENGLISH (1980); Robert J. Miller, *Introdução ao Direito Indígena Americano* [*Introduction to Indigenous American Rights*], *in* 2 DIREITO AMBIENTAL EM EVOLUÇÃO 241, 241–71 (2000) (for a general discussion of American Indian law translated into Portuguese).

14. Johnson v. M'Intosh, 21 U.S. 543 (1823).

States.[15] In this very influential case, the Court accepted as legal precedent that when European nations discovered lands unknown to other Europeans, the discovering country automatically acquired sovereign and property rights over the lands, even though Indigenous peoples were in possession of the lands.[16] The property right European nations acquired was a future right of ownership, a sort of limited fee simple title; an exclusive title held by the discovering European country that was subject, however, to the Indigenous peoples' use and occupancy rights.[17] In addition, the discoverer also gained a limited form of sovereignty over natives and their governments, which restricted Indigenous political, commercial, and diplomatic rights.[18] This transfer of sovereign and property rights was accomplished without the knowledge or the consent of native peoples, and without any payment.

The United States Supreme Court made the meaning of the Doctrine clear: "[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."[19] Consequently, a discovering European country gained exclusive property rights that were to be respected by other countries merely by walking ashore and planting a flag.[20] Indigenous rights, however, were "in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired."[21] This was so, because while natives held some sovereign powers and some rights to occupy their lands and use them, the right to sell their lands to whomever they wished and for whatever price they could negotiate was destroyed. "[T]heir rights to complete sovereignty, as independent na-

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15. *Id*. at 587–90. The case involved land purchases by British citizens in 1773 and 1775 before the United States was created. *Id.* at 550, 555; s*ee generally* ROBERTSON, *supra* note 4.

16. *Johnson*, 21 U.S. at 573–74. The *Johnson* principles have been relied on by tribunals in Australia, Canada, and New Zealand, which have applied Discovery to the Indigenous peoples in those countries. *See, e.g.*, City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 203 n.1 (2005); *Att'y-Gen. v Ngati Apa* [2003] 3 NZLR 643 (CA) at para. 19 (N.Z.) (citing *Johnson*, 21 U.S. at 574, 603); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 20 (Austl.).

17. *Johnson*, 21 U.S. at 573–74, 584, 588, 592, 603; Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 731 n.111, 741 n.183, 746 n.216 (2004).

18. *Johnson*, 21 U.S. at 574.

19. *Id.* at 573; s*ee id.* at 574, 584, 588, 603; *see also id*. at 592 ("The absolute ultimate title has been considered as acquired by discovery.").

20. *See id*. at 573.

21. *Id*. at 574.

tions, 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."[22] As defined by the Doctrine, a discovering European nation gained the right of "preemption," the right to preclude any other nation from buying the lands of Indigenous peoples.[23]

The first discoverers' property right could even be granted as future interests to others, even while the lands were still in the possession and use of Indigenous peoples.[24] Obviously, Discovery diminished the economic value of land to native peoples and benefited the discovering countries and colonists because Indigenous real property rights and values were adversely affected upon the discovery of their lands by outsiders.[25] Moreover, Indigenous sovereign powers were considered to be limited by the Doctrine because their nations' diplomatic, commercial, and political dealings were allegedly restricted to the discovering European country.[26]

It appears certain that the political and economic aspects of this "international law" were developed to serve the interests of Europeans. Through the Doctrine, European countries generally agreed to share the assets to be gained in non-European lands.[27] While they disagreed about some of the definitions of the Doctrine, and many times fought over discoveries, they never disagreed that Indigenous peoples lost significant property and governmental rights upon their discovery by Europeans.[28] As one professor stated: "The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the

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22. *Id.*

23. *Id.* at 585.

24. *Id.* at 574, 592; *see id*. at 579 (explaining the right to transfer fee title to Indian lands while still in Indian possession); Fletcher v. Peck, 10 U.S. 87, 139–44 (1810).

25. 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, e.g.,* Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. ECON. 39, 46 (1994).

26. *Johnson*, 21 U.S. at 574 (explaining that "[the original inhabitants'] rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."); *see also id.* at 588 (stating that English and American governments "asserted title to all the lands occupied by Indians . . . [and] asserted also a limited sovereignty over them . . . ."); Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831) (stating that an attempt by another country to "form a political [connection] with [Indian tribes], would be considered by all as an invasion of our territory, and an act of hostility").

27. *See* Treaty of Tordesillas, Port.-Spain, June 7, 1494, *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1684–90 (W. Keith Kavenagh ed., 1973).

28. *Johnson*, 21 U.S. at 584–85 (1823).

status of a universal principle—one culture's argument to support its conquest and colonization of a newly discovered, alien world."[29]

As defined by various European legal regimes and *Johnson v. M'Intosh*, the Doctrine is comprised of ten distinct elements.[30] The authors describe these elements here so the reader can more easily follow their development as constituent parts of the Doctrine by Portugal, Spain, England, and the Church.

1. First discovery. The first European country to "discover" new lands unknown to other Europeans gained property and sovereign rights over the lands. First discovery alone, without a taking of physical possession, was often considered to create a claim of title to the newly found lands, but it was usually considered to be only an incomplete title.

2. Actual occupancy and current possession. To fully establish a "first discovery" claim and turn it into a complete title, a European country had to actually occupy and possess newly found lands. This was usually done by actual physical possession with the building of a fort or settlement, for example, and leaving soldiers or settlers on the land. This physical possession had to be accomplished within a reasonable amount of time after first discovery to create complete title to the land in the discovering country.

3. Preemption/European title. The discovering European country gained the power of preemption, the sole right to buy the land from the Indigenous peoples. This is a valuable property right. The government that held the Discovery power of preemption prevented or preempted any other European or American government or individual from buying land from the discovered native people.

4. [Native] title. After first discovery, [Indigenous nations] were considered by European and American legal systems to have lost the full property rights and ownership of their lands. They only retained the rights to occupy and use their lands. Nevertheless, this right could last forever if the indigenous people never consented to sell their land. But if they did choose to sell, they could only sell to the government that held the power of preemption over their lands. Thus, [native] title was a limited ownership right.

5. Tribal limited sovereign and commercial rights. After first discovery, [Indigenous n]ations and native peoples were also considered to have lost some of their inherent sovereign powers and rights to free trade and diplomatic international relations. Thereafter, they

29. WILLIAMS, *supra* note 4, at 326.

30. MILLER, NATIVE AMERICA, *supra* note 1, at 3–5, 10–13.

could only deal with the Euro-American government that had first discovered them.

6. Contiguity. The dictionary definition of this word means the state of being contiguous to, to have proximity to, or to be near to. This element provided that Europeans had a Discovery claim to a reasonable and significant amount of land contiguous to and surrounding their actual settlements and the lands they actually possessed . . . . This element became very important when different European countries had settlements somewhat close together. In that situation, each country held rights over the unoccupied lands between their settlements to a point half way between their actual settlements. Most importantly, contiguity held that the discovery of a mouth of a river gave the discovering country a claim over all the lands drained by that river; even if that was thousands of miles of territory.

7. *Terra nullius*. This phrase literally means a land or earth that is null or void. The term *vacuum domicilium* was also sometimes used to describe this element, and this term literally means an empty, vacant, or unoccupied home or domicile. According to this idea, if lands were not possessed or occupied by any person or nation, or were occupied by non-Europeans but not being used in a fashion that European legal systems approved, the lands were considered to be an empty and waste and available for Discovery claims. Europeans and Americans were very liberal in applying this definition to the lands of native people. Euro-Americans often considered lands that were actually owned, occupied, and being actively utilized by indigenous people to be "vacant" and available for Discovery claims if they were not being "properly used" according to European and American law and culture.

8. Christianity. Religion was a significant aspect of the Doctrine of Discovery . . . . [N]on-Christian people were not deemed to have the same rights to land, sovereignty, and self-determination as Christians because their rights could be trumped upon their discovery by Christians.

9. Civilization. The European and later American definition of civilization was an important part of Discovery and the idea of [European] superiority. [Europeans] thought that God had directed them to bring civilized ways and education and religion to indigenous peoples and often to exercise paternalism and guardianship powers over them.

10. Conquest. [There are] two different definitions for this element. It can mean a military victory. . . . [T]his definition [also suggests] that "just wars" allegedly justified the invasion and conquest of In-

> dian lands in certain circumstances. But that is not the only definition . . . . "Conquest" was also used as a "term of art," a word with a special meaning, when it was used as an element of Discovery.[31]

A. Church Formulation of the Doctrine

The Doctrine 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.[32] Discovery was specifically developed to control European actions and conflicts regarding exploration, trade, and colonization of non-European countries, and was used to justify the domination of non-Christian, non-European peoples.[33] The Doctrine was developed over centuries primarily by the Church, Portugal, Spain, and England, and was rationalized under the authority of the Christian God and the ethnocentric idea that Europeans had the power and justifications to claim the lands and rights of Indigenous peoples and to exercise dominion over them.[34]

Commentators have traced the expansion of European rule, and especially the Doctrine, to early medieval times and, in particular, to the Cru-

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31. MILLER, NATIVE AMERICA, *supra* note 1, at 9–13,112 (footnotes omitted). For further details on the element of "actual occupancy and current possession," see also EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 294–95 (V. T. Harlow & J. A. Williamson eds., 1933) (stating that pre-1500, Portugal built "a wooden fort and garrisoned it to safeguard the factory and protect their ally. This was a first step towards dominion."). To further demonstrate this element of "contiguity," compare the shapes of the Louisiana Territory and the Oregon Country in the United States. *Territorial Growth of the United States*, *1783–1867*, MAPS ETC, http://etc.usf.edu/maps/pages/6200/6207/6207.htm (last visited Oct. 8, 2011).

32. *See* FRANCISCUS DE VICTORIA, *De Indis et de Iure Bellie Relectiones*, *in* RELECTIONES THEOLOGICAE XII 115, 115 (Ernest Nys ed., John Pauley Bate trans., Carnegie Inst. of Wash., photo reprint 1917) (1696); WILLIAMS, *supra* note 4, at 96–97 (describing Francisco de Vitoria as providing the first critical steps of creating an international order of a Law of Nations while analyzing Spain's empire in the Americas).

33. *Johnson*, 21 U.S. at 572–73; WILLIAMS, *supra* note 4, at 7–8, 325–28; *see also* Antonio Truyol y Serra, *The Discovery of the New World and International Law*, 3 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.").

34. CARL ERDMANN, THE ORIGIN OF THE IDEA OF CRUSADE 8–11, 155–56 (Marshall W. Baldwin & Walter Goffart trans., Princeton Univ. Press 1977) (1935); THE EXPANSION OF EUROPE: THE FIRST PHASE 3–4, 155–57, 186, 191–92 (James Muldoon & Edward Peters eds., James Muldoon, trans., 1977) [hereinafter EXPANSION OF EUROPE]; Miller, *The Doctrine of Discovery*, *supra* note 1, at 8–21; PAGDEN, *supra* note 4, at 8, 24, 126; *see generally* JAMES MULDOON, POPES, LAWYERS, AND INFIDELS 34–48, 107–52 (Edward Peters ed., 1979).

sades to the Holy Lands in 1096–1271.[35] In addition to justifying the Crusades, the Church established the idea of a universal papal jurisdiction which "vested a legal responsibility in the pope to realize the vision of the universal Christian commonwealth."[36] This papal responsibility and jurisdiction led to the idea of justified and legal holy wars by Christians against Infidels.[37]

In 1240, the canon lawyer Pope Innocent IV wrote a legal commentary on the rights of non-Christians that became very influential in the development of the Discovery Doctrine and on the writings of the important legal theorists Francisco de Vitoria and Hugo Grotius in the sixteenth and seventeenth centuries.[38] In his commentary, Innocent IV asked whether it is "licit to invade a land that infidels possess or which belongs to them?"[39] He answered yes because the Crusades were "just wars" fought for the "defense" of Christianity and to reconquer lands that had once belonged to Christians.[40] In answering his question, Innocent focused on the authority of Christians to legitimately dispossess pagans of *dominium*—sovereignty, lordship, and property.[41] He conceded that pagans had some natural law rights and that Christians had to recognize the right of Infidels to property and self-government.[42] But he also held that non-Christians' natural law rights were qualified by the papacy's divine mandate.[43] Since the pope was in charge of the spiritual health of all humans, this meant the pope also had a voice in the secular affairs of all

35. JAMES A. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER 24–25, 136–38 (1969); ERDMANN, *supra* note 34, at 155–56; EXPANSION OF EUROPE, *supra* note 34, at 3–4, 155–57, 186; PAGDEN, *supra* note 4, at 8, 24, 126; WILLIAMS, *supra* note 4, at 14.

36. WILLIAMS, *supra* note 4, at 29; *see also* J.H. BURNS, LORDSHIP, KINGSHIP AND EMPIRE: THE IDEA OF MONARCHY 1400–1525, at 100 (1992); PAGDEN, *supra* note 4, 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 AND STATE 1050–1300, at 152–56, 195–97 (Robert Lee Wolff & Crane Brinton eds., Univ. of Toronto Press 1988) (1964).

37. BRUNDAGE, *supra* note 35, at 19–26, 192–94; ERDMANN, *supra* note 34, at 155–56; WILLIAMS, *supra* note 4, at 29–31.

38. WILLIAMS, *supra* note 4, at 13.

39. Innocent IV, *Commentaria Doctissima*, *in Quinque Libros Decretalium* (1581), *in* EXPANSION OF EUROPE, *supra* note 34, at 191.

40. WILLIAMS, *supra* note 4, at 13, 44–45.

41. *Id.* at 13 n.4; BURNS, *supra* note 36, at 18, 98–100, 161–62; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 202–03(George Grafton Wilson ed., William S. Hein & Co. 1995) (1866).

42. WILLIAMS, *supra* note 4, at 13–14, 45, 49; SILVIO ZAVALA, THE POLITICAL PHILOSOPHY OF THE CONQUEST OF AMERICA 26 (Teener Hall trans., 1953).

43. WILLIAMS, *supra* note 4, at 13, 45; ZAVALA, *supra* note 42, at 26.

humans.[44] And, he stated that a "pope can order infidels to admit preachers of the Gospel . . . [and if infidels do not] they sin and so they ought to be punished . . . and war may be declared against them by the pope and not by anyone else."[45] Consequently, the pope had a duty to intervene in the secular affairs of Infidels if they violated natural law, as defined by Europeans, or prevented the preaching of the gospel.[46]

In justifying invasions of non-Christian countries to "defend" Christianity, Innocent borrowed from the writings on holy war by St. Augustine.[47] Augustine argued that reconquering lands previously seized by Infidels was legal.[48] In addition, he claimed the right of Christians to wage war on nations that practiced cannibalism, sodomy, idolatry, and human sacrifice, for example, as also being a defense of Christianity, to "acquire peace" and a "work of justice."[49]

Pope Innocent also based his analysis of holy war on past papal actions. For example, even before the Crusades, Archdeacon Hildebrand (later Pope Gregory VII, 1073–1085) negotiated a papal treaty with a French count to wage holy war against the Muslims in Spain, and also gave William of Normandy a papal banner authorizing the conquest of England in 1066.[50] Furthermore, Pope Urban II (1088–1099) granted Spanish crusaders the same indulgences as those granted to pilgrims visiting the holy lands.[51] Pope Urban thereafter issued the first call for crusades to the holy lands in 1095, and he continued to link crusades with pilgrimages by granting indulgences, just as he had for holy wars against the Moors.[52]

The development of Discovery ideas continued most significantly in the early fifteenth century during a dispute between Poland and the Teu-

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44. WILLIAMS, *supra* note 4, at 14–17, 45–47.

45. Innocent IV, *supra* note 39, at 192; *see also* EXPANSION OF EUROPE, *supra* note 34, at 186.

46. WILLIAMS, *supra* note 4, at 46–47, 66.

47. ERDMANN, *supra* note 34, at 8–11; *see generally* JOHN MARK MATTOX, SAINT AUGUSTINE AND THEORY OF JUST WAR 65–73 (2006) (describing the parallels between Augustine's views on just war and the idea of religious coercion).

48. WILLIAMS, *supra* note 4, at 44; *see* MATTOX, *supra* note 47, at 46–51, 60, 74.

49. PAGDEN, *supra* note 4, at 98 (quoting ST. AUGUSTINE, XIX DE CIVITATE DEI 13); WILLIAMS, *supra* note 4, at 14.

50. BRUNDAGE, *supra* note 35, at 26; WILLIAMS, *supra* note 4, at 31; *see generally* ERDMANN, *supra* note 34, at 148–70 (discussing whether Heldebrand can be considered a man of war through an examination of his military activity).

51. WILLIAMS, *supra* note 4, at 32–34; *see also* BRUNDAGE, *supra* note 35, at 31–38; *see generally* ERDMANN, *supra* note 34, at 306–54 (discussing Pope Urban II and his role in the Crusades).

52. WILLIAMS, *supra* note 4, at 35–37; *see generally* ERDMANN, *supra* note 34, at 306–54.

tonic Knights over pagan Lithuania.[53] The conflict over Lithuania once 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*—sovereignty and property rights—of Infidels.[54] In the Council of Constance of 1414, the Knights argued that their territorial and jurisdictional claims flowed from the papal bulls of the Crusades and authorized confiscation of the property and sovereignty of non-Christians, that Infidels did not possess *dominium*, and that they were subject to Christians.[55] Poland, however, relied on the writings of Innocent IV from 1240 that Infidels possessed the same natural law rights as Christians and that their lands and rights could only be taken to punish violations of natural law or to facilitate the preaching of the gospel.[56] The Council accepted Poland's position that Infidels possessed natural law rights of lordship and property that could only be invaded due to violations of natural law.[57] Future crusades, discoveries, and conquests of heathens would have to proceed under the emerging legal standards of Christendom that pagans had natural rights, but heathens had to comply with European concepts of natural law or risk conquest.[58] Thus, the Church and Christian princes had to respect the natural law rights of pagans to property and self-government but not if they strayed from European normative views.[59]

B. Portuguese and Spanish Development of the Doctrine

Portugal and Spain began to clash over exploration, trade, and colonization in the eastern Atlantic islands from the mid-fourteenth century forward.[60] Portugal first claimed the Canary Islands in 1341 based on "priority of discovery and possession against any other European pow-

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53. EXPANSION OF EUROPE, *supra* note 34, at 105–24; WILLIAMS, *supra* note 4, at 58–60. 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. EXPANSION OF EUROPE, *supra* note 34, at 105–24.

