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MAKING INDIGENOUS SELF-DETERMINATION WORK: WHAT THE NATION BUILDING PRINCIPLES AND THREE CASE STUDIES FROM CHILE TEACH US ABOUT IMPLEMENTING INDIGENOUS HUMAN RIGHTS

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Introduction

Self-determination is the only policy proven to benefit both Indigenous peoples and the nation-states in which they live. The right of self-determination is valuable for Indigenous peoples because it allows them to envision their own futures, set their own goals, and make decisions necessary to transform those visions and goals into realities. In doing so, the right of self-determination begins the process of undoing the effects of centuries of assimilative policies. The right of self-determination also benefits nation-states because it is the only policy proven to improve the socioeconomic conditions of Indigenous communities—communities that are all too often among the nation-state's most impoverished and disadvantaged.¹

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1. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 14 (HKS Faculty Research Working Paper Series, No. RWP10-043, 2010) [hereinafter Cornell & Kalt, *American Indian Self-Determination*] (“[F]ederal promotion of tribal self-government under formal policies known as ‘self-determination’ is turning out to be [...] the only strategy that has worked.”).

Under international law, the right of Indigenous self-determination has been implicitly recognized for more than two decades, beginning with the ratification of International Labour Organization Convention Number 169 (Indigenous and Tribal Peoples Convention)², and has been explicitly recognized as a norm of international law since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.³ Thus, on paper at least, there is a global policy recognizing Indigenous self-determination as a fundamental right. Despite this global recognition, in practice, many Indigenous peoples continue to have a diminished ability to exercise self-determination, frequently due to legal or political obstacles imposed by the nation-state, but also very commonly due to a lack of capacity within their own communities.⁴ As a consequence, Indigenous populations remain among the most marginalized populations found anywhere in the world.⁵

The good news is that some Indigenous peoples are beginning to break the cycles of dependency and poverty that have been forced upon them for so long. In many parts of the world, Indigenous peoples are embracing new opportunities created by legal changes that have ushered in policies of self-determination. Indigenous culture is, in many areas, experiencing a

2. International Labour Organization (ILO), Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169].

3. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, at 4, U.N. Doc. A/RES/61/295 (Mar. 2008) (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

4. See generally the following country reports of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, which provide insight into the status of indigenous self-determination globally: United States of America, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 2010); Sami People of Norway, Sweden, and Finland, U.N. Doc. A/HRC/18/35/Add.2 (Jun. 2011); Russia, U.N. Doc. A/HRC/15/37/Add.5 (Jun. 2010); New Caledonia, France, U.N. Doc. A/HRC/18/35/Add.6 (Sept. 2011); Nepal, U.N. Doc. A/HRC/12/34/Add.3 (Jul. 2009); Republic of the Congo, U.N. Doc. A/HRC/18/35/Add.5 (Jul. 2011); Australia, U.N. Doc. A/HRC/15/37/Add.4 (Jun. 2010); Namibia, U.N. Doc. A/HRC/24/41/Add.1 (Jun. 2013); Canada, U.N. Doc. A/HRC/27/52/Add.2 (Jul. 2014); Panama, U.N. Doc. A/HRC/27/52/Add.1 (May 2014). See also *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly*, U.N. Doc. A/68/317 (Aug. 2013); *Expert Mechanism on the Rights of Indigenous Peoples: Final Rep. of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, U.N. Doc. A/HRC/18/42 (Aug. 2011).

5. See, e.g., *Indigenous Peoples, Poverty and Development* ch. 1, at 3 (Gillette Hall & Harry Patrinos eds., Apr. 2010) (unpublished manuscript) (on file with the Cambridge University Press).

revitalization not seen for centuries. Across the globe, Indigenous peoples are successfully regaining control over ancestral lands, recovering cultural property, revitalizing the use of traditional languages, recreating Indigenous governments and governing institutions, and renewing religious practices, ceremonies, and other culturally significant experiences.⁶ While there remains a great deal of work to be done, Indigenous peoples are moving towards the day when control over their futures will return to its rightful place—their own hands.

Although much has been written on what nation-states can and should do to implement the right of Indigenous self-determination, there has been far less discourse on what Indigenous peoples and communities *themselves* can do to regain control over their own lives.⁷ Perhaps, the most complete answer to the question, “what can Indigenous peoples do to turn the right of self-determination into a reality?” comes from the work of the Harvard Project on American Indian Economic Development (HPAIED) and its sister organization, the Native Nations Institute for Leadership, Management, and Policy of the University of Arizona (NNI). In the decades since the United States government made Indigenous self-determination its official policy, HPAIED and NNI have systematically investigated what self-determination looks like from the Native perspective. Specifically, HPAIED and NNI have examined what Native nations in the United States can do to rebuild their governments and governance institutions, to improve their socioeconomic conditions; and to achieve whatever goals they set for themselves.⁸ The totality of their efforts have revealed five principles—commonly referred to as “Nation Building principles”—that tend to be

6. For a general overview of how far Indigenous rights have come in practice and documentation of many gains made by Indigenous peoples, see INT’L LABOUR ORG., *INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169* (2009); DEP’T OF ECON. & SOC. AFFAIRS, UNITED NATIONS, *STATE OF THE WORLD’S INDIGENOUS PEOPLES* (2009); see also *Statement of Special Rapporteur to UN General Assembly, 2013*, JAMES ANAYA (Oct. 21, 2013), <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2013>.

7. See sources cited *supra* note 4.

8. See, e.g., Cornell & Kalt, *American Indian Self-Determination*, *supra* note 1; Stephen Cornell & Joseph P. Kalt, *Where’s the Glue?: Institutional Bases of American Indian Economic Development* (Harvard Law Sch., Malcolm Wiener Ctr. for Soc. Pol’y, Working Paper Series H-91-2, 1991); JOSEPH P. KALT & JOSEPH WILLIAM SINGER, *MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE* (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2004-03, 2004).

more closely adhered to by Native nations effectively exercising self-determination than by Native nations that are not.⁹

In recent years, the applicability of the Nation Building principles for enhancing Indigenous self-determination in practice has been tested outside the United States. Although research is ongoing, there is now evidence that the Nation Building principles have relevance for Indigenous peoples trying to exercise their right to self-determination in Australia, Canada, and New Zealand.¹⁰ However, no substantial research efforts have been made to determine whether the Nation Building principles have applicability beyond nation-states that share a common language (English), legal tradition (British common law tradition), and history (former British colonies).

This article begins to fill that void by examining whether the Nation Building principles have any applicability outside the British colonial context. Specifically, this article explores whether the Nation Building principles have applicability in Chile. Chile is a compelling choice for this type of analysis because it is a South American country with a culture, history, language, political structure, and legal tradition distinct from those of the former British colonies. Additionally, the Chilean government has made Indigenous rights a priority in recent years,¹¹ and, unlike many other South American countries with Indigenous populations, Chile enjoys a

9. The five Nation Building principles are discussed in more depth at *infra* Part II, and include: practical self-rule; capable governing institutions; cultural match; strategic orientation; and public-spirited leadership.

10. STEPHEN CORNELL, *INDIGENOUS PEOPLES, POVERTY AND SELF-DETERMINATION IN AUSTRALIA, NEW ZEALAND, CANADA AND THE UNITED STATES 2* (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2006-02, 2006) [hereinafter CORNELL, *INDIGENOUS PEOPLES*].

