CHAPTER 2
MEANS OF EXTINGUISHMENT

What is the Indian title? It is mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them rather than inhabited.¹

Adjoining the rules regarding the right of acquisition, another pillar of the colonization of indigenous territories is the notion of extinguishment of indigenous peoples’ territorial rights. Legally, extinguishment is defined as “the destruction or cancellation of a right, power, contract, or estate. The annihilation of a collateral thing or subject in the subject itself out of which it is derived.”² In the case of indigenous peoples, it suggests that a government can unilaterally extinguish the right of its indigenous population to use and occupy their ancestral lands. This relies on the idea that indigenous peoples had suddenly lost their territorial sovereignty: it had been “extinguished” by the arrival of the European imperial colonial powers. While the practice of extinguishment was predominant at the time of colonization, the present chapter suggests that States have not rejected this practice in their contemporary approach to indigenous peoples’ territorial rights. In divergence with the previous chapter, where the focus lays on States ignoring the very existence of indigenous peoples, this chapter examines the cases in which international law established that indigenous peoples might have exercised some form of territorial rights, but that such rights have been extinguished either by colonial treaties or through national legislations. Accordingly, the following chapter is divided into two different sections. The first section explores how the establishment of colonial treaties between States and indigenous peoples resulted in the extinguishment of indigenous peoples’ land rights, and how, through these treaties, international law has provided resources to justify the extinguishment of indigenous territorial sovereignty over their own lands.³ Then, the second section addresses the issue of extinguishment of indigenous title to territory through national laws and domestic case law using reference to international law. More particularly, it examines the doctrine of “discovery” under which indigenous peoples’ territorial sovereignty was extinguished while a right of occu-

¹ Fletcher v. Peck, 10 U.S. 87, 121 (1810).
³ The issue of indigenous peoples’ sovereignty is certainly one of the most controversial and unresolved. While it deserves attention, the purpose here is not to concentrate on whether indigenous peoples did, and do, possess sovereignty, but to critically evaluate the extent to which States have extinguished indigenous peoples’ territorial sovereignty, i.e., the independent occupation of a territorial area. On the issue of sovereignty, see Indigenous Peoples’ Rights in Australia, Canada and New Zealand (P. Havemann ed., 1999); Makere Stewart-Harawira, The New Imperial Order: Indigenous Responses to Globalization (2005).
pancy was established for settlers. Subsequently the section considers the con-
temporary application of the practice of extinguishment in common law countries
through an analysis of the doctrine of extinguishable indigenous title. While the
present chapter is aimed at exploring the rules of international law regarding the
extinguishment of indigenous peoples’ land rights, domestic examples will also
be explored and compared to the norms of international law.

A. THE EXTINGUISHMENT OF INDIGENOUS TERRITORIAL SOVEREIGNTY BY
COLONIAL TREATIES

Treaties are a prominent source of the legal relations between indigenous
nations and States.\footnote{For example, in Canada, between 1871 and 1921, of the 11 treaties that were signed
between the government and indigenous nations, all engender some territorial consequences. In
the United States, over 371 treaties were signed between the governments and Indian tribes, 76
of them called for removal of indigenous nations from their lands and 230 dealt with land cession.
For an overview, see Final Report presented by Mr. Miguel Alfonso Martinez, \textit{Study on
Treaties, Agreements and Other Constructive Arrangements between States and Indigenous
\textit{Charles H. Alexandrowicz, An Introduction to the History of the Law of Nations in the
East Indies} (1967).
}

Traditional international law defines treaties as “consensual
agreements between two or more subjects of international law intended to be con-
sidered by the parties as binding and containing rules of conduct under interna-
tional law for at least one (normally for all) of the parties.”\footnote{Rudolf Bernhardt, \textit{Treaties}, in \textit{Encyclopaedia of Public International Law} 459
(Rudolf Bernhardt ed., 1992).} It is admitted that
with regard to treaties between indigenous peoples and States, the notion of
 treaties generally encompasses notions of agreements and other constructive
States are also to be considered in their impact on indigenous peoples’ land rights. For example,
the Lapp Codicil adopted by the kingdoms of Sweden and Norway in 1751 had some direct
consequences on the territorial rights of Saami communities in both countries, even though they
were not a party to the treaty.
}

Treatymaking was one of the first encounters between two very different legal systems. The first treaties
between indigenous peoples and European imperial powers were mostly based on
the need for commerce and peace, and for this purpose trade companies were
given extensive powers to enter into treaty relationships with indigenous peoples
in the name of their respective State.\footnote{See, for examples, \textit{Edits, Ordonnances royaux, déclarations et arrêts du Conseil
d’État du Roi concernant le Canada} (1854), which reproduces the documents establishing
\textit{la Compagnie des Cents Asssociés and la Compagnie des Indes Orientales}.} During the early encounters between Euro-
pean colonial powers and indigenous communities, treaties were often viewed as
the peaceful legal instruments used to establish either friendly relations or com-