54. WILLIAMS, *supra* note 4, at 60.

55. *Id.* at 62–65; *see* MULDOON, *supra* note 34, at 109–19.

56. EXPANSION OF EUROPE, *supra* note 34, at 187, 203–05; WILLIAMS, *supra* note 4, at 64–65.

57. MULDOON, *supra* note 34, at 119; WILLIAMS, *supra* note 4, at 65–66.

58. VICTORIA, *supra* note 32, at 115, 123, 125–28; WILLIAMS, *supra* note 4, at 65–66.

59. WILLIAMS, *supra* note 4, at 65–67.

60. CHARLES R. BOXER, THE PORTUGUESE SEABORNE EMPIRE 1415–1825, at 21–29 (J. H. Plumb ed., 1969) [hereinafter BOXER, THE PORTUGUESE SEABORNE EMPIRE]; EXPANSION OF EUROPE, *supra* note 34, at 47–48; 1 ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 142, 144, 146, 155–56 (Cooper Square Publishers 1962) (1918); PRESTAGE, *supra* note 31, at 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02.

er"[61] and the right of conquest of the rest of the Canaries.[62] Thereafter, Portugal also discovered and claimed the Azore, Cape Verde, and Madeira island groups.[63] Spanish competition for the Canary Islands led to attacks on Canary Islanders and even against converted Christians.[64] The Church became involved and Pope Eugenius IV issued a papal bull in 1434 banning all Europeans from the Canaries in order to protect converted and pagan natives.[65] King Duarte of Portugal appealed the ban on colonizing the Canaries and argued that Portugal's explorations and conquests were only on behalf of Christianity.[66] Conversion of the Infidel "wild men" was justified, according to Duarte, because they did not have a common religion or laws, lacked money, metal, writing, housing, clothing, normal social intercourse, and lived like animals.[67] Duarte claimed that the Canary converts had made themselves subjects of Portugal and had received the benefits of civilized laws and society.[68] But the pope's ban, according to the king, was interfering with the advance of civilization and Christianity because Duarte 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."[69] The king asked the pope to give the Canary Islands to Portugal out of the Church's guardianship duty to Infidels.[70]

Duarte's lawyers borrowed their legal arguments from Pope Innocent IV's writings from 1240.[71] The attorneys stated that Portugal only wanted to assume a trust and guardianship relationship with the Canary Islanders to protect them from other Europeans.[72] But they also argued that

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61. 1 MERRIMAN, *supra* note 60, at 144; *see also* 2 ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 172 (Cooper Square Publishers 1962) (1918).

62. 2 MERRIMAN, *supra* note 61, at 172; *accord* BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 21–29; PRESTAGE, *supra* note 31, at 45; *see generally* 1 MERRIMAN, *supra* note 60, at 142–46 (discussing Portugal's conquest and colonization of the Canaries).

63. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 21–29; EXPANSION OF EUROPE, *supra* note 34, at 48; PRESTAGE, *supra* note 31, 8–9, 27, 38–41, 43–50, 54–59, 96–97, 100–02.

64. EXPANSION OF EUROPE, *supra* note 34, at 54.

65. *Id.* at 48, 54–56; MULDOON, *supra* note 34, at 119–21.

66. Letter from King Duarte I of Portugal to Pope Eugenius IV (1436), *in* EXPANSION OF EUROPE, *supra* note 34, at 54–56 [hereinafter Letter from King Duarte I].

67. *Id.* at 54.

68. EXPANSION OF EUROPE, *supra* note 34, at 55; WILLIAMS, *supra* note 4, at 69.

69. EXPANSION OF EUROPE, *supra* note 34, at 55.

70. *Id.* at 56.

71. WILLIAMS, *supra* note 4, at 69–70.

72. *Id.* at 70.

the islanders would not admit missionaries, and that justified the waging of just war.[73] The lawyers also argued that it was within papal guardianship duty and authority to commission a Christian prince to punish and civilize the islanders.[74] Pope Eugenius then consulted at least two canon lawyers, who also relied on Innocent IV's commentary and concluded that the islanders had *dominium* under Roman international law (*ius gentium*) but that the papacy possessed "indirect jurisdiction" over their secular actions.[75] 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.[76]

This situation led to a refinement of the Doctrine. The new argument for European and Christian domination of Infidels 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 to convert them.[77] A pope could hardly disagree. 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.[78] This bull was reissued several times in the fifteenth century and each time significantly extended Portugal's jurisdiction and geographical rights in Africa.[79] In addition, in 1455, Pope Nicholas V granted Portugal title to lands in Africa that Portugal had "already acquired . . . and those which shall . . . be acquired in the future . . . ,"[80] 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.[81] 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,"[82] and authorized Portugal's conversion work and granted Portugal title and sovereignty over lands which

73. MULDOON, *supra* note 34, at 126; WILLIAMS, *supra* note 4, at 70.

74. WILLIAMS, *supra* note 4, at 71.

75. *Id.* at 71–73.

76. MULDOON, *supra* note 34, at 126–27; WILLIAMS, *supra* note 4, at 71–72.

77. WILLIAMS, *supra* note 4, at 70; Letter from King Duarte I, *supra* note 66, at 54–55.

78. WILLIAMS, *supra* note 4, at 72.

79. CHURCH AND STATE THROUGH THE CENTURIES 146–53 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1954) [hereinafter CHURCH & STATE]; *see* Pope Nicholas V, *The Bull* Romanus Pontifex, *in* EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 9, 23 (Frances Gardiner Davenport ed., 1917) [hereinafter EUROPEAN TREATIES].

80. CHURCH & STATE, *supra* note 79, at 150.

81. Pope Nicholas V, *supra* note 79, at 23.

82. CHURCH & STATE, *supra* note 79, at 146.

have "already [been] acquired . . . and those which shall . . . be acquired in the future."[83]

Under these bulls, and the threat of excommunication for Christian princes who violated Portugal's rights, Catholic Spain had to look elsewhere for new lands to conquer and exploit. Consequently, Christopher Columbus' plan for a westward passage to the Indies interested King Ferdinand and Queen Isabella. After having canon lawyers and theologians study the legal and scriptural authorities, Isabella agreed to sponsor the venture "to discover and acquire certain islands and mainland," and she and Ferdinand sent Columbus forth under a contract agreeing to make him the Admiral of any lands he "may thus discover and acquire."[84]

After Columbus' successful voyage to the New World, Isabella and Ferdinand sought papal ratification of their discoveries.[85] In May 1493, Pope Alexander VI issued the bull *Inter caetera* ordering that the lands, which were "not hitherto discovered by others," and were found by Columbus, now belonged to Ferdinand and Isabella, along with "free power, authority and jurisdiction of every kind."[86] The pope also granted Spain any lands it might discover in the future provided they were not "in the actual temporal possession of any Christian owner."[87] The pope also exercised his universal guardianship authority and placed the Indigenous peoples Columbus had discovered under Spanish guardianship.[88]

Portugal, however, immediately made claims to the lands Columbus discovered in the Caribbean.[89] In fact, D. João II (King John II) relied on the Discovery element of contiguity and claimed that Portugal owned the lands because he thought they were located near the Azore Islands that

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83. *Id.* at 150.

84. THE SPANISH TRADITION IN AMERICA 32–33 (Charles Gibson ed., 1968) [hereinafter THE SPANISH TRADITION] (translating Agreement of April 30, 1492 from King Ferdinand and Queen Isabella of Spain to Christopher Columbus); *see also* SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES A.D. 1492–1616, at 42–43 (1974) [hereinafter MORISON, THE EUROPEAN DISCOVERY]; 1 SAMUEL ELIOT MORISON, ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 138–39 (1942) [hereinafter MORISON, ADMIRAL]

85. WILLIAMS, *supra* note 4, at 79.

86. Pope Alexander VI, *The Bull* Inter Caetera, *in* EUROPEAN TREATIES, *supra* note 79, at 56, 61–63; *see also* THE SPANISH TRADITION, *supra* note 84, at 36–38 (translating Pope Alexander VI, *The Bull* Inter Caetera (1493)).

87. Pope Alexander VI, *supra* note 86, at 62.

88. *Id.* at 56, 61–63; WILLIAMS, *supra* note 4, at 79.

89. 2 MERRIMAN, *supra* note 60, at 199; *see* H.V. Livermore, *Portuguese History*, *in* PORTUGAL AND BRAZIL: AN INTRODUCTION 48, 61 (H.V. Livermore ed., 1953) [hereinafter Livermore, *Portuguese History*]; *see also* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 97–98.

Portugal already possessed.[90] Portugal and Spain discussed their possibly conflicting papal bulls and Spain requested another bull to clearly delineate its ownership of the lands Columbus had discovered, and might yet discover, in the New World.[91] 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 or to be discovered" west of the line and jurisdiction over Indigenous peoples and granted Portugal those same rights east of that line.[92] This bull also assigned Spain and Portugal the duty to contribute to "the spread of the Christian rule" in their respective areas of the globe.[93]

But Portugal continued to press for rights in the New World and even threatened war.[94] Consequently, in 1494, Portugal and Spain signed the Treaty of Tordesillas (*Tordesilhas* in Portuguese) and agreed to move the papally-drawn line of demarcation further west, 370 leagues west of the Cape Verde Islands, to ensure Portugal part of the New World and to protect its Atlantic trade routes to India.[95] Thus, Portugal's right to colonize the landmass of Brazil was recognized, at least by Spain, because it lies east of the Tordesillas line.[96] In 1523–1529, as these countries were making Discovery claims in the Pacific Ocean, they argued over who

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90. PRESTAGE, *supra* note 31, at 237; REGINA JOHNSON TOMLINSON, THE STRUGGLE FOR BRAZIL: PORTUGAL AND "THE FRENCH INTERLOPERS" (1500–1550) 7 (1970).

91. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 97; WILLIAMS, *supra* note 4, at 80.

92. CHURCH & STATE, *supra* note 79, at 157; *see* THE SPANISH TRADITION, *supra* note 84, at 38 (translating Pope Alexander VI, *The Bull* Inter Caetera (1493)); *see generally* MORISON, ADMIRAL, *supra* note 84, at 368–73.

93. THE SPANISH TRADITION, *supra* note 84, at 36.

94. PRESTAGE, *supra* note 31, at 241–42.

95. Treaty of Tordesillas, Port.-Spain, June 7, 1494, *in* EUROPEAN TREATIES, *supra* note 79, at 84, 84–85; Treaty of Tordesillas, *supra* note 27, at 1684–90; THE SPANISH TRADITION, *supra* note 84, at 42–51 (translating Treaty of Tordesillas, Port.-Spain, June 7, 1494); C.H. HARING, THE SPANISH EMPIRE IN AMERICA 7 n.7 (First Harbinger Books ed. 1963) (1947). For maps showing the demarcation lines, *see Reales Cédulas 1534–1539* [*Royal Decrees 1534–1539*], WIKIPEDIA (June 8, 2006), http://es.wikipedia.org/wiki/Archivo:Cedulas1534-1539.png; Lencer, *15th and 16th Century Colonial Demarcation Lines between Spain and Portugal*, WIKIPEDIA (Dec. 7, 2007, 9:10 AM), http://en.wikipedia.org/wiki/File:Spain_and_Portugal.png.

96. *See, e.g.*, MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 98. The treaty was sanctioned in January 1506 by the bull *Ea quae* issued by Pope Julius II. Alfonso Garcia Gallo, *Las Bulas de Alejandro VI y el Ordinamento Juridico de la Expansión Portuguesa y Castellana en Africa y Indias* [The Bulls of Alexander VI and the Expansion of Portugal and Spain in Africa and the Indies], *in* XXVIII ANUARIO DE HISTORIA DEL DERECHO ESPANOL [YEARBOOK OF THE HISTORY OF THE SPANISH LAW] 825 (1958).

held the Discovery rights.[97] Spain's Charles V admitted that Portugal had discovered the Molucca Islands first, but relying on the second element of Discovery, he "denied their effective possession."[98] Neither country could prove "its case for possession," so on April 23, 1529, they signed the Treaty of Saragossa and extended the Atlantic demarcation line of the 1494 Tordesillas treaty around the globe through the Pacific Ocean.[99]

After signing the treaties of Tordesillas and Saragossa, Portugal and Spain began arguing for an international law doctrine called the Closed Sea (*Mare Clausum*)—the idea that the sea was closed to all European nations except for Spain and Portugal.[100] Other European countries disagreed and argued instead for the doctrine of *Mare Liberum*, or Open Sea, in which any country could sail anywhere on the seas.[101]

By 1493, under canon and 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 a form of title and sovereignty over Indigenous peoples and their lands.[102] Second, European exploration, conquest, and colonization was designed to assist the papacy in exercising its guardianship duties over the entire earthly flock.[103] Third, Portugal and Spain held exclusive rights over all other European countries to explore and colonize the world.[104] Finally,

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97. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 477–91 (discussing various disputes between Portugal and Spain regarding discoveries in the Pacific, including an argument over ownership of the Spice Islands).

98. PRESTAGE, *supra* note 31, at 305.

99. 3 ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 447–48, 452–53 (Cooper Square Publishers 1962) (1918); Lencer, *supra* note 95; PRESTAGE, *supra* note 31, at 306; *see also* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 490–91.

100. BLACK'S LAW DICTIONARY 986 (8th ed. 2004) (defining *mare clausum*); EDUARDO BUENO, A COROA, A CRUZ E A ESPADA: LEI, ORDEM E CORRUPÇÃO NO BRASIL COLÔNIA 1548–1558 [THE CROWN, THE CROSS, AND THE SWORD: LAW, ORDER AND CORRUPTION IN COLONIAL BRAZIL 1548–1558] 45 (2006); 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, 1501–1531], at 228 (1961); Livermore, *Portuguese History*, *supra* note 89, at 62.

101. BUENO, *supra* note 100, at 45; *see, e.g.*, André-Louis Sanguin, *Geopolitical Scenarios, From the Mare Liberum to the Mare Clausum: The High Sea and the Case of the Mediterranean Basin,* 2 GEOADRIA 51, 52–53 (1997).

102. MORISON, ADMIRAL, *supra* note 84, at 368; MULDOON, *supra* note 34, at 138–39; PAGDEN, *supra* note 4, at 31–33.

103. MORISON, ADMIRAL, *supra* note 84, at 368; MULDOON, *supra* note 34, at 138–39; PAGDEN, *supra* note 4, at 31–33.

104. MULDOON, *supra* note 34, at 138–39; PAGDEN, *supra* note 4, at 31–33; *see generally* MORISON, ADMIRAL, *supra* note 84, at 368–73 (for support that Spain and Portugal held exclusive rights on their side of the demarcation line).

the mere discovery of new lands by Portugal or Spain in their respective spheres of influence under the papal bulls and undertaking acts of symbolic possession on these lands was sufficient to establish ownership rights.[105] The Portuguese, for example, erected stone and wooden crosses along the coasts of Africa and Brazil when they first arrived, and other European explorers did the same when they claimed new lands.[106]

The fact that the parameters of Discovery were well accepted by this time does not mean however that there was no debate in Portugal and Spain about the validity of European claims to Indigenous lands and over Indigenous peoples. In Portugal, though, it seems that few scholars and

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105. 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 3, at 9, 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) (discussing the late fifteenth, sixteenth, and seventeenth century view that symbolic discovery was adequate to establish legal title to terra nullius), *with* 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); Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 843, 845–46, 869 (Perm. Ct. Arb. 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).

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* PAGDEN, *supra* note 4, at 81–82 (illustrating how France claimed Tahiti in 1758 based on symbolic possession). For example, George III instructed 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." Heydte, *supra* note 105, at 460–61. 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." *Id.* at 460; s*ee also* FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754–1766, at 26 (2000) (France sent an expedition throughout the Ohio Valley in North America in 1749 to renew its 1643 Discovery claims by "bur[ying] small lead plates . . . 'as a monument' . . . 'of the renewal of possession.'").

106. MARQUES, *supra* note 10, at 219–20. "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." *Id.* One inscription read: "[P]owerful prince king João II of Portugal ordered this land to be discovered and these monuments . . . to be put." *Id.*; *see* PAGDEN, *supra* note 4, at 81; *infra* notes 236, 237, 238, 239 and accompanying text; *see also* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 63, 151.

philosophers debated Portugal's rights to empire in Asia, Africa, and Brazil.[107]

One of the very few Portuguese writers who addressed these issues was Serafim de Freitas in 1625.[108] De Freitas recognized the papal right and power to grant titles in new lands to Portugal to evangelize, and since evangelizing required trade and a limited form of conquest, Portugal and Spain were also entitled to enforce their exclusive rights in the areas set aside for them by the papacy.[109] De Freitas tried to refute Hugo Grotius' argument—that Holland possessed equal rights to trade and colonize in Asia—by citing the papal bulls.[110] De Freitas appears to have argued that it was invalid for popes to grant Portugal *dominium* over pagans and to grant rights to navigate and travel to the Indies. But he did agree that the Church possessed the right and power to grant the duty to evangelize exclusively to one monarch and that Portugal and Spain were entitled to enforce their exclusive rights.[111]

The debates in Spain about its right to empire were far more vigorous and prolonged. Spanish legal and religious circles considered the authority for the Crown's rights in the New World in depth and over many decades.[112] King Ferdinand even sought opinions on the legitimacy of the papal bulls for Spain's New World titles.[113] His legal advisors relied on the writings of Pope Innocent IV and agreed that Spain had legal authority to acquire titles and assets in the New World.[114] Ultimately, the king's council drafted policies, regulations, and laws to control Spanish conquests and colonization.[115] Most of this discussion can be summed up by

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107. PADGEN, *supra* note 4, at 4.

108. 2 SERAFIM DE FREITAS, DE IUSTO IMPERIO LUSITANORUM ASIATICO [ON THE JUST EMPIRE OF THE PORTUGUESE IN ASIA] 93–94 (1625). This book was published during the time the Spanish Crown ruled Portugal, from 1580–1640, and no doubt reflects both Portuguese and Spanish philosophies on colonial empire. PAGDEN, *supra* note 4, at 4, 48–49.