11. It was only in 1993 that Chile adopted national legislation relating to indigenous peoples with the passage of Law 19.253, commonly known as the Indigenous Law (Law No. 19.253, September 28, 1993 (Chile)). Much more recently, in 2007, Chile voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples; in 2008 after nearly twenty years of debate, Chile ratified ILO Convention 169, *supra* note 2, and also passed landmark legislation on coastal water rights for indigenous peoples (Law No. 20.249, Feb. 16, 2008 (Chile)). By the time Convention 169 went into effect in 2009, Chile had adopted a provisional consultation regulation (Decreto No. 124 del Ministerio de Planificación que reglamenta el artículo 34 de la Ley No. 19.253 a fin de regular la consulta y la participación de los pueblos indígenas (2009)) and has been actively debating its Indigenous consultation policy since that time (Gerson Guzmán, *Conadi aprueba comisión para trabajar en consulta indígena con expertos internacionales*, *BIOBIOCHILE.CL* (Sep. 14, 2011), <http://www.biobiochile.cl/2011/09/14/conadi-aprueba-crear-comision-para-trabajar-en-consulta-indigena-con-expertos-internacionales.shtml>).

relatively strong economy and stable political system.¹² Most importantly, Chilean Indigenous populations currently exercise small but meaningful amounts of self-determination.¹³ This allows us to test the applicability of the Nation Building principles within the Chilean context.

Ultimately, this article argues that the Nation Building principles are relevant to the situation in Chile and, more broadly, that they may be relevant throughout all of Latin America. This argument is presented in three parts. Part I examines what the Indigenous right of self-determination is, why it is important, and how Indigenous peoples *themselves* can exercise it effectively. Research indicates that Indigenous peoples are more effective at exercising self-determination when the Nation Building principles are more closely adhered to.¹⁴ Thus, Part I introduces the Nation Building principles and looks at the current limitations of their applicability outside the British colonial context. Part II lays the groundwork necessary for determining whether the Nation Building principles have relevance and applicability outside the British colonial context—utilizing Chile as the focal point of a comparative analysis. Part III looks at how Indigenous communities living within Chile exercise their right to self-determination and asks whether the Nation Building principles can be found anywhere in those situations. Ultimately, Part III argues that the Nation Building principles are both relevant and applicable to the Indigenous context in Chile. In our conclusion, we offer final thoughts on: what the Nation Building principles have to offer Indigenous peoples in Chile moving forward; what applicability the Nation Building principles may have for Indigenous peoples living elsewhere in Latin America; and what research is needed next to continue the comparative analysis started here.

12. Chile's Human Development Index ranks fortieth out of 187 countries analyzed in the 2013 Human Development Report, which is the highest rank of countries in Latin American and the Caribbean. HUMAN DEVELOPMENT REPORT 2013: THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD 143 (U.N. Dev. Program, 2013), available at <http://hdrstats.undp.org/images/explanations/CHL.pdf>.

13. RYAN SEELAU & LAURA SEELAU, THE PUKARÁ OF QUITOR: AN INDIGENOUS SELF-DETERMINATION CASE STUDY (2013) [hereinafter SEELAU & SEELAU, THE PUKARÁ OF QUITOR]; Laura M. Seelau & Ryan Seelau, *Protegiendo sus territorios: Coadministración entre Comunidades Atacameñas y el Estado Chileno en Valle de la Luna*, in DEFENSA DE LOS DERECHOS TERRITORIALES EN LATINOAMÉRICA 129 (Margarita Fernández & Javier Salinas eds., 2012) [hereinafter Seelau & Seelau, *Protegiendo sus territorios*].

14. Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 6 (Miriam Jorgensen ed., 2007) [hereinafter Cornell & Kalt, *Two Approaches*].

I. Self-Determination and the Nation Building Principles

A. What Is the Indigenous Right of Self-Determination?

The Indigenous right of self-determination is, at its most basic level, the right of Indigenous peoples to have meaningful control over the issues that affect their lives and culture.¹⁵ As the United Nations' Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁶ The principle of Indigenous self-determination is recognized implicitly and explicitly in various international legal instruments and is a fundamental human right.¹⁷

Self-determination is not an all-or-nothing proposition, but rather, manifests itself on a spectrum. Indigenous peoples exercise self-determination in a less robust form by providing input and feedback into the

15. A full discussion of the meaning and nature of Indigenous self-determination in international law is beyond the scope of this paper, however, the authors wish to highlight two over-arching issues associated with the right of Indigenous self-determination: first, what are the terms under which Indigenous peoples are (or are not) incorporated into the larger institutional structure of a nation-state such that they can "freely determine their political status"?; and second, what is the mechanisms through which Indigenous peoples are able to "freely pursue their economic, social, and cultural development"? James Anaya refers to these two components as the "constitutive" and "ongoing" elements of Indigenous self-determination. This paper primarily focuses on the second of these elements: how do Indigenous peoples exercise self-determination in its ongoing nature—within the nation states in which they live—to determine and pursue their own economic, social and cultural development? See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004).

16. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 3, art. 3, U.N. Doc. A/RES/61/295, at 4.

17. For a general understanding of international legal recognition of Indigenous self-determination, see, for example, Lee Swepston, *Indigenous and Tribal Peoples and International Law: Recent Developments*, 30 *CURRENT ANTHROPOLOGY* 259 (1989); Lee Swepston, *Indigenous and Tribal Populations: A Return to Centre Stage*, 126 *INT'L LABOUR REV.* 447 (1987); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 *OKLA. CITY U. L. REV.* 677 (1990) [hereinafter Swepston, *A New Step*]; S. James Anaya, *El Derecho de los Pueblos indígenas a la libre determinación tras la adopción de la Declaración*, in *EL DESAFÍO DE LA DECLARACIÓN: HISTORIA Y FUTURO DE LA DECLARACIÓN DE LA ONU SOBRE PUEBLOS INDÍGENAS* 194 (Claire Charters & Rodolfo Stavenhagen eds., 2009); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 131 (1993); Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 1 (1993).

decisions that will affect their communities. On the other hand, Indigenous peoples are exercising a more robust form of self-determination when they form governing institutions, choose their own leaders, make goals, and carry out plans to turn those goals into realities. While Indigenous peoples are at different points along the self-determination spectrum, international law promotes an ever-increasing level of Indigenous self-determination for all Indigenous peoples.

B. Why Does Indigenous Self-Determination Matter?

1. To Indigenous Peoples

The Indigenous right of self-determination matters to Indigenous peoples because it is the right that, when broadly implemented, seeks to put Indigenous peoples back in charge of their own lives, communities, and cultures. All Indigenous peoples have distinct cultures, religious beliefs, traditions, values and worldviews worth protecting. All Indigenous peoples are made up of individuals who deserve to live a life of their choosing. The Indigenous right of self-determination is the mechanism by which Indigenous peoples can regain control over all of these things. Exercising this right is how Indigenous peoples can combat the effects of centuries of assimilation. In short, the Indigenous right of self-determination offers Indigenous peoples a chance to move forward in a manner of their own design which secures the continuation of their culture and society.

2. To Nation-States

Nation-states should concern themselves with the Indigenous right of self-determination because the *only* policy shown to improve the lives and socioeconomic conditions of Indigenous individuals is one of self-determination.¹⁸ While other valid ethical, legal, and moral arguments exist for embracing a policy of Indigenous self-determination,¹⁹ it is self-determination's proven effectiveness that is likely to convince most nation-states to embrace it. Simply put, nation-states should embrace Indigenous self-determination because it is their own self-interest to do so.

More than two hundred years of evidence from the United States proves that a policy of Indigenous self-determination is the *only* policy that can improve the lives and socioeconomic conditions of Indigenous individuals. United States policies of war, treaty-making, assimilation, allotment,

18. Cornell & Kalt, *American Indian Self-Determination*, *supra* note 1.

19. Anaya, *El Derecho de los Pueblos indígenas a la libre determinación tras la adopción de la Declaración*, *supra* note 17 at 194.

reorganization, and termination have all failed miserably to do anything but make Native peoples the most impoverished and disadvantaged group in the nation.²⁰ It was not until the United States government adopted a policy of Indigenous self-determination—through passage of legislation like the Indian Self-Determination and Education Assistance Act of 1975²¹—that the situation of marginalization and poverty began improving for Native nations. While the socioeconomic conditions of Native Americans continue to fall below the national average, there has been substantial improvement over the last four decades.²² For example, some Native nations have virtually eliminated unemployment and improved life expectancy by leaps and bounds, while others have built strong economies and reduced poverty among their people by staggering amounts.²³

Indigenous self-determination works because it is a bottom-up policy. The positive changes seen among United States Native nations never would have been achieved by a single policy, program, or fund designed in Washington, D.C., and then imposed on Native nations across the nation.²⁴ Rather, positive change for Native nations comes when, by recognizing the right of self-determination, Native peoples are empowered to be innovators and problem solvers in their own communities. Although the United States federal government has played and continues to play an important supporting role with respect to many Indigenous self-determination efforts, success and sustainability are only realized when the impetus for change comes from the Native nations themselves.

C. What Can Indigenous Peoples Themselves Do to Better Exercise Their Right of Self-Determination?

When questions are asked about how the Indigenous right of self-determination can be effectively implemented, the answers more often than not revolve around what nation-states can and should be doing. International bodies involved in Indigenous rights have produced countless reports detailing the shortcomings of nation-states with respect to

20. Cornell & Kalt, *American Indian Self-Determination*, *supra* note 1, at 14 (“[F]ederal promotion of tribal self-government under formal policies known as ‘self-determination’ is turning out to be . . . the only strategy that has worked.”).

21. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450-450n (2012)).

22. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 5-6.

23. See, e.g., REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007).

24. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 14-15, 27-28.

recognizing and/or implementing Indigenous rights.²⁵ Similarly, the vast majority of Non-Governmental Organizations (NGOs) working in the field also tend to focus their research and writing on what nation-state governments need to do to bring about Indigenous self-determination.²⁶ While this work is continuously necessary to ensure that nation-states adheres to international human rights law with respect to Indigenous peoples, it is all too often overlooked that Indigenous peoples have a role to play in actualizing self-determination.

Two organizations—HPAIED and NNI—have made it their purpose to determine what Indigenous communities can do to more effectively exercise their rights.²⁷ With more than three decades of quantitative and qualitative research under their collective belts, HPAIED and NNI have determined that even where a nation-state has adopted policies and legislation recognizing and promoting self-determination, that right simply does not come to fruition in practice unless Indigenous peoples similarly embrace their own crucial role in making self-determination a reality.²⁸ More specifically, the research of HPAIED and NNI has revealed five principles that are critical for any Indigenous community wishing to take control of its own future and exercise self-determination effectively. These five principles are commonly referred to as the “Nation Building principles.”²⁹

25. This includes reports from United Nations treaty monitoring bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination as well as from thematic entities such as the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples. These reports — which exist to assess a given state’s compliance with treaty obligations — routinely issue recommendations and observations for the states, but much less frequently do so for indigenous peoples. A similar practice is seen in reports produced by the ILO, including not only periodic reports, but also those issued by expert committees in the context of Representations brought under Article 24 of the ILO Constitution.

26. See, e.g., ALBERTO SALDAMANDO, U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, *RACIAL DISCRIMINATION AGAINST INDIGENOUS PEOPLES IN THE UNITED STATES: CONSOLIDATED INDIGENOUS SHADOW REPORT* (2007).

27. *Editor’s Introduction* to *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT*, *supra* note 14, at xi-xii. HPAIED has been conducting Native-focused research in the United States Country since the 1980s. NNI, created in 2001, is a sister organization of HPAIED, that also conducts Native-focused research while simultaneously offering services to Indigenous communities in the areas of governance strengthening, institutional development, and capacity building. *Id.*

28. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 28-32.

29. See generally Cornell & Kalt, *Two Approaches*, *supra* note 14.

1. Nation Building Principles: Origins

When HPAIED began its research in the 1980s, it sought to answer the question: What explained emerging patterns of economic change and community development in Indian Country?³⁰ The research initially carried out by HPAIED indicated that the strength or weakness of Native nation economies in the United States could *not* be explained solely by characteristics such as access to natural resources, education attainment levels, proximity to markets, or culture.³¹ Instead, the answer seemed to relate to the manner—formal or informal—of organization within a given Indigenous community.³² It became clear that the way a Native nation organized itself and carried out its decisions was actually the most important factor for determining whether a Native nation would have a strong or weak economy.³³

Over time, HPAIED and NNI stopped focusing solely on Native nation economies, and turned to a broader question: Why are some Native nations able to create visions of their own futures *and make those visions a reality*, while other Native nations struggle to do the same?³⁴ Essentially, the question shifted from one about economic development to one that focused on the ability of Native nations to exercise self-determination.³⁵ The data indicates that the answer to this question also relates closely to the formal or informal organization (or lack thereof) found in a given Native community.³⁶ More specifically, the data indicates that five principles—the Nation Building principles—are commonly associated with Native nations that exercise their rights effectively. Conversely, Native nations struggling to exercise self-determination are lacking in one or more of these same principles.³⁷

30. *Editor's Introduction*, *supra* note 28, at xi.

31. *See, e.g.*, STEPHEN CORNELL & JOSEPH P. KALT, SUCCESSFUL ECONOMIC DEVELOPMENT AND HETEROGENEITY OF GOVERNMENT FORM ON AMERICAN INDIAN RESERVATIONS (Harvard Law Sch., Malcolm Wiener Ctr. for Soc. Pol'y, No. PRS 95-4, 1995); STEPHEN CORNELL, FIVE MYTHS, THREE PARTIAL TRUTHS, A ROBUST FINDING, AND TWO TASKS (Harvard Law Sch., Malcolm Wiener Ctr. for Soc. Pol'y, No. PRS 94-5, 1994).

32. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 22.

33. *Id.*

34. STEPHEN CORNELL ET AL., SEIZING THE FUTURE: WHY SOME NATIVE NATIONS DO AND OTHERS DON'T 4 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2005-01, 2005).

35. REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, *supra* note 14.

36. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 22.

37. *Id.* at 18.

2. Nation Building Principles: Substance

The Nation Building principles are: (1) practical self-rule; (2) strong, effective and capable governing institutions; (3) cultural match; (4) strategic orientation; and (5) public-spirited leadership.³⁸ It is important to note that the Nation Building principles are principles; they are not a generic, all-inclusive guide explaining how all Indigenous communities can effectively exercise self-determination. Indigenous communities, like all communities, are extremely complex systems. The Nation Building principles are universal in that they identify the properties most commonly associated with meaningful exercises of Indigenous self-determination, but are also flexible enough that they can be molded to fit a wide variety of contexts.

a) Nation Building Principle Number One: Practical Self-Rule

Practical self-rule exists when the *real power* to make decisions resides with Native nations themselves.³⁹ In the United States, all federally recognized tribes have the right, *on paper*, to make their own decisions,⁴⁰ but the reality is that not all Native nations actually can and do exercise this right on a daily basis. While having the right of self-determination has some benefits, it is the actual *exercise* of the right that is far more significant to a Native nation's ability to realize its own goals and visions.