109. PAGDEN, *supra* note 4, at 4, 48–49.

110. *Id.* at 4, 49.

111. *Id.*

112. *See id*. at 46, 48–49, 55–56, 89–90, 92–94, 96–99; LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 17–22, 113–32 (1949); JOHN THOMAS VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW: LEGAL SOURCES AND JURIDICAL LITERATURE OF SPAIN 142 (1942).

113. HANKE, *supra* note 112, at 27–28; WILLIAMS, *supra* note 4, at 89.

114. HANKE, *supra* note 112, at 27–30; 2 MERRIMAN, *supra* note 61, at 345–46; WILLIAMS, *supra* note 4, at 91; Serra, *supra* note 33, at 315–19.

115. HANKE, *supra* note 112, at 23–25, 33–36; MULDOON, *supra* note 34, at 140–43; Serra, *supra* note 33, at 317; THE SPANISH TRADITION, *supra* note 84, at 58–82. The 1512–1513 Laws of Burgos are available in English at http://faculty.smu.edu/bakewell/BAKEWELL/texts/burgoslaws.html (last visited Oct. 8, 2011).

the Spanish canon lawyer-jurist Fernando Vázquez de Menchaca, who stated that New World natives are "our enemies, prejudicial, loathsome and dangerous," and by the Spanish theologian Juan Ginés de Sepúlveda who wrote that Native Americans were "*inculti*" (uncultivated/primitive) and "*inhumani*" (inhuman).[116]

Into this wide ranging theoretical, legal, spiritual, and political discussion stepped the Spaniard Francisco de Vitoria. Vitoria was a Dominican priest, a professor at the University of Salamanca, and a royal advisor.[117] He is recognized today as the most important and influential of Spain's legal theorists from the early sixteenth century, and as one of the earliest writers on international law.[118] In 1532, he concluded that the Indians of the Americas "possessed natural legal rights as free and rational people."[119] He agreed with Pope Innocent IV and other scholars that Infidels possessed property and sovereign rights—*dominion*.[120] He thus concluded that Spain's title in the New World could not be based on papal grants because the papacy could not give away the Infidels' natural law rights or property since Indians were free men and the owners of their lands.[121]

Significantly, Vitoria also concluded that if Indians violated the natural law principles of the Law of Nations (as defined by Europeans), a Christian nation was justified in conquering and establishing an empire in the

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116. PAGDEN, *supra* note 4, at 99–100. The famous English jurist, Sir Edward Coke, stated in Calvin's Case, (1608) 77 Eng. Rep. 377, 397 (K.B.), that infidels are the perpetual enemies of Christians. PAGDEN, *supra* note 4, at 94. Perhaps the best known debate on this subject was between Sepúlveda and the Dominican friar Bartolomé de las Casas, who was appointed by the Spanish Crown as the Indian protector in the New World. HANKE, *supra* note 112, at 11, 54–58, 113–32, 153–55, 177; PAGDEN, *supra* note 4, at 100. Sepúlveda wrote a three volume work that portrayed the Spanish king as the one God had chosen to bring the "inhuman" into the human. Sepúlveda agreed that native peoples could be conquered and enslaved, and that Pope Alexander VI had chosen Spain to perform this task. THE SPANISH TRADITION, *supra* note 84, at 113–20; ZAVALA, *supra* note 42, at 52–54; s*ee generally* LEWIS HANKE, ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIAN 3–56 (1974). In contrast, Las Casas argued that Indians were rational humans, at a backward stage of development, who would peacefully receive Christianity but that Spain had no right to enslave them or wage war against them. PAGDEN, *supra* note 4, at 101–02.

117. PAGDEN *supra* note 4, at 46–47.

118. *Id.* at 46; WILLIAMS, *supra* note 4, at 96–97, 97 n.135; Felix Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11–13 (1942).

119. WILLIAMS, *supra* note 4, at 97; *see* VICTORIA, *supra* note 32, at 115, 123, 125–28.

120. VICTORIA, *supra* note 32, at 123.

121. *Id.* at 129–31, 135–39. Lands that were truly empty, *terra nullius*, could be claimed by the first occupant; "[T]hat what belongs to nobody is granted to the first occupant." *Id.* at 139.

Americas.[122] The natural law duties that Indians owed Europeans under international law included allowing Spaniards the right to travel wherever they wished; the opportunity for free commerce, trade, and profits wherever they traveled; and the ability to collect and trade common items such as fish, animals, and precious metals.[123]

Vitoria also advocated the idea of Europeans engaging 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 [L]aw of [N]ations . . . 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."[124]

Vitoria agreed that Spain could engage in these actions based on its Christian guardianship duty to civilize barbarian peoples and its obligation to preach the gospel.[125] In effect, Vitoria supported the justifications for Spanish empire as they had already been stated. He simply added the idea that the European Law of Nations, a secular statement of the superior rights of Europeans, had become part of the international law of Discovery and European empire.[126]

These debates about the justifications of European empire and conquest, and the history and actions of Portuguese and Spanish expansion and colonization demonstrate that these countries accepted and operated under the Doctrine of Discovery.

C. Other European Countries and Discovery

Other European countries were also eager to use the Doctrine of Discovery to claim lands and assets outside of Europe. England, France, Holland, and Russia, for example, used international law and claimed the rights of first discovery, sovereign and commercial rights, and title in various parts of the world.[127] This Article only briefly discusses these

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122. *Id.* at 154; WILLIAMS, *supra* note 4, at 97, 100–01; J.H. PARRY, THE AGE OF RECONNAISSANCE: DISCOVERY, EXPLORATION AND SETTLEMENT 1450 TO 1650, at 305–06 (Praeger Publishers 1969) (1963).

123. ANTHONY PAGDEN, SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION 21 (1990); VICTORIA, *supra* note 32, at 151–54; WILLIAMS, *supra* note 4, at 99–103.

124. VICTORIA, *supra* note 32, at 154; *see also* HANKE, *supra* note 112, at 133–46, 156–72; ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 61–62 (1947); SEED, *supra* note 3, at 88–97.

125. VICTORIA, *supra* note 32, at 156–57.

126. WILLIAMS, *supra* note 4, at 106–07.

127. *See, e.g.*, MILLER, NATIVE AMERICA, *supra* note 1, at 12–23, 44–48, 120–26, 131–36.

efforts and will primarily focus on how their efforts added to the definition of the international law of Discovery.

England claimed, for example, that John Cabot's 1496–1498 explorations and alleged first discoveries along the east coast of North America gave it a first Discovery claim to parts of modern-day Canada and the United States.[128] England also used other elements of Discovery to argue against Dutch and Swedish settlements in the modern-day United States in the 1640s because England claimed "first discovery, occupation and the possession" of the lands due to its colonial settlements.[129] Furthermore, France contested England's claims of first discovery in North America and argued that France had discovered, and accordingly, possessed, those areas first and established its claim.[130]

Despite their claims in North America, France and England faced a common problem regarding colonization and trade in the New World. They were both Catholic countries in 1493 and were concerned about infringing the papal bulls for Portugal and Spain and risking excommunication.[131] But they were also anxious to acquire newly discovered territories and their assets.[132] Therefore, legal scholars in England and France analyzed canon law, the papal bulls, and history, as well as developed new theories of Discovery that allowed their countries to colonize and trade in the New World.[133]

One of the new theories, primarily developed in England, held that Catholic King Henry VII would not violate the papal bulls if his explorers only sought out and claimed lands that had not yet been discovered by any Christian prince.[134] This new definition of Discovery was further refined by Protestant Queen Elizabeth I and her advisers when they demanded that Spain and Portugal actually occupy or possess non-Christian

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128. *Id.* at 17, 25, 70; PAGDEN, *supra* note 4, at 81.

129. VII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, at 31 (Alden T. Vaughan & Barbara Graymont eds., 1998) [hereinafter VII EAID].

130. *See, e.g.*, 1 JOSEPH JOUVENCY, AN ACCOUNT OF THE CANADIAN MISSION 179, 205 (1710); PAGDEN, *supra* note 4, at 34; *see generally* 2 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 1610–1791, ACADIA 1612–1614, at 33, 127, 199, 203 (Reuben Gold Thwaites ed., Finlow Alexander et al. trans., 1959) (discussing New France, or Canada); 3 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 1610–1791, ACADIA 1611–1616, at 33, 39–41 (Reuben Gold Thwaites ed., Finlow Alexander et al. trans., 1959) (generally discussing New France).

131. *See* WILLIAMS, *supra* note 4, at 74, 81.

132. Johnson v. M'Intosh, 21 U.S. 543, 572–73 (1823).

133. WILLIAMS, *supra* note 4, at 126–225.

134. *Id*. at 121–22.

lands to prevent England from making Discovery claims.[135] Consequently, Henry VII, Elizabeth I, and James I, all ordered their explorers to discover and colonize lands "unknown to all Christians"[136] and "not actually possessed of any Christian prince."[137] It is interesting to note that Protestant monarchs complied with this emerging secular international law even though they did not fear excommunication or the papal bulls.

England and France thus created the new element of actual occupancy and possession of new lands as a requirement for European Discovery claims and applied this element in their dealings with Portugal and Spain. In the 1550s, England and France separately negotiated treaties with Portugal and Spain to settle issues regarding discoveries and trade in the New World.[138] Portugal and Spain refused to consider any terms that allowed England and France to trade or colonize within the areas the pope had granted them, even if they were not yet in actual possession of all those lands.[139]

Holland also used Discovery in making claims in North America, Asia, and Brazil. Since Holland could not rely on claims of first discovery in

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135. Heydte, *supra* note 105, at 452 ("At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation."). In 1523, Spain's Charles V denied that Portugal had gained ownership of Mallucco merely by finding it. *Id.* ("[I]t was evident that to 'find' required possession, and that which was not taken or possessed could not be said to be found, although seen or discovered."); *accord* FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST 132 (1975) ("'possession' instead of just 'discovery' [is] the basis of Christian right.").

136. Letters Patent of King Henry VII of England Granted to John Cabot (March 5, 1496), *reprinted in* 1 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 18 (W. Keith Kavenagh ed., 1973).

137. Letters Patent of Queen Elizabeth I of England to Sir Humfrey Gylberte (June 11, 1578), *available at* http://avalon.law.yale.edu/16th_century/humfrey.asp; *see* Patent of New England Granted by King James I of England (Nov. 3, 1620), *reprinted in* 1 FOUNDATIONS, *supra* note 136, at 22–29; SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 24–25 (William MacDonald ed. 1899).

138. WILLIAMS, *supra* note 4, at 133; Heydte, *supra* note 105, at 458–59 (explaining that Elizabeth I wrote a Spanish minister, rejecting the papal bulls and stated that first discovery alone "cannot confer property"); I CHARLES C. HYDE, TREATISE ON INTERNATIONAL LAW 163 n.3 (1922). France insisted on a general right to trade in the West Indies while Spain relied on papal authority for its monopoly right. The French argued that they "would not agree to exclude Frenchmen from places discovered by them and not actually subject to the kings of Portugal and [Spain]," but . . . would consent . . . [to] keep away from lands actually possessed by the aforesaid sovereigns." Treaty of Cateau-Cambrésis, Fr.-Spain, April 3, 1559, *in* EUROPEAN TREATIES, *supra* note 79, at 219, 220.

139. WILLIAMS, *supra* note 4, at 133.

any of these areas, it adopted the idea that actual occupation and current possession of Indigenous lands was the crucial element.[140] The Dutch established colonies in North America, signed treaties with Indian tribes, purchased land from tribes, and acted in accordance with the Doctrine.[141] England strongly protested the Dutch colonies because it claimed first discovery of North America.[142] England also claimed that, through its American colonies, it was actually occupying and possessing all the disputed areas via the element of contiguity, which allowed a European country to claim a large area of land in the vicinity of its actual settlements.[143] England claimed, under Discovery and preemption, that the Dutch could not buy land from Indians or engage in trade with them.[144] Holland countered with the argument that since the English settlements were far from the Dutch settlements that England was not in occupation or possession of the areas the Dutch settled.[145]

England and France also developed another element of Discovery: *terra nullius* (vacant lands).[146] This element stated that lands that were possessed by no one, or were occupied but not used in a manner European legal systems approved or recognized, were considered to be waste and vacant and available for Discovery claims.[147] England, Holland, France,

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140. *See* VII EAID, *supra* note 129, at 30–31; JENNINGS, *supra* note 135, at 132.

141. VII EAID, *supra* note 129, at 30–31; Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600–1776*, *in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 136, 140, 353 nn.43–47, 356 nn.68–72 (Oren Lyons & John Mohawk eds., 1992); *see also* Regulation of Trade with Indians, Erection of Fences, and Control of Livestock (July 1, 1647), *reprinted in* 2 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1260 (W. Keith Kavenagh ed., 1973).

142. *See* Simsarian, *supra* note 105, at 117–18.

143. *Id.*

144. VII EAID, *supra* note 129, at 30–31.

145. *Id.*

146. *See* PAGDEN, *supra* note 4, at 91 (stating that Spain and Portugal did not need *terra nullius* arguments because they had papal grants; England and France did not). This principle derives from Roman law, and is part of Islamic law because "*mewat*" (empty or unclaimed land) can be turned into privately owned land by activities such as fencing, occupying, or cultivating the land. SIRAJ SAIT & HILARY LIM, LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD 12, 22, 61, 70, 170 (2006).

147. COLIN G. CALLOWAY, CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783–1815, at 9 (1987); *see also* John Michael Bennet & Alex Cuthbert Castles, *British Admiralty, Secret Instruction Book*, *reprinted in* ABORIGINAL LEGAL ISSUES, COMMENTARY AND MATERIALS 10 (H. McRae et al. eds., 1991).

> You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.

and the United States relied on this element to claim that lands actually occupied and used by Indigenous nations were legally vacant, or *terra nullius*, and open for appropriation.[148]

From the foregoing discussion, the authors conclude that the European countries that colonized the New World clearly utilized the Doctrine of Discovery. The Doctrine was widely accepted and applied by Europeans as the legal authority for colonization around the world and for dominating Indigenous nations.[149] Europeans occasionally disagreed over the exact definition of the elements, and oftentimes violently disputed their claims, but universally believed that Indigenous peoples and nations lost sovereign, property, and human rights under international law immediately upon their discovery by Europeans.

II. THE DOCTRINE IN BRAZILIAN AND PORTUGUESE LAW AND HISTORY

Portugal was restored to Christian control as part of the reconquest of the Iberian Peninsula and the capture of Lisbon from the Moors in 1147.[150] To ensure it remained free from Castile, Portugal offered itself as a fief to the pope in 1179 in exchange for papal recognition of its independence.[151] Within a relatively short time, Portugal began, for example, building an overseas trade and colonial empire, began disputing the ownership of the Canary Islands with Castile, and used Doctrine of Discovery principles to justify its claim.[152] In 1415, Portugal gained its first foothold in Northern Africa when it conquered Ceuta and thereafter began expanding its economic interests by exploring the west coast of Africa.[153] After being granted control of the Canary Islands by the pope in 1436, Portugal continued to rely on the papacy to ratify its discoveries and claims in Africa. In 1454–1456, various popes issued bulls granting Portugal jurisdiction, sovereignty, and title over the lands it discovered in western Africa.[154] In undertaking these actions, Portugal and the pope

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Id. The term has a second meaning: "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) (internal citation omitted).

148. S*ee, e.g.*, MILLER, NATIVE AMERICA, *supra* note 1, at 21, 27–28, 49, 56, 63–64, 156, 159–60; THE SPANISH TRADITION, *supra* note 84, at 9.

149. MILLER, DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 249–64; Miller & Ruru, *supra* note 1, at 898–914.

150. EXPANSION OF EUROPE, *supra* note 34, at 47.

151. *Id.*

152. *See supra* notes 60–66 and accompanying text.

153. EXPANSION OF EUROPE, *supra* note 34, at 47–48; Livermore, *Portuguese History*, *supra* note 89, at 59.

154. *See supra* notes 79, 81, 83 and accompanying text; *see also* PRESTAGE, *supra* note 31, at 45–46, 165–66.

relied on the papacy's legal authority and guardianship duties to commission a Christian prince to punish and civilize Infidels, and to deprive them of property and lordship if they failed to admit Christian missionaries or violated natural law.[155]

Portugal also relied on Discovery arguments when it created and justified its trade and economic empire in Africa and occupation of the Madeira, Azore, and Cape Verde islands.[156] Portuguese explorers and traders continued exploring southwards down the coast of Africa, and in 1498 Vasco da Gama sailed to India with orders from King Manoel to make discoveries so as to spread the Christian faith and to acquire the riches of the east.[157] Portugal, however, had few, if any, intentions of colonizing Africa and Asia.[158] Because it had a population of barely a million inhabitants at that time, trade was more profitable and safer than actual conquest and colonization.[159] However, Portugal did attempt to protect its claims to exclusive economic rights in these areas with Discovery principles.[160]

In 1500, Portugal found and claimed first discovery rights in Brazil but it was far more interested at that time in the rich spice trade of India and as such made no official attempts to occupy or colonize Brazil for several decades.[161] But as the Dutch successfully increased their attacks on Portuguese shipping and trading posts in Asia, and as Dutch, French, and English traders began to target Brazil, and Spain was finding great treasures in the New World, Portugal became more interested in protecting, exploiting, and colonizing Brazil under the justifications of Discovery.[162]

As already discussed above, Portugal was intimately involved during the fifteenth century in developing the Doctrine as part of the Law of Nations and in using that legal authority to explore and claim lands, assets, and peoples in Africa and Asia. The ten elements of Discovery as

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155. EXPANSION OF EUROPE, *supra* note 34, at 55.

156. *See* Livermore, *Portuguese History*, *supra* note 89, at 60.

157. *See id.*; MICHAEL KRONDL, THE TASTE OF CONQUEST, THE RISE AND FALL OF THE THREE GREAT CITIES OF SPICE 127 (2007); PRESTAGE, *supra* note 31, at 251.

158. *See* KRONDL, *supra* note 157, at 136.

159. EXPANSION OF EUROPE, *supra* note 34, at 48; JAMES LANG, PORTUGUESE BRAZIL: THE KING'S PLANTATION 23 (1979) (insofar as Portugal's interest was in trade and not colonization); PAGDEN, *supra* note 4, at 64.