When Native nations make decisions for themselves, the results are better. Recent Native American history is the story of external or foreign governments trying to administer Indigenous resources, run programs for Indigenous peoples, and to make decisions on their behalf.⁴¹ These efforts by external decision-makers, whether motivated by good or evil intentions, are substantially less effective than Native nations' own efforts in the same regard.⁴² Native nations exercising practical self-rule have outperformed external governments in a variety of contexts, including: inventing more efficient and more sustainable systems of management for natural

38. *Id.*

39. *Id.*

40. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450-450n (2012)).

41. Stephen Cornell, *Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, *supra* note 14, at 57, 59-60.

42. JONATHAN B. TAYLOR, DETERMINANTS OF DEVELOPMENT SUCCESS IN NATIVE NATIONS OF THE UNITED STATES 2-3 (Native Nations Inst. for Leadership, Mgmt. & Policy & Harvard Project on American Indian Econ. Dev., 2008).

resources; acquiring better prices for the sale of products; developing more effective social programs, including health and educational programs; and creating communities where Native citizens want to live.⁴³

There are two primary reasons why Native nation decision-makers outperform external decision-makers. First, with practical self-rule, the development strategy—whether cultural, economic, political, or social—rests in the hands of Native nations. It better reflects the interests, visions and concerns of the people who will be affected by the strategy. Native nation leaders are closer to local conditions and possess a better understanding of the needs, values, and desires of their communities. As such, their decisions more closely match the community's priorities than do those of an outsider, which tends to result in more legitimate and better decision-making.⁴⁴ Second, practical self-rule ensures that there is a connection between those who make the decision and those who have to live with the consequences of the decision. Tying consequences to the decision ultimately results in better decision-making.⁴⁵

b) Nation Building Principle Number Two: Capable Governing Institutions

In addition to practical self-rule, the HPAIED and NNI research also indicates that “stable, fair, effective and reliable governing institutions” are crucial to a Native nation’s ability to meaningfully exercise self-determination.⁴⁶ This second Nation Building principle addresses the way in which self-rule is exercised.⁴⁷ Native nations can have the right of self-determination and the right to self-government, but those rights are meaningless without the ability to exercise them effectively.⁴⁸ “Without effective institutions, asserting the powers of self-government means little The powers of self-government come with the burdens of

43. *Id.*

44. *Id.*

45. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 21; TAYLOR, *supra* note 42.

46. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 24.

47. When international law talks about the Indigenous right to self-determination, it frequently starts with a discussion of the right to consultation with “Indigenous peoples’ representative institutions”. Decades of attempting to implement the right of consultation have revealed that enormous difficulties arise when Indigenous peoples’ representative institutions do not exist or are not clearly defined. The Nation Building principles speak directly to this substantial obstacle to the implementation of international human rights law related to Indigenous peoples.

48. Cornell & Kalt, *Two Approaches*, *supra* note 14.

governing effectively.”⁴⁹ Only when stable and capable governing institutions exist can the rights of self-determination and of self-government be fully realized. When a Native nation has strong, effective, capable institutions, they have the capacity to turn the desires of the community into concrete actions.

Governing institutions can take many different forms. Generally, the term “governing institutions” conjures images of written constitutions, bureaucratic offices, courts and the other familiar components that form modern-day democracies. In the Nation Building context, “governing institutions” are defined simply as the accepted forms of organization—whether formal or informal—within a community; the way authority is exercised in a community—that is, who exercises it and through what procedures; and the mechanisms by which community decisions are carried out.⁵⁰ The important aspect of a governing institution—which will be developed further in the discussion of the third Nation Building principle—is not whether it is formal or informal, but that it is designed by the Native nation it serves.⁵¹

Although governing institutions may adopt a variety of forms, Native nation experiences in the United States indicate that not all institutions are equally effective. There are three criteria that determine whether an institution is effective. First, governing institutions—whatever form they take—must be stable. The norms of conduct and the processes for assigning authority to someone can neither change frequently nor arbitrarily. Second, governing institutions must be able to execute tasks in a timely and trustworthy manner. The institutions must be capable of converting decisions into concrete actions. Third, to be effective, governing institutions generally require a division of labor.⁵² For instance, effective governing institutions are oftentimes separated so that political issues are dealt with in a manner distinct from that of other activities such as conflict resolution, services management and delivery, or business administration.⁵³

49. TAYLOR, *supra* note 42, at 3.

50. STEPHEN CORNELL & JOSEPH P. KALT, ROLLING THE DICE: IMPROVING THE CHANCES FOR ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS 17 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02, 2003) [hereinafter CORNELL & KALT, ROLLING THE DICE].

51. TAYLOR, *supra* note 42, at 4.

52. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 23.

53. *Id.* at 22-23.

c) Nation Building Model Principle Number Three: Cultural Match

The third Nation Building principle answers the question: What makes a governing institution effective?⁵⁴ To be effective, an institution must have legitimacy, and to have legitimacy the institution must “culturally match” the community it is serving.⁵⁵ Legitimate institutions need to be rooted in the culture and values of the community they represent. Specifically, they need to appropriately reflect the community’s expectations of how power and authority are distributed and utilized. For example, some Native nations value the concentration of political power and authority in a single elected official, while other Native nations value power that is dispersed and shared among several people chosen by a consensus of the entire community. It is crucial that governing institutions are organized in a manner that conforms to the Native citizens’ expectations of how power and decision-making authority should be allocated.⁵⁶

All societies require legitimate governing institutions to function as collectives, but when Native nations design their own culturally appropriate governing institutions, they begin reversing the effects of a uniquely brutal history of assimilation. For centuries, Native nations have been subjected to assimilative policies,⁵⁷ designed to impose rules, institutions, and processes upon Native nations that did not match their culture or reflect their values.⁵⁸ Even when policies were supposed to be benevolent towards Native peoples, Native nations were still required to adopt governmental systems that lacked legitimacy and authenticity in the communities they were intended to benefit.⁵⁹ For example, during the era of reorganization, Native nations were pushed into adopting one-size-fits-all constitutions that were written by outsiders. These culturally inappropriate constitutions frequently caused more problems than they solved, especially with respect to Native

54. *Id.* at 25 (“Building legitimate institutions . . . means tapping into Indigenous political cultures. . . . The crucial issue is the degree of match or mismatch between formal governing institutions and *today’s* Indigenous ideas . . . about the appropriate form and organization of political power. . . . Where cultural match is low, the legitimacy of tribal government also tends to be low, [and] governing institutions consequently are less effective[.]”).

55. *Id.* at 24-25.

56. *Id.* at 25.

57. See generally Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63 (2012-2013).

58. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 24-25.

59. TAYLOR, *supra* note 42, at 4-5.

nations whose cultural values and expectations about the distribution of authority were vastly different from what was written in the constitution they were provided. The principle of cultural match seeks to reverse this historical trend of cultural assimilation by the creation—or recreation—of institutions and structures based upon the Native peoples' own cultural values.⁶⁰

For Native nations, matching culture to their governing institutions does not necessarily mean turning back the clock and re-installing traditional governing systems. In many cases, turning back the clock is impossible because ancestral traditions and customs have been lost. In other cases, returning to customary practices is neither practical nor ideal. It is important to remember that culture is not static; it is dynamic. Culture changes and adapts to new situations and challenges. Likewise, governing institutions that incorporate cultural values may look differently today than they did five hundred years ago. Culturally-appropriate governing institutions need to be responsive to the modern world's unique challenges. The principle of cultural match thus requires Native nations to identify the problems they currently face, determine what their current values and goals are with respect to those problems, and then design their governing institutions accordingly.⁶¹ It may be necessary to revive old institutions and practices, or to invent and develop new ones.