160. *See, e.g.*, GOMES EANNES DE AZURARA, THE CHRONICLE OF THE DISCOVERY OF GUINEA (1472), *reprinted in* EXPANSION OF EUROPE, *supra* note 34, at 58–59.

161. *See infra* notes 187–194, 196– 208 and accompanying text.

162. BUENO, *supra* note 100, at 50, 56; KRONDL, *supra* note 157, at 178–79 (insofar as the Dutch had increased their attacks on Portuguese shipping and trading posts in Asia); LANG, *supra* note 159, at 34 (insofar as the Portuguese trading empire was eventually reduced to its holdings in Brazil).

described, however, are primarily based on the definition of the Doctrine from *Johnson v. M'Intosh* and Anglo-American legal regimes.[163] This Article will now compare, element by element, whether Portugal and Brazil used these same Discovery principles in Brazil, and if so, how the elements were defined and applied.

A. First Discovery

Portugal clearly relied on the principle of first discovery to make territorial, sovereign, and commercial claims to the island groups off the Iberian Peninsula and in Africa and Asia.[164] "The Portuguese Crown claimed a monopoly of the Guinea trade, on the grounds both of prior discovery, and of papal bulls of 1454 and 1456."[165] In 1455, Portugal made an express first discovery claim to the Cape Verde Islands.[166] However, in the papal bulls of 1493, even while granting Portugal and Spain exclusive rights of Discovery around the world, Pope Alexander VI recognized that other European nations might have and could retain rights to any lands that they had discovered first in the Spanish and Portuguese areas as long as the discoveries had occurred before January 1, 1493.[167] Thus, the papacy realized the importance under international law of making first discoveries to validate claims over non-European lands.

In 1494, in the Treaty of Tordesillas, Portugal and Spain moved the papally drawn line of demarcation further west and, purposefully or accidentally, preserved Brazil for Portugal.[168] Under either demarcation line, Spain and Portugal possessed exclusive rights around the world granted by the papacy which might appear to negate the need or use of the element of first discovery to establish their claims. In fact, Portugal and Spain did use the papal bulls as legal authority to establish their

163. MILLER, NATIVE AMERICA, *supra* note 1, at 3–5; Miller & Ruru, *supra* note 1, at 876–96.

164. PARRY, *supra* note 122, at 131; PRESTAGE, *supra* note 31, at 9; *see, e.g.*, H.V. LIVERMORE, A NEW HISTORY OF PORTUGAL 127–30 (2d ed. 1976).

165. PARRY, *supra* note 122, at 134; *accord* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 5.

166. PARRY, *supra* note 122, at 131.

167. CHURCH & STATE, *supra* note 79, at 157 (translating Pope Alexander VI, *The Bull* Inter Caetera (1493)). On September 26, 1493, the Pope issued another bull and further clarified this point. Pope Alexander VI, *The Bull* Dudum Siquidem (Sept. 26, 1493), *available at* http://www.reformation.org/dudum-siquidem.html.

168. *See supra* notes 94–96 and accompanying text. Some historians allege that Portugal was perhaps aware of Brazil and wanted to establish a claim and also ensure the safety of its trade route to India. LIVERMORE, *supra* note 164, at 131; PRESTAGE, *supra* note 31, at 277.

rights.[169] England, France, and Holland contested these claims and argued first discovery and the other elements of Discovery addressed above.[170] Consequently, Portugal and Spain had to refute these arguments and often relied on claims of first discovery to assert their alleged commercial and sovereign rights over newly discovered lands.[171]

Portugal naturally relied on papal authority and the 1494 Tordesillas line of demarcation to claim Brazil. However, it also relied heavily on its first discovery of Brazil by Pedro Álvares Cabral on April 22, 1500.[172] In fact, 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 then again to Brazil.[173] Portugal claimed sovereign, commercial, and property rights in Brazil based on that first discovery, the Treaty of Tordesillas, and the papal bulls.[174] In 1501, King Manoel of Portugal reported Cabral's discovery of Brazil to the king of Spain and stated that it was a new discovery.[175]

In 1501 and 1503, the Crown promptly dispatched other expeditions to explore further and make new discoveries along the coast of Brazil to solidify its claim to the region.[176] In keeping with the prior practice of Portuguese kings in Africa, King Manoel required the expeditions he sent to Brazil in 1501 and 1503, along with the private merchants he li-

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169. *See, e.g.*, *supra* notes 100, 101, 104, 105 and accompanying text.

170. *See supra* notes 131–46 and accompanying text.

171. *See supra* notes 77–81 and accompanying text; Miller, Lesage, & Escarcena, *supra* note 1, at 835–53.

172. *See* LIVERMORE, *supra* note 164, at 138–39 (describing Cabral's voyage and discovery); *see also* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 223–24.

173. LIVERMORE, *supra* note 164, at 139 ("Cabral . . . [reported] his discovery of a large island, which he called the land of Vera Cruz."); MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 223 ("Cabral named the country, which he supposed to be an island, *Ilha da Vera Cruz*."); LAURA DE MELLO E SOUZA, INFERNO ATLÂNTICO: DEMONOLOGIA E COLONIZAÇÃO: SÉCULOS XVI–XVIII [ATLANTIC HELL: DEMONOLOGY AND COLONIZATION: CENTURIES XVI–XVIII] 30 (2d ed. 1993) (indicating that Cabral named the land "Santa Cruz" ("Holy Cross")). Cabral was leading a royal trading expedition to India, but several historians believe he was also ordered to look for Brazil and did not find it by accident. *See, e.g.*, KRONDL, *supra* note 157, at 126, 134 (discussing evidence that the Portuguese knew Brazil was there before they discovered it); PRESTAGE, *supra* note 31, at 277.

174. *See, e.g.*, ALEXANDER MARCHANT, FROM BARTER TO SLAVERY: THE ECONOMIC RELATIONS OF PORTUGUESE AND INDIANS IN THE SETTLEMENT OF BRAZIL, 1500–1580, at 13–14 (photo. reprint 1966) (1942) (insofar as Cabral took possession of Brazil upon first discovery); PRESTAGE, *supra* note 31, at 243, 277.

175. PRESTAGE, *supra* note 31, at 285.

176. *Id.* at 290; MARQUES, *supra* note 10, at 218, 252; MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 280–81; *see infra* note 192.

censed beginning in 1502, to methodically explore and chart the coastal regions and to discover 300 leagues of new coastline each year.[177] Other Portuguese explorers and colonists contributed to the effort to extend Portugal's claims and Brazil's borders by making first discoveries while searching for minerals and slaves, and actively working to define and expand the borders.[178] For example, in 1638, a Portuguese flotilla sailed up the Amazon to Quito and claimed first discovery rights, and Portuguese missionaries made numerous voyages of first discovery while seeking converts far and wide.[179] Most of the Portuguese explorers in Africa and Brazil also engaged in the usual Discovery practice of mapping and naming physical features of the landscape to prove their first discoveries of new areas.[180]

In sum, it appears certain that Portugal used the well-recognized Discovery element of first discovery to establish and prove its claims to Brazil.

B. Actual Occupancy and Current Possession

The second element required that a European country physically occupy and possess lands that it claimed to control under international law within a reasonable length of time after first discovery to create a recognized title of ownership.[181] Portugal and Spain opposed these arguments and the development of this facet of Discovery, but they well recognized the practical application of solidifying their claims by actually possessing newly discovered lands.[182] Portugal used this element in making claims to own island groups off the Iberian Peninsula and exclusive trade rights in Africa, and frequently argued actual occupancy to establish its claim to Brazil.[183]

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177. MARQUES, *supra* note 10, at 253; John Leonard Vogt, Jr., Portuguese Exploration in Brazil and the Feitoria System, 1500–1530: The First Economic Cycle of Brazilian History 45, 89–90 (June 1967) (limited circulation Ph.D. dissertation, University of Virginia).

178. MARQUES, *supra* note 10, at 356; *infra* notes 219–22 and accompanying text.

179. MATHIAS C. KIEMEN, THE INDIAN POLICY OF PORTUGAL IN THE AMAZON REGION, 1614–1693, at 54, 54 n.23 (1954); *see infra* notes 223, 224 and accompanying text.

180. *See* MARQUES, *supra* note 10, at 218; SEED, *supra* note 3, at 9, 9 n.19, 69–73, 101–02; *supra* notes 176, 177 and *infra* notes 189, 205, 369 and accompanying text.

181. *See supra* notes 134, 135, 137 and accompanying text; LIVERMORE, *supra* note 164, 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."); MILLER, NATIVE AMERICA, *supra* note 1, at 3, 147.

182. PRESTAGE, *supra* note 31, at 44–45.

183. MARQUES, *supra* note 10, at 148, 152; PARRY, *supra* note 122, at 147, 258.

i. Actual possession

The Portuguese monarchs and the papacy realized the importance of solidifying a first discovery claim by actually occupying and possessing new lands. In the papal bulls issued in 1493, while ostensibly granting Portugal and Spain exclusive ownership of lands on their sides of the demarcation line, the pope also demonstrated the importance of actual occupation. The bull stated that if another country had discovered land in Portugal's or Spain's designated areas, and it was "actually possessed by some other Christian king" as of January 1, 1493, then that country's claim was valid against Portugal or Spain.[184] But if a country had only "sailed thither at some time" and made a first discovery in Portugal's or Spain's areas but had not yet "actually taken [it] into possession," then its first discovery claim was invalid.[185] This statement accurately reflected the second element of Discovery as later defined by England.[186]

In light of this element, one of the most important goals of the Portuguese government was to see that the newly discovered lands in Brazil were fully occupied and settled as soon as possible. Portugal faced several problems in doing this, however. First, King Manoel thought Brazil did not contain riches that could be quickly exploited and was uninterested in funding governmental efforts at colonization.[187] Second, Portugal had only a small population and most of its merchants and adventurers were drawn to Asia and the greater opportunities to acquire wealth from that continent.[188] Still, the king realized the importance of permanently occupying Brazil if he was to acquire recognized ownership and thus, immediately upon hearing of the discovery of Brazil, he authorized an expedition in 1501 to investigate the region's economic potential and to explore and chart the coast.[189] This expedition noted the great quantity and value of Pau-Brasil, a wood which provided a valuable red dye.[190]

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184. CHURCH & STATE, *supra* note 79, at 157–58.

185. Pope Alexander VI, *supra* note 167.

186. *See supra* notes 133–34 and accompanying text.

187. LANG, *supra* note 159, at 25–26 (colonization was expensive and Brazil did not yield enough resources for the Crown to pay for Brazil's defense); *see also* Vogt, *supra* note 177, at 1 n.1 ("The earliest report we have from Brazil . . . did not even mention commercial possibilities in this new land, but instead emphasized that the primary advantage to be gained would be in the conversion of the Brazilian natives to Christianity.").

188. ALDEN, *supra* note 11, at 31.

189. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 280–81; PRESTAGE, *supra* note 31, at 290; Vogt, *supra* note 177, at 45, 57, 63–64, 70–71.

190. *Feitorias* [*Trading Posts*], MEMÓRIA DA RECEITA FEDERAL, http://www.receita.fazenda.gov.br/Memoria/administracao/reparticoes/colonia/feitorias.asp (last visited Oct. 8, 2011). This wood gave Brazil its name. *Id.*

This discovery was still not enough to turn the king's attention from the lucrative spice trade of India.[191] The king did decide, though, to give the job of exploiting Pau-Brasil to private entrepreneurs from 1502 on. He licensed merchants to undertake this task and required them to explore 300 leagues of new coastline each year and to build forts and trading posts, "*feitorias*," in Brazil.[192] European countries had long built forts and trading posts in non-European lands as "an extension of sovereignty for commercial purposes"[193] and as "a first step towards dominion."[194] The Portuguese king ordered these private merchants to construct forts and factories for the same reasons, and to satisfy the second element of Discovery by beginning the occupation of Brazil.[195]

These plans failed, though, because the merchants and factories did not succeed in settling Brazil. By 1516, the privately owned factories were already in decline and had failed to fulfill the Crown's desire to occupy and defend Brazil, and establish Portuguese sovereignty and economic monopoly.[196] In fact, by 1519, there were only two factories along 3,000 miles of Brazilian coastline.[197] The Portuguese Crown realized that the use of private merchants was risking the loss of Brazil because the valuable wood was attracting the attention of French, English, and Dutch merchants who were starting to encroach on Portuguese economic rights in Brazil.[198]

The growing menace to Portugal's exclusive ownership of Brazil induced the king to "systematically . . . promote the [colonization] of Brazil."[199] So Portugal began to defend the land militarily and in 1516 and

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191. BUENO, *supra* note 100, at 23.

192. *Id.*; *accord* MARQUES, *supra* note 10, at 252; PRESTAGE, *supra* note 31, at 294–95; Vogt, *supra* note 177, 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 159, at 24.

193. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 43.

194. PRESTAGE, *supra* note 31, at 295.

195. BUENO, *supra* note 100, at 23; LANG, *supra* note 159, at 23–24; MARQUES, *supra* note 10, at 252; PRESTAGE, *supra* note 31, at 294–95; Vogt, *supra* note 177, at 64–65, 89–90.

196. *See* PRESTAGE, *supra* note 31, at 294–95; Vogt, *supra* note 177, at 10, 168.

197. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 303.

198. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 86, 159; *see* MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 585 (for an in-depth discussion of the French interlopers).

199. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 86; *accord* WILLIAM FREDRIC HARRISON, A STRUGGLE FOR LAND IN COLONIAL BRAZIL: THE PRIVATE CAPTAINCY OF PARAI´BA DO SUL, 1533–1753, at 1, 10–12 (1970).

1527 attacked French shipping and settlements in Brazil.[200] Then the King tried to occupy and settle Brazil by naming private captaincies and giving them enormous land grants and the responsibility to explore the coastline for political and commercial reasons, and to occupy, colonize, and defend Brazil for the Crown.[201] Portugal had already successfully used this system of private settlement to occupy and acquire colonies in the Azore and Madeira islands.[202]

In the 1530s, the king divided the coastline between the Amazon River and São Vicente into a dozen privately owned captaincies and granted them jurisdiction and exclusive economic privileges thirty to one hundred leagues along the coast.[203] The captains were expressly required to occupy and cultivate these lands.[204] A Portuguese historian, writing in 1576, claimed that the captaincies had marked out all of Brazil between the coast and the "Line of Demarcation" and that Brazil was "now well peopled."[205] In reality, almost all the captaincies failed and did not establish Portuguese settlement of Brazil.[206] Several of the captains, among others, warned the Crown about French activities and the vulnerability of the Portuguese position in Brazil due to the lack of actual occupation.[207]

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200. BUENO, *supra* note 100, at 49–50; MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 587 ("[A]round 1527 D. João III ordered a former Frenchman in his service . . . . to sweep the Brazilian coast with a naval squadron and destroy every French ship or shore establishment that he encountered."); *História do Brasil* [History of Brazil], LUSOAFRICA, http://www.lusoafrica.net/v2/index.php?option=com_content&view=article&id=87&itemid=108 (last visited Oct. 8, 2011).

201. KIEMEN, *supra* note 179, at 8; PRESTAGE, *supra* note 31, at 287; Dauril Alden, *Black Robes Versus White Settlers: The Struggle for "Freedom of the Indians" in Colonial Brazil*, *in* ATTITUDES OF COLONIAL POWERS TOWARD THE AMERICAN INDIAN 19, 22 (Howard Peckham & Charles Gibson eds., 1969) [hereinafter Alden, *Black Robes*].

202. BUENO, *supra* note 100, at 31; 3 CARLOS MALHEIRO DIAS ET AL., HISTÓRIA DA COLONIZAÇÃO PORTUGUESA DO BRASIL: A IDADE MÉDIA BRASILEIRA (1521–1580) [HISTORY OF THE PORTUGUESE COLONIZATION OF BRAZIL: THE BRAZILIAN MIDDLE AGES (1521–1580)] 168, 312–13 (1924); CHARLES VERLINDEN, THE BEGINNINGS OF MODERN COLONIZATION 15 (Yvonne Freccero trans., 1970).

203. HARRISON, *supra* note 199, at 1, 3, 9–13; MARCHANT, *supra* note 174, at 52–53, 56; MARQUES, *supra* note 10, at 254.

204. HARRISON, *supra* note 199, at 3, 9; MARQUES, *supra* note 10, at 255; Eulália Maria Lahmeyer Lôbo, *Conflict and Continuity in Brazilian History*, *in* CONTINUITY AND CONFLICT IN BRAZILIAN SOCIETY 268, 269 (Henry H. Keith & S. F. Edwards eds., 1969).

205. 2 PEDRO DE MAGALHÃES, THE HISTORIES OF BRAZIL 31 (John B. Stetson, Jr. ed. & trans., 1922) (1576).

206. ALDEN, *supra* note 11, at 31; HARRISON, *supra* note 199, at 24–25; LANG, *supra* note 159, at 25; MARCHANT, *supra* note 174, at 80–81.

207. ALDEN, *supra* note 11, at 31; BUENO, *supra* note 100, at 30; DIAS, *supra* note 202, at 259; HARRISON, *supra* note 199, at 24–25; KIEMEN, *supra* note 179, at 11–12; LANG,

Finally, the Crown realized that it had to take official steps and direct the occupation and colonization of Brazil because other European countries were trading along the coast and establishing colonies, and Portuguese "colonies must be planted at once."[208] Consequently, in 1549, the king appointed the first Governor-General of Brazil, Tomé de Sousa, and sent him and a large expedition with instructions to erect a fortified capital, establish the royal government, and strengthen the existing Portuguese settlements and build new ones.[209] Sousa was granted broad powers and given very detailed instructions in the *Regimento Régio*.[210] He was directed, for example, to address the problems the captaincies faced by assisting the colonization efforts, combating rebellious Indians, and defending the territory against foreign invasions.[211] He was also authorized to give land grants to settlers and require grantees to start cultivation within two years.[212] These efforts assisted settlement somewhat, because by 1614, Portugal claimed that it had occupied Brazil as more than 3,000 Portuguese resided there.[213]

Other European countries were not convinced, however, that the enormous land mass of Brazil was actually occupied and possessed by just 3,000 Portuguese. French, English, and Dutch traders and colonists continued to target Brazil, and in 1621 the Dutch West India Company was

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supra note 159, at 27–28; *see also* H. B. Johnson Jr., *The Donatary Captaincy In Perspective: Portuguese Backgrounds to the Settlement of Brazil*, 52 HISP. AM. HIST. REV. 206 (1972) (addressing lack of direct control).

208. ROY NASH, THE CONQUEST OF BRAZIL 88 (Harcourt, Brace & World, Inc., 1954) (1926); *accord* MARCHANT, *supra* note 174, at 80–81; MARQUES, *supra* note 10, at 253; PARRY, *supra* note 122, at 258; PRADO, *supra* note 100, at 242.

209. ALDEN, *supra* note 11, at 31; BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 86–87; MARQUES, *supra* note 10, at 364.

210. *See* Regimento Régio de Tomé de Sousa (Dec. 17, 1548) (Braz.), *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 11, at xxiv (a *regimento* was a list of instructions, duties, powers, and restrictions given to a particular official); BUENO, *supra* note 100, at 30, 53 (indicating that Sousa was granted power). 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 100, at 85, 92.

211. Regimento, *supra* note 210.

212. Lôbo, *supra* note 204, at 269. Many Portuguese land grantees in Brazil were required to establish towns, churches, and houses and were given five and six years to do so before the grants lapsed. HARRISON, *supra* note 199, at 105–06; MARQUES, *supra* note 10, at 255.

213. NASH, *supra* note 208, at 91 (quoting 2 ROBERT SOUTHEY, HISTORY OF BRAZIL 300 (1817)).

created with the specific goal of occupying and exploiting Brazil.[214] The French were also interested in colonizing Brazil and specifically chose to settle the places the Portuguese had not occupied.[215] France ultimately established several colonies in the sixteenth century in various parts of Brazil and occupied what is now Rio de Janeiro for at least five years before Portuguese forces evicted them and Portuguese settlers occupied the area.[216] Ultimately, Portugal engaged in sporadic warfare with both French and Dutch traders and settlers for over a century.[217] These aggressive threats to Portuguese ownership, exploitation, and settlement of Brazil led the Crown to attempt to actually occupy Brazil to solidify its claim under international law.[218]

The subsequent history of Portuguese colonization in Brazil further demonstrates the importance the Crown placed on occupying land to establish ownership and sovereignty. For example, Portuguese exploration and occupation of immense areas of new territory within modern day Brazil occurred during the sixteenth and eighteenth centuries.[219] One voyage of Jesuits up the Amazon was specifically designed to ensure Portugal would "not lose possession of this river."[220] In 1687, the Portuguese Crown challenged French settlements in French Guiana by building a fort on the northern bank of the Amazon River.[221] Also, in the seventeenth century, the Crown brought Azore Island settlers to Brazil and ordered royal officials to introduce more white settlers.[222] The Crown was not above using propaganda to get colonists to migrate to Brazil and help occupy it.[223] The Portuguese well understood the importance of actual occupancy of lands to help establish their Discovery claims.

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214. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 87, 112; BUENO, *supra* note 100, at 161; RALPH DAVIS, THE RISE OF THE ATLANTIC ECONOMIES 74, 80 (1973); HARRISON, *supra* note 199, at 1, 10–12, 38; MARQUES, *supra* note 10, at 358; PRADO, *supra* note 100, at 227.

215. MARQUES, *supra* note 10, at 358.

216. *See* BUENO, *supra* note 100, at 162 (indicating that France had colonies in Rio de Janeiro); DAVIS, *supra* note 214, at 74, 80; HARRISON, *supra* note 199, at 28–29; MARQUES, *supra* note 10, at 357; ALIDA C. METCALF, GO-BETWEENS AND THE COLONIZATION OF BRAZIL 1500–1600, at 118 (2005); PRADO, *supra* note 100, at 227.

217. *See, e.g.*, ALDEN, *supra* note 11, at 306; BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 112; MARQUES, *supra* note 10, at 254; NASH, *supra* note 208, at 94–95; PARRY, *supra* note 122, at 189, 259.

218. DAVIS, *supra* note 214, at 172.

219. BUENO, *supra* note 100, at 189; MARQUES, *supra* note 10, at 355, 436.

220. KIEMEN, *supra* note 179, at 90–92, 180.

221. MARQUES, *supra* note 10, at 448.

222. KIEMEN, *supra* note 179, at 24, 56.

223. Brazil was portrayed as a place of wonders where the natives lived idyllic lives. E. BRADFORD BURNS, A HISTORY OF BRAZIL 20 (2d ed. 1980).

ii. Uti Possidetis

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 in modern-day Uruguay. They engaged in numerous battles and voluminous negotiations and ultimately signed several treaties about the ownership of these lands.[224]

In 1680, Portugal aggressively attempted to "occupy" the lands of modern-day Uruguay and establish its claims to the region using the Discovery element of contiguity.[225] Portugal built and occupied the settlement of Nova Colônia do Santíssimo Sacramento across the River Plate from Buenos Aires with the intent of gradually expanding Portuguese settlements in southern Brazil southwards towards Colonia.[226] In fact, the Portuguese *Conselho Ultramarino* (Overseas Council), created in 1642 as the administrative body to manage the colonies, advised the king to establish other colonies southwards towards Colonia to solidify his claim to the unoccupied (by European standards) lands of modern-day Uruguay.[227] After establishing these settlements, the Crown began inducing homesteaders from its Atlantic islands, and even foreigners, to settle the region.[228]

After decades of fighting and arguing over these lands and the exact location of the 1494 Tordesillas line of demarcation, Portugal and Spain finally 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."[229] A series of treaties in 1701, 1703, 1715, 1737, and then the Treaty of Madrid in 1750, allowed Portugal to retain the lands it already occupied in South America, even though some of those lands were clearly beyond the limits of the Tordesillas line.[230] This made *de jure* the *de facto* occupation by Portugal of

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224. ALDEN, *supra* note 11, at 59, 66–67.

225. *Id*. at 70.

226. *Id.* at 67.

227. *Id.* at 76; Mathias C. Kiemen, *The Conselho Ultramarino's First Legislative Attempts to Solve the Indian Question in America, 1643–1647*, 14 THE AMERICAS 259, 259 (1958) ("The Conselho Ultramarino in Portugal was created by King João IV in 1642.").

228. ALDEN, *supra* note 11, at 73.

229. BLACK'S LAW DICTIONARY, *supra* note 33, at 1582 (defining *uti possidetis*); *see generally* MARCHANT, *supra* note 174, at 122 (discussing settlers using natives as slaves to expand the size of their plantations).

230. ALDEN, *supra* note 11, at 84–88; BUENO, *supra* note 100, at 167, 176, 179 (indicating that Portugal occupied land beyond the Todesillas line); Kenneth G. Grubb, *Brazil: Land and People*, *in* PORTUGAL AND BRAZIL, *supra* note 89, at 276, 284, 293, 297–98.

the lands that became the southern part of Brazil, and demonstrates Portugal's recognition and use of this element of Discovery to acquire recognized ownership of lands in Brazil.[231] "[E]ffective possession rather than prior discovery or earlier treaty rights thus became the primary basis for determining their common colonial boundaries."[232] Thus, while the Tordesillas demarcation line and first discovery were necessary to lay claims to land, Portugal and Spain came to accept that actual possession was necessary to determine full ownership.

iii. Symbolic Possession

Portugal also demonstrated its knowledge of the significance of occupancy and possession and its use of that element when it engaged in acts of symbolic possession and fictional occupancy to claim lands. Portugal and Spain often argued that when they merely spied new lands on their respective sides of the demarcation lines and then performed certain ceremonies on that land, it established their possession and ownership of the land under international law.[233] Other European governments and the United States also engaged in acts of symbolic possession and claimed ownership of lands that they were not yet able to actually occupy.[234]

The Portuguese Crown expressly ordered its explorers to perform these kinds of acts to prove where they had traveled and to establish Portugal's claims of ownership over newly discovered areas.[235] Portuguese explorers erected stone monuments, "*padrões*," along the west coast of Africa to mark their discoveries and "as emblem[s] of Portuguese sovereignty."[236] The Portuguese also used other procedures to claim new lands such as erecting crosses, celebrating mass on the lands, and bringing home symbolic items, commonly a handful of dirt, to present to the king.[237] They used all of these procedures in Brazil, as demonstrated by Pedro Cabral's actions on the Brazilian coast in 1500 when he went ashore and conducted a ceremony to officially take possession of the ter-

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231. Luiz Eniani Caminha Giorgis, *The Madrid Treaty–1750*, TERRAGAÚCHA.COM, http://www.terragaucha.com.br/tratado_de_madri_eng.htm (last visited Oct. 8, 2011).

232. ALDEN, *supra* note 11, at 88.

233. *See, e.g.*, SEED, *supra* note 3, at 9, 9 n.19, 69–73, 101–02.

234. *See, e.g.*, *supra* note 105 and accompanying text; A.S. KELLER, O.J. LISSITZYN & J.E. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400–1800 (1938); MILLER, NATIVE AMERICA, *supra* note 1, 125–26; SEED, *supra* note 3, at 9, 9 n.19, 69–73, 101–02.

235. *Compare* SEED, *supra* note 3, at 9 n.19, 69–73, 101–02, *and* Simsarian, *supra* note 105, at 113–14, 117–18, 120–24.

236. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 227.

237. PEDRO CALMON, HISTÓRIA DA FUNDAÇÃO DA BAHIA [HISTORY OF THE FOUNDATION OF BAHIA] 226 (1949); SEED, *supra* note 3, at 9, 9 n.19, 69–73, 101–02.

ritory in the name of the king, had several masses performed, and unfurled the banner of Christ.[238] Since he did not bring a stone *padrão*, his men erected an enormous wooden cross and "carved on it the arms of Portugal, and set it up near the mouth of the Santa Cruz River" to proclaim "Portuguese sovereignty" over the area.[239]

In conclusion, the evidence is overwhelming that the Portuguese Crown, officials, and citizens understood the importance and necessity under international law of occupying and possessing the lands in Brazil to solidify their country's first discovery claims to own the land and they used many means, including symbolic possession, to establish their occupancy of the lands.

C. Preemption/European Title

From the beginning of Portuguese colonization in Brazil, the Crown asserted its exclusive ownership of the land and assets in Brazil under international law, and its right of preemption, the power to control all acquisitions of land from native peoples.[240] In 1502, for example, the Crown began leasing land in Brazil to private merchants and licensing the use of Brazil's natural resources.[241] The Crown also distributed ownership of land to the captaincies and gave them the authority to make other land grants.[242] In 1548, the king authorized the first royal Governor-General to make land grants to colonists.[243] The Crown also consistently exercised its preemption power to prevent other countries and Portuguese colonists from buying land directly from Indigenous tribes and that they could not encroach on, or use, native lands without royal authorization.[244]

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238. MAGALHÃES, *supra* note 205, at 21–22; MARCHANT, *supra* note 174, at 13–14; PRESTAGE, *supra* note 31, at 281–83; Maria Adelina Amorim, *Primeiro Missionário em Terras de Vera Cruz* [*The First Missionary in the Lands of Vera Cruz*], 8 REVISTA DE LETRAS E CULTURAS LUSÓFONAS (2000), *available at* http://www.instituto-camoes.pt/revista/freihenrique.htm; José Augusto Alegria, *Presença da Romana Cantilena no Brasil* [*The Roman Catholic Presence in Brazil*], BRASIL-EUROPA (1992), *available at* http://www.revista.akademie-brasil-europa.org/CM20-01.htm.

239. MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 227.

240. ALDEN, *supra* note 11, at 32; BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 22; DIAS, *supra* note 202, at 312–13; MARQUES, *supra* note 10, at 255; *see* Bailey W. Diffie, *The Legal "Privileges" of the Foreigners in Portugal and Sixteenth-Century Brazil*, *in* CONTINUITY AND CONFLICT IN BRAZILIAN SOCIETY, *supra* note 204, at 1.

241. *See supra* notes 177, 192 and accompanying text.

242. *See supra* notes 201–04 and accompanying text.

243. ALDEN, *supra* note 11, at 31–32; Regimento, *supra* note 210.

244. Regimento, *supra* note 210.

The lands and assets in the colony of Brazil were considered to be the property of the Crown and could be distributed only by a king or his governor.[245] The first Governor-General enforced this right and forbade purchases of Indigenous lands or encroachment onto those lands by colonists without express authorization from the government.[246] He also imposed a system of licensing for trade and to buy lands from natives.[247] The colonists could not purchase lands directly from the natives because the king held the right of preemption over those lands, and every relationship between the Portuguese and the native tribes was controlled by royal officers.[248]

After independence, Brazil continued to assert its alleged rights under Discovery to control the sales and uses of Indigenous lands and to exercise the right of preemption against its citizens and Indigenous peoples. The Brazilian constitutions of the twentieth century exercise the preemption power over native lands and still prevent their sale without the permission of the federal government.[249] Thus, Indigenous Brazilians today are limited in selling or leasing their lands and the federal government plays a major role in those decisions.

It seems clear that the Portuguese royal government and the colonial and modern-day governments of Brazil claimed the European title and right over native lands. Portugal and Brazil exercised the Discovery right of preemption in the same manner as England and its colonies did in North America, the Spanish and Chilean governments did in the New World, and the United States continues to do today.[250]

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245. *Id.*

246. *Id.*

247. *Id.*

248. BUENO, *supra* note 100, at 225; KIEMEN, *supra* note 179, at 6 (in that officers were put in charge of handling native activities); FRANCISCO ADOLPHO DE VARNHAGEN, HISTÓRIA GERAL DO BRASIL [GENERAL HISTORY OF BRAZIL] XX (1903).

249. *See* CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1988 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL OF 1988] art. 20; CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1967 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL 1967] art. 186; CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1946 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL 1946] arts. 5, 216; CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1937 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL] art. 154; CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1934 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL 1934] art. 129.

250. *See, e.g.*, MILLER, NATIVE AMERICA, *supra* note 1, at 27, 31–35, 44–45; 25 U.S.C. §§ 81, 177, 415 (2006); Miller, Lesage & Escarcena, *supra* note 1, at 878– 84.

D. Native Title

The native title element of Discovery presumes that Indigenous peoples owned the full title to their lands before the arrival of Europeans but that international law immediately diminished their full property rights when Europeans arrived.[251] The discovering European country was presumed to have acquired the preemption right and the powers discussed above.[252]

Portugal assumed from the beginning of colonization that Indigenous peoples had either no property rights or else very limited rights in the lands they farmed and controlled for hunting and gathering activities. First, the Crown granted the captaincies the possession and control of the land and all the people who lived there.[253] Then, in the *Regimento Régio*, the Crown granted the first Governor-General the same rights in 1548.[254] Thereafter, Portuguese colonial officials acted as if native title was of no consequence 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 native lands.[255] The entire course of Portuguese colonization demonstrated a very limited view of native land rights.

One historian, however, states an opposing view when discussing lands the governor-generals granted to Indians who were brought to live in the villages established by the Jesuits.[256] In that situation, the lands granted to Indians could not be transferred from their ownership unless Indians willingly agreed.[257] This same author states that Indians were considered to be the owners of their cultivated lands and forests, and that these could not be taken from them.[258] In a 1677 amendment of a 1663 law, for example, the king stated that the Indians "were owners of their property and land, [in the Jesuit villages] 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."[259]

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

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251. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

252. *See supra* Part II.B.iii.C (regarding the limited property right of native title that Indigenous peoples were alleged to have retained).

253. DIAS, *supra* note 202, at 309–12.

254. BUENO, *supra* note 100, at 222.

255. *Id.* at 228.

256. KIEMEN, *supra* note 179, at 6, 143.

257. *Id.*

258. *Id.* at 6.

259. *Id.* at 143.

and natural owners of the lands in Brazil.[260] This law was reissued in June 1755 and Indians continued to be legally recognized as the primary and natural owners of their lands.[261]

Only a little evidence was uncovered on the native view point on the takeover of their lands and what they presumed they owned in real property. In one instance, though, Tupinambá warriors burned sugarcane plantations and told the Portuguese owners that the plantations and factories were located on native-owned lands.[262] The Guarani tribe also opposed the passing of their land to the Portuguese.[263] Apparently, these Indians shared ideas of land ownership and their rights and objected to Portuguese confiscation of their lands.

In more modern times, native title has presumably been recognized in Brazil. In 1823, José Bonifacio de Andrada e Silva, the father of Brazilian independence and a central figure in Brazil's first constitutional convention, wrote a document in which he defined the official Brazilian position on natives.[264] He presumed that Indians were the first and true owners of the land and not the Portuguese who arrived later, and that the "Índios bravos" ("wild Indians")[265] were "the truly ancient lords of the land."[266]

In several versions of the Brazilian constitution, the idea of a limited native title was addressed. The first constitution to deal with Indigenous questions was the Constitution of 1934: "The possession of the lands by the Indians that are permanently found in them must be respected, how-

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260. CELSO RIBEIRO BASTOS, CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] 496 (1998); SERVIÇO DE PROTECÇÃO AOS ÍNDIOS E LOCALISAÇÃO DE TRABALHADORES NACIONAES, COLLECTÂNEA INDÍGENA, DISCURSO DE INSTALLAÇÃO DO SERVIÇO DE PROTECÇÃO AOS ÍNDIOS, NO AMAZONAS [SERVICE OF PROTECTION OF INDIANS & LOCALIZATION OF NATIONAL WORKERS, INDIGENOUS COLLECTIVES, DISCOURSES ON THE INSTALLATION OF THE SERVICE OF PROTECTION OF THE AMAZON INDIANS] 10 (2d ed. 1929) [hereinafter COLLECTÂNEA INDÍGENA].

261. BASTOS, *supra* note 260, at 496; Lei de 6 de Junho de 1755 [Law of June 6, 1755] (Port.), *available at* http://iuslusitaniae.fcsh.unl.pt/imagens_livros/30_colleccao_legislacao_portugueza/01_legislacao_1750_1762/0369.jpg.

262. DIAS, *supra* note 202, at 168, 312–13.

263. ANTÔNIO MENDES JR. ET AL., BRASIL HISTÓRIA [BRAZIL HISTORY] (1995), *available at* http://www.geocities.ws/terrabrasileira/contatos/guaranis.html.

264. 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 1, 98 (David Maybury-Lewis et al. eds., 2009).

265. *Id.* at 98–100.