Although it can prove difficult, effective Native nation governing institutions find a way to balance the demands of modern society and the values of their people.⁶² Finding this equilibrium is not an abandonment of culture or tradition, but is a reinvention of traditional values to confront new problems—something that Native peoples have done repeatedly throughout history.⁶³ Regardless of what the final product looks like, Native nation governing institutions must reflect the expectations and values of the communities that they represent and serve, or they will not be effective.⁶⁴

d) Nation Building Model Principle Number Four: Strategic Orientation

Strategic orientation refers to the manner in which successful Native nations approach decision-making.⁶⁵ Successful and sustainable community development begins with the question, "What kind of society or community

60. CORNELL & KALT, *ROLLING THE DICE*, *supra* note 50, at 18-21.

61. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 24-25.

62. TAYLOR, *supra* note 42, at 4-5.

63. *Id.*

64. *Id.*

65. Cornell & Kalt, *Two Approaches*, *supra* note 14, at 25-26.

are we trying to build?"⁶⁶ Answering this question requires a long-term vision for the nation's future, and should be done before any action takes place. Once a vision exists, a strategic orientation considers the question: How do we put in place the systems and policies necessary to build the type of society we envision?⁶⁷ This question forces Native nations to consider the long-term sustainability of their visions, and of the nation as a whole. Effective strategic decision-making may involve substantial time and research, but the result is a clear goal with clear steps on how to achieve it and sustain it.

e) Nation Building Model Principle Number Five: Public-Spirited Leadership

The final Nation Building principle is public-spirited leadership. A lack of effective leadership results in little, if anything, getting done. Community support and community action are necessary for societies to grow and change, but without leadership, these essential factors are often missing.⁶⁸ That said, what makes an effective leader? The Nation Building research indicates that an effective leader is primarily concerned with "putting in place the institutional and strategic foundations for sustained development and enhanced community welfare."⁶⁹ Under this definition, leadership is not limited to government officials, but includes any citizen who takes responsibility for the future of his or her nation.⁷⁰

3. Nation Building Principles: Limitations

Although the Nation Building principles were developed based on years of research within the United States, their applicability to other British colonial contexts has been examined and continues to be investigated.⁷¹ The initial results suggest that the Nation Building principles have applicability not only in the United States, but also in Australia, Canada, and New Zealand.⁷² When comparing the four nations:

There is substantial evidence from the U.S. case that Indigenous self-determination has been a critical element in the effort by American Indian nations to improve their socio-economic

66. *Id.* at 25.

67. *Id.*

68. *Id.* at 26-27.

69. *Id.* at 26.

70. *Id.* at 27.

71. *See, e.g.,* CORNELL, INDIGENOUS PEOPLES, *supra* note 10.

72. *See id.*

conditions. While Indigenous situations in Australia, New Zealand, Canada and the U.S. vary, certain commonalities encourage comparative inquiry and a search for transferable policy insights. They suggest that it would be a mistake for other governments to dismiss the U.S. evidence.⁷³

To be sure, more research and analysis is required to determine how meaningful the Nation Building principles are in the former British colonies. Additionally, no research has attempted to look at whether the Nation Building principles have any value outside the English-speaking world. While the Nation Building principles have been powerful tools where they have been utilized, thus far their global impact has been limited predominantly to the United States.

II. Chile

A. Chile, the Nation-State

Chile is a South American nation state bordered by the Pacific Ocean on the west, the Andes Mountains on the east, the Atacama Desert to the north, and Antarctica to the south.⁷⁴ Chile has a population exceeding seventeen million people⁷⁵ and is ranked thirty-seventh in the world in terms of land area.⁷⁶ It is a former Spanish colony that fought for its independence from Spain in 1810 and formally declared independence in 1818.⁷⁷ Chile is a unitary presidential constitutional republic with one of the strongest economies in the world.⁷⁸

Chile has a number of advantages for the type of comparative analysis attempted in this article, but three characteristics of the nation make it particularly useful for our purposes. First, Chile's culture, history, language, political institutions, legal institutions, and even geography are unique from anywhere the Nation Building principles have been tested in the past (Australia, Canada, New Zealand, and the United States). Second, Chile

73. *Id.* at 26.

74. *See, e.g.*, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 47-48 (6th ed., 1990).

75. *Chile*, UNDATA, <http://data.un.org/CountryProfile.aspx?crName=Chile#Summary> (last visited Sept. 6, 2014).

76. *Land Area*, WORLD BANK, <http://data.worldbank.org/indicator/AG.LND.TOTL.K2> (last visited Sept. 6, 2014).

77. Proclamación de la Independencia de Chile (Jan. 1818), *available at* <http://www.bcn.cl/obtienearchivo?id=documentos/10221.1/13314/1/acta1%20copia.pdf> (last visited Oct. 26, 2014).

78. *Chile*, *supra* note 75.

possesses a strong, steady economy and a stable government.⁷⁹ A strong economy and stable government are not required for our comparison, but their presence allows the focus to turn to what Indigenous communities can do to exercise self-determination and eliminates a discussion of whether a nation-state's poor economic conditions and/or unstable government are actually responsible for the plight of Indigenous peoples in a given part of the world. In other words, this article is interested in what Indigenous peoples are able to do for *themselves*, and is not overly interested in how nation-state governments need to alter their practices for the benefit of Indigenous peoples—that specific topic is certainly important, but it is also the subject of most comparative analyses involving Indigenous peoples. Finally, Chile has a substantial body of literature in accessible formats, which provides the basis for this type of comparison to take place at all. With these three characteristics in mind, the remainder of Part II offers a brief picture of the Indigenous peoples who live within Chile's boundaries, and discusses the current political-legal environment with respect to the right of Indigenous self-determination.

B. The Indigenous Peoples Living in Chile

Chile recognizes nine Indigenous people groups living within its borders: the Aymara, Colla, Diaguita, Kawésqar, Likan Antai (or Atacameño), Mapuche, Quechua, Rapa Nui, and Yagán.⁸⁰ Determining the precise Indigenous population, however, is a difficult task. There are three major sources of population information: the national census, the most recent of which was completed in 2012;⁸¹ the CASEN study (*Encuesta de Caracterización Socioeconómica Nacional*—the National Socio-economic Characterization Survey), conducted every two to three years by the Ministry of Social Development;⁸² and data from CONADI (*Corporación Nacional de Desarrollo Indígena*—the National Indigenous Development Corporation), which is charged with issuing Indigenous accreditation

79. While not always the case, Chile has enjoyed both a stable economy and stable political system since it returned to democracy in 1990.

80. Law No. 19.253, art. 1, September 28, 1993 (Chile).

81. INSTITUTO NACIONAL DE ESTADÍSTICAS, CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN (2012) [hereinafter CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN].