266. JOSÉ BONIFÁCIO DE ANDRADA E SILVA, APONTAMENTOS PARA A CIVILIZAÇÃO DOS ÍNDIOS BÁRBAROS DO REINO DO BRASIL [REMARKS FOR THE BRAZILIAN KINGDOM'S CIVILIZATION OF BARBARIC INDIANS] 37 (Agência-Geral do Ultramar 1963) (1823).

ever, they are prohibited from alienating them."[267] This constitution goes on to state clearly the elements of Brazilian preemption and limited native title: "The possession of the land by the silvicolous [inhabitants of woods] will be respected if they are permanently living in those lands; however, the alienation of those lands by them is forbidden."[268] Thus, Indians in Brazil could occupy and use their original lands but they were not allowed to sell them because, apparently, they only held a limited title. These are the same concepts of preemption and Indian title that are applied in the United States today.[269]

The Brazilian Constitution of 1937 also recognized and guaranteed Indians these rights using the same language, while the Constitution of 1946 used slightly different phrasing to protect identical rights.[270] The Constitution of 1967 also protected Indians' exclusive rights to use their land and natural resources: "It is assured, to the silvicolous, permanent possession of the lands they inhabit and recognize their right to exclusive usufruct of their natural resources and all the useful things existing in them."[271]

The current constitution of Brazil continues to recognize Indian title and its limitations and the federal government's overriding right in these lands, as defined by the Discovery elements of preemption and native title. The Constitution of 1988 states:

> The lands traditionally occupied by the Indians are the ones permanently inhabited by them and which are absolutely necessary to the preservation of the natural resources needed to the physical and cultural preservation of the land. The Indians have permanent possession of the land and exclusive usufruct of its natural riches. Any exploration within the indigenous lands will depend on the authorization of the National Congress, after the indigenous communities that would be affected are given a hearing, and are able to participate in the results of the explora-

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267. CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1934 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL 1934] art. 129.

268. *Id.*; THE COMPACT OXFORD ENGLISH DICTIONARY 1990 (2d ed. 1991) ("Silvicolous—living or growing in woodlands").

269. *See* 25 U.S.C. §§ 81, 177, 415 (2006); *accord* Johnson v. M'Intosh, 21 U.S. 543, 573–74 (1823).

270. CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1937 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL] art. 154; CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL 1946 [CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL 1946] art. 216.

271. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1967 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL 1967] art. 186.

> tion. These lands are inalienable and unavailable and the rights over those lands are not transferable.[272]

This constitution also allows Indians to ask the federal government to legally demarcate lands for them.[273] However, the lands must fit limited characteristics as defined in the constitution and must be traditionally occupied and used by Indians on a permanent basis, necessary for the preservation of environmental resources and native wellbeing, and necessary for native physical and cultural reproduction.[274] The constitution also invalidates any attempt to occupy or exercise dominion over Indigenous lands, and states that any exploration of the natural resources is void if not approved by the federal government.[275] It is clear that Indian land rights and "native title" are still limited by Brazilian law.[276]

Portugal and Brazil clearly used the element of the limited native title. These countries exercised extensive and unilateral authority over native lands throughout colonial history, and Brazil continues to exercise these extensive powers today.

E. Native Limited Sovereign and Commercial Rights

This element holds that Indigenous governmental rights, sovereign powers, and commercial and property rights were automatically limited upon the arrival of Europeans.[277] Various popes explicitly granted Portugal these powers in the papal bulls of the fifteenth and sixteenth centuries over Indigenous peoples and governments in Africa and the New World.[278] Thereafter, Portugal and Brazil enforced this authority against native peoples.

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272. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1988 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL OF 1988] art. 231.

273. *Id.* One commentator alleges that the process used for demarcating lands for Indigenous peoples makes it impossible to get legal and effective approvals. David Maybury-Lewis, *From Savages to Security Risks: The Indian Question in Brazil*, *in* THE RIGHTS OF SUBORDINATED PEOPLES 50 (Oliver Mendelsohn & Upendra Baxi eds., 1994).

274. BASTOS, *supra* note 260, at 498.

275. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1988 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL OF 1988] art. 231.

276. *See* BASTOS, *supra* note 260, at 495.

277. Johnson v. M'Intosh, 21 U.S. 543, 573–74 (1823); *see supra* Part II.B.iii.C–D (demonstrating ways in which the real property rights of the Indigenous peoples of Brazil were deemed to be limited by Discovery, as much of it is relevant to the element of the limitations imposed on Indigenous sovereign and commercial rights in Brazil).

278. *See* CHURCH & STATE, *supra* note 79, 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 permission from Portugal.).

The Crown assumed from the beginning of its exploration and exploitation of Brazil that it possessed exclusive authority over the native peoples, land, and resources.[279] As mentioned above, starting in 1501, the king was interested in exploiting the resources of Brazil and immediately began licensing private merchants to harvest the valuable Brazilwood and to look for other resources.[280] In establishing the captaincies, the Crown granted lands, sovereign authority, jurisdiction, and commercial authority over the areas and everyone found there, including native peoples.[281] The king also took steps to control all the commercial and economic activities in Brazil during the time of the captaincies and the governor-generals. For example, the king ordered that trade could only take place in designated markets and he established a system of licenses for merchants and shipments of merchandise.[282] Royal laws forbade unlicensed foreign ships in any Portuguese overseas possession and prevented direct foreign trade with Brazil from 1591 to 1808.[283] The Crown tried to stop foreign trade with Brazilian natives and forbade Portuguese colonists from trading with Indians.[284]

The first Governor-General, from 1549–1553, exercised royal authority over Indigenous commercial rights by granting licenses to build and operate mills and salt works to Portuguese colonists using native lands and resources.[285] He also established a system of regulations to control commerce between natives and colonists and prevented individual settlers from trading with Indians without a royal license.[286] This trade had to be conducted in reserved areas that were governed by royal rules.[287] Portuguese colonists were also disallowed from traveling to Indian villages to trade.[288]

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279. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 22. 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. DIAS, *supra* note 202, at 312–13; MARQUES, *supra* note 10, at 255.

280. *See, e.g.*, KIEMEN, *supra* note 179, at 8; MARCHANT, *supra* note 174, at 28–29 (discussing the king contracting for the cultivation of brazilwood almost immediately following Brazil's discovery); PARRY, *supra* note 122, at 258; Alden, *Black Robes, supra* note 201, at 20.

281. DIAS, *supra* note 202, at 174, 309–13; Regimento, *supra* note 210.

282. BUENO, *supra* note 100, at 221; Regimento, *supra* note 210.

283. ALDEN, *supra* note 11, at 403–04.

284. KIEMEN, *supra* note 179, at 98 (insofar as the Portuguese Crown wanted to stop foreign trade in the Amazon Valley); Regimento, *supra* note 210.

285. MARCHANT, *supra* note 174, at 58, 83.

286. *Id.*; BUENO, *supra* note 100, at 117.

287. BUENO, *supra* note 100, at 117.

288. *Id.* at 91 (citing Governor Sousa's orders to the colonists); Regimento, *supra* note 210.

Additionally, the Crown tried to control Indians' sovereign and property rights by directing where they lived and how they governed their villages. The Jesuits were authorized by the Crown for over two hundred years to civilize and convert natives by relocating them to Jesuit controlled missions or towns called *aldeias*.[289] The Jesuits required natives to work to support the villages and to allegedly acquire European habits of industry.[290] Indians were supposed to be paid for their work but they were then required to pay the salary of the Jesuits and the lay officials who helped run the villages and exercised judicial authority.[291] In the 1770s, after the expulsion of the Jesuits from Brazil, the Minister of the Kingdom, the Marquis of Pombal, ordered that natives continue to be forcibly removed to reservations and that they be managed by royal officials.[292]

Interestingly, the Crown did recognize some native sovereign and governmental rights from the beginning of official colonization. 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.[293] Moreover, the Portuguese recognized some sovereign authority of native leaders and sometimes tried to rule Indigenous people through their own governments and chiefs.[294]

Today, 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. The Constitution of 1988 reserves to the federal government "the lands traditionally occupied by the Indians."[295] The only land right apparently reserved to natives is the ability to keep their lands in the natural state.[296]

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289. E. BRADFORD BURNS, ET AL., *Brazil: Royal Governors, Jesuits, and Slaves*, BRITANNICA ONLINE ENCYCLOPÆDIA ACAD. ED., http://www.britannica.com/EBchecked/topic/78101/Brazil (last visited Oct. 9, 2011); *see generally* MARCHANT, *supra* note 174, at 105–08 (discussing Jesuits collecting converted Indians into three parishes).

290. NASH, *supra* note 208, at 120.

291. KIEMEN, *supra* note 179, at 5–8, 52 (internal citation omitted).

292. CARTAS: INFORMAÇÕES, FRAGMENTOS HISTÓRICOS E SERMÕES [LETTERS: INFORMATION, HISTORICAL GRAGMENTS AND SERMONS] 358–59 (Jose De Anchieta ed., 1988) (discussing churches that were built closer to areas where the Indians were); NASH, *supra* note 208, at 120; Maybury-Lewis, *supra* note 273, at 39.

293. BUENO, *supra* note 100, at 222 (the Regimento Régio required a system of cooperation and alliances between the government and Indigenous tribes).

294. KIEMEN, *supra* note 179, at 4 (internal citations omitted).

295. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1988 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL OF 1988] art 20.

296. *Id.*

i. Slavery

The most extreme example of Portuguese assertion of authority over Indigenous sovereign and commercial rights was the imposition of slavery on native peoples. In fact, the papal bulls that authorized Portuguese attacks on pagans in Africa and Brazil, and the capture of their goods and territories, also ordered that they be placed into "perpetual slavery."[297] The vast majority of Brazilian settlers were happy to comply with this command especially since they thought that the colony could not exist or succeed without native slavery.[298] They also argued that natives were sufficiently paid for being enslaved by conversion to Christianity.[299] Colonists sought any excuse to enslave natives and to control their sovereignty, economic rights, lives, and destinies.[300]

The Crown, however, took ambiguous and conflicting positions on slavery for much of the colonial period. While ostensibly outlawing native slavery under most circumstances as early as 1570, the Crown often legally justified it and tolerated hundreds of years of slavery of native peoples.[301] Most of the colonists ignored the ineffectual bans on slavery the Crown put in place and the Crown was well aware of it.[302]

The 1548 *Regimento* issued to the first Governor-General allowed enslavement of tribes that were hostile, Indians who assaulted whites, and Indians who captured other natives for "cannibalistic feasts."[303] Ironically, any Indians who were allegedly "rescued" from being sacrificed or eaten—the so-called "cord Indians"—could then legally be enslaved since the Portuguese had apparently saved their lives, or ransomed them

297. Pope Nicholas V, *supra* note 79, at 23; *see, e.g.*, BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 21.

298. BUENO, *supra* note 100, at 131 (arguing that the Portuguese found support for enslaving natives and Africans in the biblical story of Noah and Ham); KIEMEN, *supra* note 179, at 98–99; FAUSTO, *supra* note 10, at 26; *see* BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 88, 92–93 (priests repeatedly reported that settlers mistreated, killed, and enslaved Indians on any pretext); *see generally* Stuart B. Schwartz, *Indian Labor and New World Plantations: European Demands and Indian Responses in Northeastern Brazil*, 83 AM. HIST. REV. 43, 60 (1978) (Colonists and Jesuit missionaries shared a basic agreement "that Indian labor was vital to the colony's success."); Oliveira, *supra* note 264, at 94 (Father Antônio Vieira called the labor of the natives "red gold.").

299. Alden, *Black Robes*, *supra* note 201, at 31; *see generally* KIEMEN, *supra* note 179, at 97–99 (discussing law governing captured Indian slaves).

300. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 88, 92–99. The Spanish pursued the same interests in their New World colonies and enslaved Indians through the *encomienda* system. *See, e.g.*, HANKE, *supra* note 112, at 23–24.

301. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 88; KIEMEN, *supra* note 179, at 5–7; Alden, *Black Robes*, *supra* note 201, at 28.

302. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 88.

303. KIEMEN, *supra* note 179, at 3–5; MARCHANT, *supra* note 174, at 82.

from the cord as it was called.[304] Portuguese colonists were then allowed to enslave the rescued native for five to ten years as repayment.[305] Several laws were enacted over many decades naming who was authorized to decide whether an Indian had been ransomed and could be enslaved.[306] As one commentator notes: "Cord-Indians, the rarest of rare phenomena, suddenly became as common . . . as mangos and Brazil nuts, when the solemn tribunals sat to determine the legal status of Indian slaves."[307] Colonists engaged in many expeditions, called *resgates* (rescues), allegedly designed to save Indians so that they could then be enslaved.[308] The Crown had a conflict of interest in stopping *resgates* because colonists were required to pay the government for enslaved Indians.[309] Additionally, in 1624 a Governor-General ruled that the royal fifth, or 20% of any mined minerals and a head tax (*Capitacao*), on Indigenous slaves captured had to be delivered to the Crown.[310]

A schizophrenic series of laws and policies on native enslavement then followed over centuries as settlers demanded slaves, the Crown desired more profits and taxes, and, allegedly, priests argued for more humane treatment of natives.[311] As already mentioned, the Crown first outlawed Indian slavery in Brazil under most circumstances in 1570.[312] In 1595, the Crown enacted its second law preventing Indian slavery, but in fact allowed servitude for Indians who had been captured in just wars.[313] Three more statutes were enacted in the early seventeenth century outlawing enslavement, and a 1609 royal edict stated that both Christian and pagan Indians were born free and could not be compelled to work.[314] But these laws caused such bitter complaints by the Portuguese settlers that a 1611 law modified the royal position and once again allowed compensation to be paid to settlers who ransomed Indians about to be cannibalized; the compensation being ten years of free labor from the rescued Indi-

304. KIEMEN, *supra* note 179, at 5, 7, 35.

305. *Id.*

306. *Id.* at 6–7. In case of war or uprising, church and civil officials could order a just war, and then colonists could enslave captured natives. *Id.*

307. NASH, *supra* note 208, at 111.

308. KIEMEN, *supra* note 179, at 5, 7, 35.

309. *Id.* at 4–7.

310. FAUSTO, *supra* note 10, at 51; TERESA A. MEADE, A BRIEF HISTORY OF BRAZIL 28 (2d ed. 2010).

311. *See* KIEMEN, *supra* note 179, at 148, 153, 158, 162, 164, 175, 185.

312. *Id.* at 4 (internal citation omitted); MAGALHÃES, *supra* note 205, at 115–16.

313. KIEMEN, *supra* note 179, at 101 ("labor-hungry colonists" could create incidents to justify defensive just wars); Alden, *Black Robes*, *supra* note 201, at 28.

314. KIEMEN, *supra* note 179, at 5–8; Alden, *Black Robes*, *supra* note 201, at 28, 31 n.25.

an.[315] This law also appointed lay captains, instead of Jesuits, to oversee the temporal affairs of Indian communities and the task of assigning native labor to settlers.[316] In addition, all able-bodied Indians, ages thirteen through sixty, who lived in the Jesuit villages were registered by the director of Indian settlements and at all times half of the registered Indians were required to work for Portuguese colonists.[317]

Further laws in 1624, 1647–1649, 1653–1655, 1663, 1677, 1679, and 1686 demonstrate the amount of time the Crown put into dealing with the conflicting policies and its own conflicts of interest about authorizing and controlling Indian slavery.[318] In 1663, the colonists got the law they had long demanded because the Crown allowed town councils to elect officials who would decide how many Indian slaves each colonist needed.[319] Then, in contrast, in 1686, the king issued a comprehensive body of laws under which the priests once again had complete jurisdiction in the Indian villages, but, conveniently, they were ordered to locate the villages near the settlers' communities so as to facilitate trade and the procurement of Indian labor by colonists.[320] In 1688, the Crown repealed the ban on slavery and once again sanctioned slaving expeditions—but only if missionaries certified that a hostile tribe was preparing to attack, had invaded the property rights of Christians, or was inhibiting the preaching of the gospel.[321] Starting in the 1750s, Brazilian policy consisted of placing Indians on reservations and renting them out to Portuguese settlers or the government to work for up to six months a year for an insignificant wage.[322]

Settlers had no trouble working around the putative bans on Indian slavery. One noted figure in Brazilian history, Father Antônio Vieira,

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315. KIEMEN, *supra* note 179, at 5, 7; Alden, *Black Robes*, *supra* note 201, at 28.

316. KIEMEN, *supra* note 179, at 5, 7; Alden, *Black Robes*, *supra* note 201, at 28.

317. KIEMEN, *supra* note 179, at 91; NASH, *supra* note 208, at 120.

318. KIEMEN, *supra* note 179, at 65, 68, 70–71, 86, 95–96, 98–99, 136, 139–46, 156–57, 164; Alden, *Black Robes*, *supra* note 201, at 28, 32.

319. KIEMEN, *supra* note 179, at 118–19, 171 (in 1687 and 1688, there is evidence of local juntas discussing the legality of defensive and offensive wars to acquire slaves).

320. KIEMEN, *supra* note 179, at 158–62; IV SERAFIM LEITE, HISTORIA DA COMPANHIA DE JESUS NO BRASIL [HISTORY OF THE SOCIETY OF JESUS IN BRAZIL] 369–75 (1938–50) (reprinting the Regimento das Missões do Estado do Maranhão e Grão-Pará of 1686) [hereinafter IV LEITE, COMPANHIA DE JESUS]; Alden, *Black Robes*, *supra* note 201, at 31, 33–34 (Jesuits were entrusted with a major role in distributing Indian workers to settlers).

321. KIEMEN, *supra* note 179, at 164–66; IV LEITE, COMPANHIA DE JESUS, *supra* note 320, at 377–80 (internal citation omitted); Alden, *Black Robes, supra* note 201, at 34.

322. Maybury-Lewis, *supra* note 273, at 39; *see* JOHN HEMMING, RED GOLD: THE CONQUEST OF THE BRAZILIAN INDIANS 36–37 (1972) ("Royal patents specified that a donator could use all the Indian slaves he wished in Brazil or on his ships . . . [as] slavery [had] now became [institutionalized] as part of the colonial way of life in Brazil itself.").

stated that the 1611 law led to fraud as ransoming expeditions, purportedly to free Indians, were instead designed to capture Indians, Christian or not, and make them slaves.[323] Historians agree that settlers would seize any Indian, even those living in the Jesuit towns, and claim they were hostiles so as to enslave them.[324] Obviously, slavery was a major limitation on the sovereign and commercial rights of Indigenous communities and individuals.

This discussion shows how Portugal and Brazil dealt with the peoples and resources in the New World and also illustrates how they defined the limited nature of Indigenous sovereign and commercial rights. The Portuguese Crown repeatedly demonstrated its overriding interest and alleged right to rule Brazil as a colony and to acquire the economic assets and sovereign powers of the Indigenous governments and peoples.

F. Contiguity

Portugal used the element of contiguity to claim lands far beyond the areas it actually discovered and occupied. The 1493 papal bulls and the 1494 Treaty of Tordesillas granted Portugal exactly this kind of right to all lands east of the demarcation lines in South America.[325] That grant was about as expansive a definition of contiguity as can be imagined. In addition, Portugal used a more limited application of contiguity in the 1530s when it granted the captaincies enormous stretches of Brazil's coastline and all lands into the interior to the demarcation line.[326] The vast majority of these lands had not even been seen by Portuguese explorers, never mind occupied by them. Finally, Portugal used contiguity principles in its contest with Spain for lands that are today in Uruguay.[327]

The demarcation lines of the papal bulls and the Treaty of Tordesillas are proof that Portugal, Spain, and the papacy understood and used the element of contiguity to establish Discovery claims. The lines designated the boundaries of the lands each would own. Portugal and Spain honored these lines somewhat. For example, kings of Spain often ordered their

323. KIEMEN**,** *supra* note 179, at 83–85; *see also* Alden, *Black Robes*, *supra* note 201, at 31, 37.

324. MARCHANT, *supra* note 174, at 115.

325. Pope Alexander VI, *supra* note 86, at 56; Treaty of Tordesillas, *supra* note 27, at 84–85.

326. HARRISON, *supra* note 199, at 12–13; 4 ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 386 (Cooper Square Publishers 1962) (1918). 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. MILLER, NATIVE AMERICA, *supra* note 1, at 4, 19, 56, 69–70.

327. *See supra* Part II.B.ii.

explorers to avoid any part of Brazil and any land on Portugal's side of the demarcation lines.[328] As both countries penetrated the Pacific, they agreed in the 1529 Treaty of Saragossa to draw the line of Tordesillas around the globe into the Pacific.[329] In 1559, a Spanish expedition to the Pacific was enjoined not to trespass on Portugal's side of that line.[330] Portugal and Spain evidently recognized each other's rights under the Discovery element of contiguity as defined by these demarcation lines.

In addition, Portugal used the element of contiguity—more in line with the Anglo-American definition—and made claims to lands that were contiguous to Portuguese and Brazilian colonial settlements. In the 1450–1470s, Portuguese kings claimed islands off the Iberian coast due to their proximity to Portugal's Cape St. Vincent.[331] Moreover, when Christopher Columbus returned from the Caribbean, King John of Portugal claimed the newly discovered lands because he thought they were close or contiguous to his Azore Island colonies.[332] John prepared a fleet to take possession of those Caribbean islands.[333] Because of doubts about the contiguity argument and for other reasons, Spain and Portugal ultimately signed the Treaty of Tordesillas preserving the Caribbean for Spain and reserving Brazil and the southern Atlantic trade routes to India for Portugal.[334] As already mentioned, in the 1530s, Portugal used principles of contiguity in Brazil when it granted enormous stretches of coastline and land to the demarcation line to the captaincies.[335] Portugal also used contiguity, 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.[336]

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328. 2 MERRIMAN, *supra* note 61, at 210–13, 218 (citing Spanish King Ferdinand's instructions to Juan Diaz de Solis "to explore the coasts of South America . . . taking great care not to trespass on the territories of the king of Portugal."); 3 MERRIMAN, *supra* note 99, at 421–22 (citing King Charles V of Spain's instructions to Magellan to "navigate to [the Spice Islands] without touching any sea or land of the king of Portugal" and a 1518 instruction from King Charles V to an expedition bound for the Pacific to safeguard the "rights of the king of Portugal . . . inside the limits of his line of demarcation.").

329. 3 MERRIMAN, *supra* note 99, at 452–53.

330. 4 MERRIMAN, *supra* note 326, at 226.

331. PRESTAGE, *supra* note 31, at 45.

332. *Id.* at 237; MARQUES, *supra* note 10, at 222; MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 89; PARRY, *supra* note 122, at 151.

333. LIVERMORE, *supra* note 164, at 131; PRESTAGE, *supra* note 31, at 237.

334. PARRY, *supra* note 122, at 152.

335. *See supra* note 203 and accompanying text.

336. MARQUES, *supra* note 10, at 355.

As already discussed under the element of actual occupancy, Portugal also used contiguity in its struggle with Spain over the lands in modern day Uruguay.[337] Portugal and Brazilian colonists used contiguity arguments and actions to make claims to "possess" and own these lands long before they had actual possession of them. The Portuguese established the town of Colonia do Sacramento in 1679 across from Buenos Aires but far south of any Brazilian settlements.[338] The Crown sent troops and settlers to Colonia and at the same time it made a contiguity argument that it already owned all the lands in between.[339] The Crown began establishing other settlements south of São Paulo towards Colonia, such as Santa Catarina and Rio Grande in 1737, and offered inducements to its Atlantic Island citizens and foreigners to populate these new towns.[340] The royal *Conselho Ultramarino* (Overseas Council) was well aware of the legal principle of contiguity and the need to occupy land and accordingly advised the king in 1728 that a delay in founding the town of Rio Grande might prejudice Portugal's claim to the unoccupied lands of that area.[341] In 1730, the Council even recommended building Rio Grande on the south side of the Rio Grande River so as to create a contiguity claim over the plains south and west of that river towards Colonia which, as the Council stated, would not happen if Portugal built the town on the north side of the river.[342] In 1736, the Council expressly advocated contiguity ideas when it suggested that homesteaders from the Atlantic Islands occupy Rio Grande "because the continuation of these settlements will be the best means of deciding the question of limits . . . between the two crowns."[343]

There is no question that Portugal was aware of the Discovery element of contiguity and used it in making claims in the eastern and western Atlantic, Brazil, and in the lands that are in modern-day Uruguay.

G. Terra Nullius

The *terra nullius* element of Discovery states that Europeans legally owned any vacant and empty lands that they encountered.[344] Europeans defined *terra nullius* as any area of land that was physically empty of human beings, and any region that was populated but that was governed

337. *See supra* Part II.B.
338. ALDEN, *supra* note 11, at 67.
339. *Id.*; *see infra* notes 339–343 and accompanying text.
340. ALDEN, *supra* note 11, at 70–73.
341. *Id.* at 76.
342. *Id.* at 76–77.
343. *Id.* at 77.
344. *See supra* p. 8 (discussing the definition of *terra nullius*).

by a human society, form of government, or laws that European legal regimes did not recognize.[345] Portugal used both arguments to consider lands in Brazil to be "vacant" and available to claim.

At the very beginning of building its overseas empire, Portugal and the papacy relied on the idea of *terra nullius* and that Portugal could claim, and popes could grant, vacant lands to Portugal. Under medieval law, the pope was assumed to have the authority to dispose of unoccupied lands.[346] 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.[347] On many other occasions Portugal made claims to own various Canary, Azore, and Madeira islands based on the argument that they were empty, unoccupied, and had no owner.[348] The Portuguese even named an archipelago the Desertas Islands, meaning deserted or waste.[349]

Portugal also made claims to lands in Brazil based on *terra nullius*.[350] 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.[351] In the 1960s, Brazil continued to assume that it could encroach on Indigenous lands under *terra nullius* ideas.[352]

The papacy and Portugal also advocated for the second definition of *terra nullius*, that is, Indigenous lands would be available for Portuguese ownership even if they were occupied if the governments, religions, and societies there were ones that Europeans did not recognize as valid.[353] A long series of papal bulls granted Portugal and Spain ownership of Indigenous lands even though it was common knowledge that non-Europeans

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345. *See supra* note 148. Spain, England, and the United States also claimed vacant lands under *terra nullius*. *Id.*

346. PRESTAGE, *supra* note 31, at 8.

347. PARRY, *supra* note 122, at 147.

348. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 21; LIVERMORE, *supra* note 164, at 112; PRESTAGE, *supra* note 31, at 43–44.

349. MARQUES, *supra* note 10, at 148.

350. *Id.* at 252 (stating that because there were few Brazilian Indians, and they were sparsely distributed, vast areas of very inviting land looked deserted).

351. ALDEN, *supra* note 11, at 66–67 (internal citation omitted).

352. *See* WILLIAM BALÉE, FOOTPRINTS OF THE FOREST: KA'APOR ETHNOBOTANY–THE HISTORICAL ECOLOGY OF PLANT UTILIZATION BY AN AMAZONIAN PEOPLE 46–47 (1994) In 1962, the Brazilian federal agency, SUDENE ("Agency for the Development of the Northeast"), 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. *Id.*

353. MILLER, NATIVE AMERICA, *supra* note 1, at 4–5.

were living on and governing those lands.[354] European Christian legal systems assumed that non-Christians did not have rights to "possess or negotiate any dominion in the then-existing international context."[355] Europeans also based *terra nullius* ideas on race. They argued that "the first occupier of a land devoid of Caucasian people in areas outside Europe . . . would belong to the first nation who occupied it."[356]

The first official Brazilian historian, Francisco Adolfo Varnhagen, also invoked *terra nullius* principles when he wrote in 1854 that "savage" Indians could not be considered a dignified ancestry for a country that wanted to be counted among the civilized nations.[357] He said that Brazil, "this blessed soil," could not be governed "through the wild anarchy" of Indigenous people because that "would leave the country unpopulated" and "Christianity came to extend its hand to this degraded and sad state."[358]

In sum, Portugal and Brazil were well aware of *terra nullius* as an element of international law and relied on both definitions of this principle to claim land ownership and sovereignty in Brazil over vacant lands, and over lands occupied and ruled by Indigenous governments and societies.

H. Christianity

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could . . . the 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 ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity.[359]

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354. *See, e.g.*, Pope Nicholas V, *supra* note 79, at 20–26; Pope Alexander VI, *supra* note 86, at 61–63; *see also* Valentin Y. Mudimbe, Romanus Pontifex *(1454) and the Expansion of Europe*, *in* POSTCOLONIALISMS: AN ANTHOLOGY OF CULTURAL THEORY AND CRITICISM 58 (Gaurav Desai & Supriya Nair eds., 2005).

355. Mudimbe, *supra* note 354, at 51.

356. PRADO, *supra* note 100, at 228.

357. NILO ODALIA, VARNHAGEN: HISTORIA [VARNHAGEN: HISTORY] 37–38 (1979) (discussing Varnhagen, HISTORY OF BRAZIL, *supra* note 248).

358. *Id.* Varnhagen's reference to Brazil remaining "unpopulated" if civilized Europeans did not settle the land reminds one of the United States Supreme Court's similar statement in *Johnson v. M'Intosh* that:"[t]o leave [Indians] in possession of their country, was to leave the country a wilderness." Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

359. *Johnson*, 21 U.S. at 572–73.

Portugal, the papacy, and Brazilian colonists fully subscribed to the sentiment expressed by the United States Supreme Court above. Portugal justified its explorations and claims to the assets of Asia, Africa, and Brazil first and foremost on religion.[360] Brazil's colonial officials and modern-day governments also used this element to justify their domination of Indigenous peoples.[361] The evidence is overwhelming that Portugal and Brazil used religion to assert their superiority over Indigenous peoples and to establish legal claims over the lands, assets, and peoples.

The papal bulls from 1436 forward ordered Portugal to spread Christianity through its explorations and conquests.[362] The Crown often recognized the importance of religion to its colonization of Brazil.[363] King João III, for example, instructed the first Governor-General 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."[364] The Portuguese of every class saw themselves as a chosen people with a duty to spread the Catholic faith and convert the Infidels.[365]

In Brazil, the Crown and Church created a system called *Padroado Real* (royal patronage), in which the Church was subordinated to the Crown and became an integral part of the government.[366] *Padroado* was a union between Church and State, where the Crown agreed to support, protect, and administer the business of the Church, and the Church agreed to relinquish all property and donations to the Crown in exchange for the exclusive right to educate, civilize, and convert the native peoples.[367] If Portuguese kings desired to continue building their empire,

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360. William J. Entwistle, *Religion and Institutions*, *in* PORTUGAL AND BRAZIL: AN INTRODUCTION, *supra* note 89, at 82, 84; J. H. Plumb, *Introduction* to BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at xxi–xxvi (Fifteenth century Portuguese "exploitation from the very first was encased in religious zeal" was conducted in "the service of God and profit" and killing and enslaving heathens was righteous and just).

361. *See, e.g.*, *infra* notes 371–373 and accompanying text.

362. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 21–23; *see also* Pope Nicholas V, *supra* note 79, at 20–26.

363. COLLECTÂNEA INDÍGENA, *supra* note 260, at 7.

364. SOUZA, *supra* note 173, at 23.

365. KRONDL, *supra* note 157, at 148.

366. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 228.

367. FAUSTO, *supra* note 10, at 23–24; *see* MARSHALL C. EAKIN, BRAZIL: THE ONCE AND FUTURE COUNTRY 122 (1998). Under canon law, *ius patronatus* made the kings of Portugal and Spain responsible for the propagation of the faith and the organization of the Church in newly discovered lands. In exchange for these obligations, the kings received the right, among others, to nominate bishops. This became known as the patronage system. FAUSTO, *supra* note 10, at 23; LANG, *supra* note 159, at 51 (noting that the Crown had authority to make appointments to all ecclesiastical posts in Brazil).

they had to fulfill their part of the bargain under the system of *Padroado*.[368]

The Crown attempted to carry out its part of the bargain in Brazil.[369] The donations of land and sovereignty to the captaincies in the 1530s, for example, gave them a special mission to convert the Infidels.[370] Colonial officials stated in laws from 1548, 1663, and 1677 that the principal purpose of the colony was to convert natives.[371] The Jesuits were given almost complete control over natives and had the sole authority to travel into the backlands to domesticate pagans and show them the way to salvation.[372] Interestingly, at first the natives were considered to not have any religion and that they would be easy to convert.[373] Soon, however, native peoples were increasingly considered the Devil's envoys.[374] It was thought that since the gospel had expanded to all corners of Europe, the devil had been exiled to lands outside of Europe, such as Brazil.[375]

The Crown and colonists were, from the very beginnings of European colonial expansions, not solely interested in religious conversion. From the very beginnings of European colonial expansions, religious motivation was never the sole interest.[376] Economic and social motives were inextricably linked with religion.[377] For Portugal, expansion and trade to Africa, Asia, and Brazil was designed to gain converts and to acquire trade and profits.[378]

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368. KRONDL, *supra* note 157, at 156.

369. Pedro Cabral sailed under the symbol of the *Ordem de Cristo*, the Order of Christ. This order was created by Pope John XXII. *See Historia Da Odrem Militar De Cristo* [*History of the Military Order of Christ*], ORDENS HONORIFICAS PORTUGUESAS [PORTUGUESE ORDERS OF HONOR], http://www.ordens.presidencia.pt/?idc=120&idi=1918 (last visited Oct. 9, 2011); *see also* Francis A. Dutra, *Membership in the Order of Christ in the Seventeenth Century: Its Rights and Obligations,* 27 THE AMERICAS 3, 3–25 (1970). Cabral named the land *Terra de Vera Cruz* (Land of the True Cross). THOMAS E. SKIDMORE, BRAZIL: FIVE CENTURIES OF CHANGE 19 (1999). Later the name became *Terra de Santa Cruz* (Land of the Holy Cross). *Id.*

370. *See, e.g.*, DIAS, *supra* note 202, at 309–12.

371. KIEMEN, *supra* note 179, at 4, 143.

372. *Id.* at 6.

373. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 85; MAGALHAES, *supra* note 205, at 21–22, 113; PRESTAGE, *supra* note 31, at 284; Alden, *Black Robes*, *supra* note 201, at 20–21.

374. SOUZA, *supra* note 173, at 34.

375. SOUZA, *supra* note 173, at 24; *see generally* JOSE DE ANCHIETA, PREGACAO UNIVERSAL [UNIVERSAL SERMON] (1561).

376. EXPANSION OF EUROPE, *supra* note 34, at 5.

377. *Id.*; PARRY, *supra* note 122, at 19.

378. EXPANSION OF EUROPE, *supra* note 34, at 58–59.

Brazilian colonization and the conquest of the Indigenous peoples were justified by the Discovery element of religion and the idea of the superiority of Christianity.

I. Civilization

Portuguese and Brazilian colonists presumed that the superiority of their governments, cultures, and civilizations justified their conquests and authority over barbarian Indigenous peoples.[379] There is ample evidence to support this fact. Other colonizing countries and settler societies—such as Spain, the United States, and England—fostered similar ethnocentric beliefs, paternalistically espousing native people's need for European structure and control.[380]

From the start, Portuguese explorers and settlers believed that Brazilian natives lacked "religion, laws, or kings."[381] Indians were stereotyped as unspoiled children of Nature who needed tutelage and protection; a conviction that was quickly replaced by the image of the irredeemable savage who was without government or law.[382] Both of these ideas, ironically, reflect the papal bulls and the guardianship duties that the papacy awarded to Portuguese kings to civilize pagans in the Canary Islands, Africa, and the New World.[383] A Portuguese priest in Brazil in the 1550s clearly expressed the negative view of natives when he wrote of the "savage" nature of the Amerindians: they were "utterly bestial and untrustworthy" the "most vile and miserable heathens in all mankind"[384] and the Portuguese had to force them to live and work in villages "as rational creatures."[385]

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379. C. R. BOXER, RACE RELATIONS IN THE PORTUGUESE COLONIAL EMPIRE 1415–1825, at 90, 94–96 (1963) [hereinafter BOXER, RACE RELATIONS].

380. *See, e.g.*, Miller, Lesage & Escarcena, *supra* note 1, at 873; MILLER, NATIVE AMERICA, *supra* note 1, at 28, 39–40, 163–73; MILLER, DISCOVERING INDIGENOUS LANDS, *supra* note 1, at 43, 49, 76–78, 87–88, 92–93, 107, 128, 149, 171–72, 175, 186, 216–18, 220–21, 250.