82. GOBIERNO DE CHILE, PUEBLOS ORIGINARIOS CASEN 2011 (n.d.) [hereinafter PUEBLOS ORIGINARIOS CASEN 2011], available at http://observatorio.ministeriodesarrollo.social.gob.cl/layout/doc/casen/Pueblos_Indigenas_Casen_2011.pdf.

certificates to individuals and with maintaining records of all the registered Indigenous communities and associations.⁸³

The 2012 Chilean census data and the results of the most recent CASEN study are the numbers that drive public policy with respect to Indigenous peoples, and likely offer the most accurate picture of Indigenous peoples living in Chile. According to the 2012 Chilean census, the total population of Chile is just over 16.5 million people with 11.11% or approximately 1.7 million individuals, self-identifying as Indigenous.⁸⁴ Those numbers are slightly higher than the results of the 2011 CASEN, which calculated the Indigenous population at 1.4 million individuals, constituting 8.1% of the total population of Chile.⁸⁵ Both datasets clearly indicate that the Indigenous population in Chile has been increasing over the last several years, both in terms of raw numbers and in terms of the percentage of the total population that identifies as Indigenous.⁸⁶

83. Ministerio de Desarrollo Social, Corporación Nacional de Desarrollo Indígena—Dirección Nacional (July 2013) (containing information provided to authors in response to an information request made under Chile's transparency law).

84. CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN, *supra* note 81, at 172. This report stated that the data from Chile's 2012 Census must be accompanied by a disclaimer: following the 2012 Census in Chile, the *Comisión Externa Revisora del Censo 2012* (the 2012 Census External Review Committee) issued a report highlighting multiple deficiencies in the 2012 census data, and recommended that the data not be used for certain purposes. *Id.* The report went so far as to call for an abbreviated census to be performed in 2015 in hopes of having more accurate data. INFORME FINAL COMISIÓN EXTERNA REVISORA DEL CENSO 2012 (Aug. 2013), available at http://www.censo.cl/documentos/informe_final-comision-nacional.pdf. Further complicating use of the 2012 census data as it relates to the Indigenous population in Chile is the fact that, in the months leading up to the census, there was serious debate in Chile about the specific questions that would be included to measure Indigenous populations. CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN, *supra* note 81, at 84. The issue was to be resolved by an Indigenous consultation process, but Indigenous peoples frequently contested the process and no consensus of how to proceed was ever reached. Ultimately, the questions utilized on the 2012 census were different from those that had appeared in earlier censuses and were also distinct from similar questions used by other data collection organizations with respect to Indigenous peoples. *Id.*

85. PUEBLOS ORIGINARIOS CASEN 2011, *supra* note 82.

86. By comparison, the 2006 CASEN survey data revealed that the Indigenous population in Chile was just over 1 million people, constituting 6.6% of the national population. MINISTERIO DE PLANIFICACIÓN, GOBIERNO DE CHILE, PUEBLOS ORIGINARIOS CASEN 4 (2006). The 2002 census data, which cannot be strictly compared to 2012 data due to changes in the questions asked, showed the Indigenous population to be 692,192 individuals, or 4.6% of the national population. INSTITUTO NACIONAL DE ESTADÍSTICAS, ESTADÍSTICAS SOCIALES DE LOS PUEBLOS INDÍGENAS EN CHILE, CENSO 2002 9, 12 (2005)

Unlike the census and CASEN data, CONADI's numbers are not based on statistical methods of data collection and analysis. Instead, CONADI maintains a list of individuals that have been granted certificates accrediting them as Indigenous individuals. Applying for accreditation is a strictly voluntary decision and often occurs only when an Indigenous individual seeks access to certain types of government benefits such as scholarship programs, grant funding opportunities, or land titling.⁸⁷ As of July 2013, CONADI reports that 293,890 individuals in the country have applied for these certificates, of which 281,568 have been issued.⁸⁸ CONADI's data on the number of Indigenous communities and Indigenous associations registered within Chile do little to clarify the exact number of Indigenous individuals living within Chile, but they do paint a picture of the enormously complex organizational quagmire found in the country. Again, as of July 2013, CONADI had recognized 3,392 Indigenous communities and 2,017 Indigenous associations.⁸⁹

The vast majority of Indigenous individuals in Chile identify as Mapuche—a fact that drives much of the debate over what Indigenous policy and law should be. Of the total Indigenous population, 86.4% or nearly 1.2 million people identify as Mapuche.⁹⁰ The next largest population is the Aymara people, which make up 7.2% of the Indigenous population, or approximately 98,000 individuals.⁹¹ None of the remaining seven Indigenous peoples constitute more than 3% of the total Indigenous population living in Chile.⁹²

Over the last several decades, the Indigenous population in Chile has become increasingly urban. While a higher percentage of Indigenous people continue to live in rural areas than do non-Indigenous people, only about one-quarter of the total Indigenous population resides in rural areas of the nation.⁹³ The trend towards urbanization is particularly great for non-Mapuche Indigenous peoples: approximately 70%-90% of all non-Mapuche Indigenous populations reside in urban areas.⁹⁴ The Región Metropolitana,

87. Law No. 19,253, art. 3, September 28, 1993 (Chile).

88. Ministerio de Desarrollo Social, *supra* note 83.

89. *Id.*

90. See PUEBLOS ORIGINARIOS CASEN 2011, *supra* note 82, at 2-3.

91. *Id.* at 3.

92. *Id.* The population data for the remaining Indigenous peoples are: Diaguita 2.5% (34,000); Atacameño 1.7% (23,000); Quechua 0.8% (11,000); Coya 0.7% (9,500) Rapa Nui 0.4% (5,500); Kawésqar 0.1% (1,300); and Yagán 0.1% (1,300). *Id.*

93. *Id.*

94. COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE, ATLAS SOCIODEMOGRÁFICO DE LOS PUEBLOS INDÍGENAS DE CHILE 42 (2012).

a region including the capital city of Santiago as well as the top ten municipalities in terms of Indigenous populations, has, in particular, absorbed a significant number of Indigenous migrants.⁹⁵

As with many Indigenous peoples around the world, the Indigenous peoples in Chile lag behind the general population when it comes to nearly any socioeconomic indicator. The following statistics offer a brief glimpse into some of the socioeconomic challenges the Indigenous peoples in Chile face.⁹⁶

- 19.2% of Indigenous people live in poverty and 4.3% live in extreme poverty, compared to 14% and 2.7%, respectively, of the non-Indigenous population;
- 5% of the Indigenous population is illiterate, compared to 3.2% of the non-Indigenous population;
- The average educational attainment for Indigenous people is ninth grade, compared to ninth grade for the non-Indigenous population;
- While gaps in early childhood and basic education are closing, only 38.4% of the Indigenous population attends post-secondary education, compared to 45.1% of the non-Indigenous population;
- 10.6% of the Indigenous population is unemployed, compared to 7.5% of the non-Indigenous population; and
- The average hourly wage for Indigenous individuals is 33% less than the average hourly wage for non-Indigenous people.

It is important to note that the data presented above is an *aggregate view* of the Indigenous population of the country as a whole, covering all geographic regions as well as both urban and rural Indigenous populations. The reality is that there are areas where these socioeconomic gaps are much more pronounced. For example, the rates of illiteracy are much higher for the Mapuche people, where, in some municipalities, the rate of illiteracy is

95. *Id.* at 43.

96. The bullet-point data is taken from PUEBLOS ORIGINARIOS CASEN 2011, *supra* note 82.

two to three times greater than the average level of illiteracy for Indigenous adults living in other regions of the country.⁹⁷ Similarly, while Indigenous peoples average one less year of education as compared to the non-Indigenous population, in certain Mapuche territories of southern Chile, that gap grows to a difference of more than two years.⁹⁸

C. The Political-Legal Environment for Self-Determination in Chile

Indigenous rights in Chile are almost exclusively outlined in just three legal instruments. First, Law 19.253 (1993), commonly known as the “Indigenous Law,” is the oldest piece of national legislation directly addressing Indigenous rights and policy in Chile.⁹⁹ Second, in 2008 Chile ratified ILO Convention 169 on indigenous and tribal peoples (Convention 169).¹⁰⁰ Since its ratification, Convention 169 has greatly impacted the legal and policy debates within the nation. Finally, Chile voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, although this instrument occupies a decidedly less significant place in both the legal framework and in the national discourse on Indigenous rights.¹⁰¹

While the importance and influence of Convention 169 increases in Chile, the Indigenous Law continues to define the structure of Indigenous rights within the nation. When the Indigenous Law was passed in 1993, it was considered a landmark piece of legislation because it was the first to

97. COMISIÓN ECONÓMICA PARA AMÉRICA LATIN Y EL CARIBE, *supra* note 60, at 91.

98. *Id.* at 99.