381. Alden, *Black Robes*, *supra* note 201, at 21; *accord* BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 85; MORISON, THE EUROPEAN DISCOVERY, *supra* note 84, at 285 (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 . . . they have no boundaries of kingdoms and provinces.").

382. BOXER, THE PORTUGUESE SEABORNE EMPIRE, *supra* note 60, at 85; BUENO, *supra* note 100, at 173.

383. *See* Pope Alexander VI, *supra* note 86, at 84–85; Pope Nicholas V, *supra* note 79, at 20–26.

384. BOXER, RACE RELATIONS, *supra* note 380, at 90–91.

385. *Id.* at 91 (quoting 2 MONUMENTA BRASILIAE 1553–1558, at 448–49 (Serafim Leite ed., 1957)).

As early as 1540, the Portuguese Crown placed the Jesuits in charge of all education of the natives of Brazil.[386] Jesuits established villages around Brazil and removed entire tribes to settle under their control in these towns.[387] The Jesuits worked to assimilate natives into Portuguese culture, and Jesuit historians claim they were the "great civilizers" who "combat[ed] idolatry, drunkenness, . . . laziness, and polygamy."[388]

Portuguese colonists used arguments about the lack of civilization of the Indigenous peoples for an ulterior motive—to denigrate their humanity so as to enslave them and take their assets. One colonist claimed in 1694, for example, that in searching for slaves and precious metals as far as the Andes and the Amazon that "we go to conquer the savage heathen . . . to reduce them to the knowledge of urbane humanity and human society and rational dealings"[389] Moreover, in the 1720s, another settler justified the enslavement of natives due to their lack of civilization by citing the Bible and classical authorities.[390] He stated that Indians were "not true human beings, but beasts" and "savages, ferocious and most base, resembling wild animals in everything save human shape."[391]

In the 1750s, the government of Portugal took over the task of civilizing the Indigenous peoples. Under policies and laws from the mid-to-late 1750s, assimilationist goals were continued and the eradication of native civilizations and cultures was the aim.[392] Portuguese was imposed as the official language on native Brazilians who were prevented from using native languages.[393] Mixed marriage was encouraged and prohibitions on

386. BUENO, *supra* note 100, at 36.

387. NASH, *supra* note 208, at 103.

388. Daniel T. Reff, *The Jesuit Mission Frontier in Comparative Perspective: The Reductions of the Río 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).

389. BOXER, RACE RELATIONS, *supra* note 380, at 94–96 (citing Letter from Domingos Jorge Velho, Colonial Expedition Leader, to the Portuguese king (July 15, 1694)).

390. *Id.*

391. *Id.* A prominent founding father of the United States, George Washington, also compared American Indians to animals. In a letter to the 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 from George Washington, Commander-in-Chief, Cont'l Army to James Duane, Delegate, Cont'l Cong. (Sept. 7, 1783), *in* 27 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 140 (John C. Fitzpatrick ed., 1975).

392. Oliveira, *supra* note 264, at 95 (citing RITA HELOÍSA ALMEIDA, O DIRETÓRIO DOS ÍNDIOS [THE INDIAN'S DIRECTORY] (1997)).

393. *Id.*

non-Indians living in native villages were removed.[394] The policy was that a Portuguese civil life would be the best school for natives, and public officials were now to be the teachers to turn Indians into citizens.[395]

In more modern times, the government of 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, and created the Service of Protection of Indigenous Peoples ("the Service"), and guaranteed the continued possession of any lands occupied by Indigenous peoples if they requested legal rights to the lands. The government also sought restitution for lands illegally taken from Indian communities.[396] These laws provided that the Service could confiscate vacant lands to create homelands for natives.[397] Brazil also tried to protect and control Indigenous peoples. They could only marry nonindigenous individuals in civil ceremonies, for example, if the native was assimilated and civilized.[398] Furthermore, aboriginal peoples who committed a crime could only be charged as minors, yet crimes committed against Indigenous persons were considered aggravated offenses.[399]

By 1915, the notion that Indians were savages still persisted in the general Brazilian society.[400] In 1916, the government enacted a statute that 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."[401] Today, the aboriginals are still considered incapable of conducting certain legal acts and are not considered to have enough experience to defend their persons or property, but this incapacity will last only until they adapt to civiliza-

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394. *Id.*

395. *Id.* at 94–95. The Marques de Pombal enacted the Diretório de Índios (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.*

396. COLLECTÂNEA INDÍGENA, *supra* note 260, at 71, 95–98.

397. *Id.* at 73.

398. *Id.* at 75.

399. *Id.* at 76–77. In 1928, these provisions were reauthorized and other steps were taken so that the government could regulate Indians. *Id.* at 10, 83. This law also allowed the teaching of religious principles to Indians without the supervision of the Service. *Id.* at 83.

400. JOSÉ VERÍSSIMO, HISTÓRIA DA LITERATURA BRASILEIRA [HISTORY OF BRAZILIAN LITERATURE] 14 (1916).

401. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 6 (Braz.) (quoted in S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 48 n.145 (2009)).

tion.[402] Natives can only consent to certain legal acts when assisted by their curators or else the contracts can be voided by their guardian, the federal government.[403] Furthermore, the government provides other protections for Indigenous populations such as through the Ministério Público, an independent body of prosecutors charged with protecting the public welfare, which works to protect the rights and interests of natives.[404]

In 1978, Mauricio Rangel Reis, Minister of the Interior, prepared a decree to emancipate Indians so they would no longer receive governmental protection and restrictions.[405] Large areas of land have apparently been demarcated for the exclusive use of Indians and non-natives have been removed.[406] One author claims that the 1988 Constitution eliminated (at least on the judicial and legal level) the tutelage of natives, and affirmed Indians' civil capacity and recognized Indian cultures and languages as integral and permanent parts of Brazil.[407] Today, Indigenous individuals are considered persons for purposes of the penal and civil codes of Brazil and discrimination against Indians is punishable under tort and criminal law.[408] Notwithstanding the passage of centuries and these changes in Brazilian thinking and policy, the Indians of Brazil continue to be seen "as fragile, obsolete and lost . . . as if they were living

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402. 1 SILVIO RODRIGUES, DIREITO CIVIL: PARTE GERAL [CIVIL LAW: GENERAL PART] 51, 55 (28th ed. 1998).

403. C.C. art. 82–84 (Braz.); VALDEMAR P. DA LUZ, MANUAL DO ADVOGADO [LAWYER'S MANUAL] 32 (12th ed. 1998); PAULO DOURADO DE GUSMÃO, INTRODUÇÃO AO ESTUDO DO DIREITO [INTRODUCTION TO THE STUDY OF LAW] 261 (21st ed., 1997). For an explanation of voidable legal acts, see MIGUEL REALE, LICÕES PRELIMINARES DE DIREITO [PRELIMINARY LESSONS IN LAW] 204 (1996).

404. Lei No. 7.347, de 24 de Julho de 1985, DIÃRO OFICIAL DA UNIÃO [D.O.U.] (Braz.); CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 1988 [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL OF 1988] art. 129; *see also* MAXIMILIANUS C. A. FUHRER & ÉDIS MILARE, MANUAL DE DIREITO PUBLICO E PRIVADO [MANUAL OF PUBLIC AND PRIVATE LAW] (1994).

405. ALCIDA RITA RAMOS, INDIGENISM: ETHNIC POLITICS IN BRAZIL 243–45 (1998); Alcida Rita Ramos, *Frontier Expansion and Indian Peoples in the Brazilian Amazon*, *in* WHERE CULTURES MEET: FRONTIERS IN LATIN AMERICAN HISTORY 196, 203–05 (David J. Weber & Jane M. Rausch eds., 1994).

406. Oliveira, *supra* note 264, at 110. Very serious issues of illegal trespass, squatting, and mining on native lands in Brazil continue to this day, including many allegations of physical violence against and even murder of Indigenous peoples. *See, e.g.*, *Trial of Indian Leader's 'Assassins' Resumes*, SURVIVAL INT'L (Feb. 18, 2011), http://www.survivalinternational.org/news/7007 (report on a trial in Brazil of three defendants for murdering a Guarani leader).

407. Oliveira, *supra* note 264, at 110.

408. *See, e.g.*, CÓDIGO PENAL [C.P.] [PENAL CODE] art. 149 (Braz.) (prohibiting slavery); Lei No. 7.716, de 5 de Janeiro de 1989, DIÃRO OFICIAL DA UNIÃO [D.O.U.] (Braz.) (A Lei dos Crimes Raciais [Law Against Racial Crimes]).

fossils in need of protection"[409] and in the case of the Indigenous Amazonians, "headed for inevitable extinction."[410]

In a 1998 book, a well-respected jurist justifies the continuing interference of the federal government in Indigenous affairs. The jurist believes that tribal organizations are too fragile to resist the colonizers and should be forcibly assimilated.[411] Therefore, he believes that federal government interference in indigenous affairs is not only necessary but desirable.[412]

In light of the above history and evidence, it is clear that Portugal considered non-Christian and Indigenous peoples to be uncivilized, and that justified Portuguese colonization and the acquisition of almost all of the land and assets of Brazil. There is no question that Portugal and Brazil justified their territorial and sovereign claims over Brazil by using the Discovery element of civilization and the presumed superiority of their civilizations and cultures over that of Indigenous peoples.

J. Conquest

The United States Supreme Court can be interpreted as defining this element in two ways. First, actual conquest in warfare vested the conquering country with many rights and powers.[413] Second, the United States Supreme Court also defined this element by inferring that the mere arrival of Europeans in the New World was analogous to a physical conquest.[414] This was so because first discovery alone was considered to automatically grant European countries most of the Discovery rights this Article has discussed.[415] In Brazil and elsewhere, Portugal claimed the rights of conquest based on actual warfare and on the analogy that first discovery was like a military conquest.[416]

Portugal often utilized the laws and policies of what is called "just war" to acquire Discovery rights and assets in non-European lands. The papal bulls, once again, authorized wars of conquest against all pagans.[417] Portugal engaged in its first significant overseas military con-

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409. Oliveira, *supra* note 264, at 114.

410. *Id.* at 101–02.

411. BASTOS, *supra* note 260, at 496.

412. *Id.*

413. MILLER, NATIVE AMERICA, *supra* note 1, at 4–5.

414. Johnson v. M'Intosh, 21 U.S. 543, 590–92 (1823).

415. *Id.*; MILLER, NATIVE AMERICA, *supra* note 1, at 5.

416. *See* BOXER, RACE RELATIONS, *supra* note 380, at 2 ("[The Portuguese colonial] empire [was] cast in a military . . . mould."). 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.

417. BOXER, RACE RELATIONS, *supra* note 380, at 2. The bull *Romanus Pontifex* of January 8, 1455, from Pope Nicholas V to King Alfonso V of Portugal, authorized "King

quest of the city of Ceuta in North Africa in 1415.[418] Portugal claimed and exercised sovereign and commercial rights from this military conquest.[419] 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."[420]

Portugal also used just war to claim Discovery rights in Brazil against Indigenous peoples.[421] Just wars were only to be waged with the permission of the king or governor-general of Brazil, but permission was not necessary in exigent circumstances such as if Indians were assaulting whites or taking captives for cannibalistic feasts.[422] The Crown enacted several laws on this subject, including one in 1595, in which the king authorized the enslavement of Indians who had been captured in just wars.[423] Such wars could legally be fought against natives whenever a tribe evinced hostility against the state or opposed the spread of the gospel.[424] In 1688, the Crown authorized just war whenever missionaries certified that a tribe was preparing to attack, had invaded the property rights of Christians, or was inhibiting the preaching of the gospel.[425] One commentator states that just wars simplified the extermination as well as the capture, slavery, and baptism of Indians and were "motivated both by greed and religious intolerance."[426] Portuguese colonists engaged in many just wars against Brazilian natives over the centuries and the last officially declared just war was in the 1850s.[427]

Alfonso . . . to invade, search out, capture, vanquish, and subdue all Saracens and other pagans . . . and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods . . . held and possessed by them." Pope Nicholas V, *supra* note 79, at 23; *see also* MARQUES, *supra* note 10, at 163.

418. MARQUES, *supra* note 10, at 131.

419. *Id.*

420. C.R. Boxer, *The Portuguese in the East, 1500–1800*, *in* PORTUGAL AND BRAZIL: AN INTRODUCTION 185, 233 (H.V. Livermore ed., 1953).

421. NASH, *supra* note 208, at 111.

422. KIEMEN, *supra* note 179, at 4–5.

423. *Id.* at 5 (citing 2 JOÃO FRANCISCO LISBOA, JORNAL DE TIMON: APONTAMENTOS, NOTÍCIAS E OBSERVAÇÕES PARA SERVIREM A HISTÓRIA DO MARANHÃO [Timon Periodical: Notes, News and Comments to Serve the History of Maranhão] 279 (1865)); Alden, *Black Robes, supra* note 201, at 28, 31.

424. KIEMEN, *supra* note 179, at 85 (explaining that the Conselho Ultramarino (Overseas Council) justified war against Brazilian natives if they "[impeded] the preaching of the gospel," stopped defending the lives and property of the king's subjects, robbed or impeded commerce, or if they were cannibals).

425. KIEMEN**,** *supra* note 179, at 164–66 (internal citation omitted); Alden, *Black Robes*, *supra* note 201, at 34.

426. Oliveira, *supra* note 264, at 92.

427. *Id.* at 98.

Portugal also used the second definition of conquest and the idea that its mere arrival in non-European, non-Christian lands was the equivalent of an actual conquest.[428] For example, the kings of Portugal adopted for centuries the title "Lord of the conquest, navigation, and commerce of Ethiopia, India, Arabia and Persia" immediately after Vasco da Gama made his first trading voyage to India in 1498.[429] Further, one historian alleges that the "fifteenth-century voyages of discovery have often been described as a continuation of the Crusades" and thus were like conquests.[430]

In conclusion, Portuguese and Brazilian colonists and officials explicitly applied conquest and just war principles many times in Brazil to justify taking the lands and assets of the native peoples. They also used the second definition of conquest because they considered their arrival to be a conquest that justified their appropriation of the Indians' lands, assets, and labor. Without question, Portugal and Brazil utilized the Discovery element of conquest and claimed the legal rights that it allegedly created.

CONCLUSION

In light of the above evidence, it is clear that Portugal and Brazil applied the international law Doctrine of Discovery to make their claims to the lands and assets of the Indigenous nations and peoples in modern day Brazil. Both countries utilized, to greater and lesser degrees, all of the elements of Discovery, and defined and used them in much the same way as, for example, Spain, England, France, and the United States.

This Article serves two purposes. First, it investigates whether Brazil was acquired and colonized by Portugal using the international law of Discovery and whether Brazilian governments have used, and still are using, the Doctrine against Indigenous peoples. As already stated, this evidence illustrates that Discovery was the legal basis and provided the primary justifications for Portugal's and Brazil's domination of the Indigenous peoples of that region and the appropriation of almost all their lands and assets, and continues to be part of Brazilian law and native policies today.

Second, if the Doctrine was behind the Portuguese colonization and settlement of Brazil, this Article aspires to contribute to the growing body of work that is examining the use of Discovery in the past and the present day by settler societies around the world. This Article seeks to

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428. *See* BOXER, RACE RELATIONS, *supra* note 380, at 2. The Portuguese had a "conviction that they were primarily crusading *conquistadores* who were entitled to conquer or to dominate the lands of the Muslim and the Heathen from Morocco to Mindanao." *Id.*

429. BOXER, RACE RELATIONS, *supra* note 380, at 2.

430. PARRY, *supra* note 122, at 22.

disseminate this information so that the Brazilian government, courts, and citizens, including the Indigenous peoples, can better understand their own colonial and legal histories and the modern day structure and laws of their society. As one commentator states: "Law in a society can only be explained by its history, often its ancient history and frequently its contacts with foreign legal history."[431] Consequently, the authors hope that in some small way this Article helps to explain modern day Brazilian law and society by examining its history.

The authors agree with an American professor who stated that law was and still is an essential instrument used to legitimize the genocidal conquest and colonization of the American Indians and other Indigenous peoples.[432] Portugal and Brazil also used law to legitimize their conquest of Indigenous peoples. In addition to law, settler societies used national stories and even fables, often personified by inspirational slogans, to justify their conquests and expansions. In the United States the national legend of expansion is called "Manifest Destiny," in Chile it is the "Southern Destiny," and in Argentina it is the "Conquest of the Desert."[433] In Brazil, the idea that Portuguese and Brazilian civilizations and religions were destined to triumph over Indigenous peoples is reflected in how Brazilian anthropology and commentators examine their history through the analytical lenses of the expanding frontier; even as the Amazon is still considered today to be "the last frontier"[434] and "the planet's final bulwark against the advance of civilization."[435] All of the ideas and principles encapsulated in these slogans reflect the Doctrine of Discovery and its elements, demonstrate a settler/colonizer mind frame that still exists in these countries to lesser and greater degrees, and continue to color the relationships and interactions between these majority societies and Indigenous peoples.

The authors hope that the Article's examination of this important aspect of the legal history of Brazil provides a glimpse into just how deeply intertwined the Doctrine of Discovery is with that country's history. If Brazilian officials, judges, and citizens understand that the Portuguese

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431. Alan Watson, *Legal Culture v Legal Tradition*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 1, 1 (Mark Van Hoecke et al. eds., 2004).

432. WILLIAMS, *supra* note 4, at 6.

433. MILLER, NATIVE AMERICA, *supra* note 1, at 115–62; Miller, Lesage & Escarcena, *supra* note 1, at 869; 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 86, at 51 ("In Argentina's official history the so-called Conquest of the Desert refers to the military annexation of the Indian territories of Pampa and Patagonia.").

434. Oliveira, *supra* note 264, at 85, 87, 89.

435. *Id.* at 87.

acquisition of Brazil was founded on feudal, religious, racial, and ethnocentric justifications, then everyone will be better equipped to understand and work through the issues that face Brazil, and all colonizer/settler societies, by addressing their modern day relations with Indigenous peoples, the laws that affect Indigenous peoples, and in resolving long standing issues. Any attempts to address and perhaps redress past wrongs, and to create a more positive and equal future for all Brazilians, must begin with the truthful recognition of that country's history and the development of that country's legal regime and laws, and must proceed with serious efforts to eradicate the vestiges of the Doctrine of Discovery from Brazilian law and society.