99. Law No. 19.253, September 28, 1993 (Chile) (establishing norms for the protection, promotion and development of indigenous peoples and to create the National Indigenous Development Corporation).

100. Decree No. 236 of the Ministry of Exterior Relations (2008) (promulgating International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries).

101. U.N. GAOR, 61st Sess., 107th plen. mtg., at 20, U.N. Doc. A/61/PV.107 (Sept. 2007) (remarks by Chile’s delegate to the United Nations during the vote on the Declaration) (“The delegation of Chile voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples, for we recognize the important and valuable contribution of indigenous peoples in building and developing our societies. The Declaration is a significant step in our great national undertaking to build a more inclusive, diverse and tolerant society”); DERECHOS DE LOS PUEBLOS INDÍGENAS, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008, at 361 (Universidad Diego Portales Centro de Derechos Humanos, Nicholas Espejo Yaksic & Marcelo Rojas Vásquez eds., 2008) [hereinafter INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008].

comprehensively address Indigenous issues and rights in Chile's history.¹⁰² The Indigenous Law accomplishes a number of things, including:

- recognizes the nine Indigenous "ethnicities" in Chile;¹⁰³
- forming the basis for the creation of CONADI (the *Corporación Nacional de Desarrollo Indígena*), the government agency charged with implementing—but not setting—Indigenous policy;¹⁰⁴
- establishing Indigenous accreditation procedures for Indigenous individuals;¹⁰⁵
- defining how Indigenous peoples are allowed to organize themselves by creating two types of legal entities—"Indigenous Communities" and "Indigenous Associations";¹⁰⁶
- establishing the procedures through which Indigenous individuals and Indigenous Communities may: obtain title to ancestral lands; clear title to ancestral lands; and register ancestral lands as "Indigenous lands";¹⁰⁷
- defining the special protections—for example, related to alienation, division, encumbrances, rent and inheritance—afforded to "Indigenous lands";¹⁰⁸
- allowing the government to create "Indigenous Development Areas" or ADI's (*Áreas de Desarrollo Indígena*), which are geographic areas where government agencies are required to focus their efforts for the benefit of Indigenous peoples;¹⁰⁹

102. *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Chile*, U.N. Doc. E/CN.4/2004/80/Add.3 (Nov. 2003).

103. Law 19.253, art. 1, September 28, 1993 (Chile).

104. *Id.* at tit. VI.

105. *Id.* at tit. I.

106. *Id.* at para. 4; *id.* at tit. V, para. 2.

107. *Id.* at tit. II, para. 1.

108. *Id.*

109. *Id.* at tit. II, para. 2.

- establishing the Indigenous Development Fund and the Indigenous Lands and Waters Fund;¹¹⁰ and
- defining and recognizing specific Indigenous rights related to culture, education, justice systems, and participation.¹¹¹

Although the foregoing list broadly summarizes the Indigenous Law, the law addresses many other complex issues affecting Indigenous peoples as well.

In addition to the Indigenous Law, Convention 169 has played an increasingly important role in defining Indigenous rights and the state-Indigenous relationship since its ratification by Chile in 2008.¹¹² Convention 169 is an international treaty, adopted by the International Labour Organization in 1989, and ratified by twenty-two countries.¹¹³ It is the only international treaty to specifically address Indigenous rights and is loosely based on the principle of Indigenous self-determination.¹¹⁴

Convention 169 addresses many of the same substantive issues addressed in the Indigenous Law. Within its key provisions, the Convention:

- defines the term “Indigenous peoples” and establishes Indigenous peoples as holders of collective rights;¹¹⁵

110. *Id.*

111. Law No. 19.253, tit. IV, September 28, 1993 (Chile) (culture and education); Law No. 19.253, tit. V, September 28, 1993 (Chile) (participation); Law No. 19.253, tit. VII, September 28, 1993 (Chile) (judicial procedures).

112. INSTITUTO NACIONAL DE DERECHOS HUMANOS, INFORME ANUAL 2010: SITUACIÓN DE LOS DERECHOS HUMANOS EN CHILE 91-112 (2010) [hereinafter INFORME ANUAL 2010]; INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2009, at 221-32, (Universidad Diego Portales, Jorge Contesse Singh & Andrea Palet eds., 2009).

113. *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=NORML_EXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO (last visited Oct. 26, 2014).

114. *See, e.g.*, sources cited *supra* note 17.

115. Article 1 of Convention 169 specifies that the Convention applies to peoples that fall into one of two broad categories: “tribal peoples” whose social, cultural and economic conditions distinguish them from the national community and who are regulated by their own customs or traditions or special laws and regulations; and peoples who are regarded as indigenous by virtue of having descended from populations that inhabited a geographic area

- recognizes and protects Indigenous peoples' rights to lands, territories and natural resources;¹¹⁶
- establishes labor and employment rights and protections for Indigenous peoples;¹¹⁷
- protects and promotes Indigenous peoples' access to health and education, including access to traditional health and education practices and institutions;¹¹⁸
- recognizes and protects Indigenous peoples' own representative institutions;¹¹⁹
- recognizes and protects the Indigenous rights to consultation and to participation, the "cornerstone" rights of the Convention;¹²⁰ and

prior to conquest and colonization. Under the Convention, self-identification as Indigenous is a fundamental factor to consider. ILO Convention 169, *supra* note 2, at art. 1.

115. The incorporation of the term "peoples" into the Convention is significant and represents a clear shift in international law towards the recognition and protection of collective rights as distinct from individual human rights. *See generally* Swepston, *A New Step*, *supra* note 17.

116. ILO Convention 169, *supra* note 2, at arts. 13-19.

117. *Id.* at arts. 20-23.

118. *Id.* at arts. 24-31. With regards to education, for example, the Convention provides in Article 27 that "governments shall recognise the right of [indigenous peoples] to establish their own educational institutions and facilitie[s]." *Id.* at art. 27.

119. *Id.* at arts. 5, 8. Article 5 obligates governments to respect the "integrity of the values, practices and institutions" of indigenous peoples while Article 8 of Convention 169 recognizes the right of indigenous peoples to "retain their own customs and institutions". *Id.*

120. *Id.* at arts. 6-7. The right of consultation is explicitly laid out in article 6 of the Convention, while the right to participation is recognized in article 7 of the Convention. *Id.* These two rights additionally appear repeatedly throughout the Convention in articles dealing with other substantive rights. *See also* Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) at para. 31 (Nov. 14, 2001) ("The Committee considers that the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based."), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507223,en:NO.

- requires nation-states to modify existing legislation and/or adopt new measures that fully implement Convention 169.¹²¹

Because Convention 169 is a human rights treaty, it enjoys special status under Chilean law and supersedes other national legislation and regulations.¹²² The Chilean Constitution mandates that any legislation or regulation not in sync with Convention 169—or any other international norm Chile has agreed to adhere to—must be modified in order to comply with the treaty’s provisions.¹²³ While an analysis of Chile’s compliance—or lack thereof—with Convention 169 is beyond the scope of this paper, it is safe to say that Chile, like many other nations that have ratified Convention 169, is still learning how Convention 169 fits within the broader legal framework.

The final significant legal instrument operating within Chile is the United Nations’ Declaration on the Rights of Indigenous Peoples (the Declaration).¹²⁴ The Declaration has received significantly less attention than Convention 169 within the Chilean discourse on Indigenous rights, largely due to international law making a clear distinction between the binding legal effect of “treaties” and non-binding “declarations.”¹²⁵ The Declaration does, however, form a part of customary international law that

121. ILO Convention 169, *supra* note 2, at arts. 2-4 (establishing general obligations for member states to take the necessary measures to uphold the rights recognized in the Convention). More specific state obligations are detailed throughout the Convention in the context of specific thematic areas.

122. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 5 (establishing that it is the obligation of the state to respect and promote the rights recognized in the Constitution and in international human rights treaties ratified by Chile). This same article establishes that such rights place a limit on Chile’s exercise of sovereignty. *Id.*; see also INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2009, *supra* note 112, at 22.

123. Decree No. 236 of the Ministry of Exterior Relations, *supra* note 100; see also CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] [Constitution], art. 5. This position is also consistent with the Vienna Convention on the Law of Treaties, of which Chile is a signatory. That Convention provides in Article 27 that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 339.

124. U.N. GAOR, 61st Sess., 107th plen. mtg., *supra* note 101; INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008, *supra* note 101, at 361.

125. Int’l Law Ass’n, 75th Conference, Resolution No. 5/2102, at para. 2 (Sofia, Aug. 5, 2012) [hereinafter ILA Resolution 5/2102]; COMM. ON THE RIGHTS OF INDIGENOUS PEOPLES, INT’L LAW ASS’N, FINAL REPORT (2012) [hereinafter ILA FINAL REPORT]; *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly*, *supra* note 4; S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 79-82 (2009).

Chile has promised to uphold and promote.¹²⁶ Within the Declaration are many of the same Indigenous rights found in Convention 169, but there are a few significant additions as well—including the Indigenous right of self-determination.¹²⁷ The explicit mentioning of the Indigenous right of self-determination within the Declaration means, in theory at least, that Chile is committed to upholding and promoting this right going forward.¹²⁸

Beyond these three foundational pieces of legislation there are a handful of laws and regulations that touch on specific Indigenous issues or specific Indigenous groups. For example, in 2008, Chile passed Law 20.249 establishing procedures for the designation of “Original Peoples Marine Coastal Areas” (*Espacio Costero Marino de los Pueblos Originarios*),¹²⁹ which is a law primarily addresses the issue of Indigenous coastal rights.¹³⁰

126. In this regard, on the occasion of Chile’s vote in 2008, the representative from Chile said:

The delegation of Chile voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples, for we recognize the important and valuable contribution of indigenous peoples in building and developing our societies. The Declaration is a significant step in our great national undertaking to build a more inclusive, diverse and tolerant society. In that context, we would like to reaffirm a crucial principle of our domestic legal system, namely, the need to “respect, protect and promote the development of indigenous people, including their culture, families and communities.” That principle underpins the public policies and initiatives we are promoting for the economic, social and cultural development of our indigenous peoples. The Declaration will serve to strengthen those national efforts, which are being carried out through dialogue, respect for our specificities, observance of our international commitments and, in particular, our domestic institutions, rule of law and legal norms.

U.N. GAOR, 61st Sess., 107th plen. mtg., *supra* note 101, at 20.

127. While the Convention does not explicitly reference the right of self-determination, the Declaration does. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 3, art. 3. For a general discussion of the role of the Declaration in relation to other international norms, see *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples to the General Assembly*, U.N. Doc. A/HRC/9/9 (Aug. 2008).

128. ILA Resolution 5/2102, *supra* note 125; ILA FINAL REPORT, *supra* note 125; *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly*, *supra* note 4; ANAYA, *supra* note 125, at 79-82; *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples to the General Assembly*, *supra* note 127, at paras. 34-43.

129. Law No. 20.249, Feb. 16, 2008 (Chile) (creating the Indigenous peoples’ marine coastal area).

130. See *infra* Part III (addressing law in more detail as it is the basis of the *Identidad Territorial Lafkenche* case study).

Similarly, in 2009, Chile's Ministry of Planning and Development¹³¹ promulgated Decree 124,¹³² a provisional regulation concerning Indigenous consultation and participation in certain circumstances.¹³³ In 2014, Decree 124 was repealed and replaced with Decree 66.¹³⁴ There are also a handful of special laws and regulations that apply only to Easter Island, the home of the Rapa Nui people.¹³⁵ Finally, several generally applicable laws and regulations contain specific articles touching on Indigenous rights across a range of issues, including but not limited to: education,¹³⁶ environmental protection,¹³⁷ extractive industries,¹³⁸ forestry,¹³⁹ health,¹⁴⁰ and national parks and reserves.¹⁴¹

131. Now known as the Ministry of Social Development.

132. Decreto No. 124 del Ministerio de Planificación que reglamenta el artículo 34 de la Ley No. 19.253 a fin de regular la consulta y la participación de los pueblos indígenas (2009).

133. *Id.* arts. 4-5.

134. Decreto No. 66 del Ministerio de Desarrollo Social que regula el procedimiento de consulta indígena en virtud del artículo 6 No. 1 Letra A) y No. 2 del Convenio No. 169 de la Organización Internacional del Trabajo y deroga normativa que indica (2014).

135. For example, in 2000 a decree was adopted to establish the Easter Island Development Commission, which provides for the participation of Rapa Nui representatives in development planning for the island. Decreto No. 3 del Ministerio de Planificación y Cooperación que aprueba reglamento de la comisión de desarrollo de Isla de Pascua (2000).

136. *See, e.g.*, Decreto No. 280 del Ministerio de Educación que establece los objetivos fundamentales y contenidos mínimos obligatorios de la educación básica y fija normas generales para su aplicación (2009). This decree introduced the indigenous language sector into the national education curriculum, establishing guidelines for which schools might have indigenous language programs, at which grade levels, and how those programs will be implemented. *Id.*

137. Law No. 19.300, art. 4, January 3, 1994 (Chile) establishes that State entities, in carrying out their duties under the law, must promote the conservation, development and strengthening of Indigenous identity, languages, institutions, and social and cultural traditions. In addition, Chile recently adopted new regulations governing environmental impact assessments for large-scale development projects. These new regulations specifically address Indigenous consultation. *See* Decree 40 del Ministerio del Medio Ambiente que aprueba reglamento del sistema de evaluación de impacto ambiental (2013).

138. Extractive industries projects in Chile are subject to the environmental impact assessment process established in Law 19.300 and its regulation, Decree 40 del Ministerio del Medio Ambiente que aprueba reglamento del sistema de evaluación de impacto ambiental (2013).

139. *See, e.g.*, Decreto Ley 701 del Ministerio de Agricultura que fija régimen legal de los terrenos forestales o preferentemente aptos para la forestación, y establece normas de fomento sobre la materia (1974). A new law governing forestry—and that also includes provisions relevant to Indigenous peoples—is currently being considered in Congress. Boletín 8603-01 (Oct. 2, 2012).

Before presenting and analyzing the Indigenous self-determination case studies from Chile, it is beneficial to point out three key differences between Chilean Indigenous policy and that of the United States:

First, while the United States has a land reservation system, Chile does not. Indigenous peoples in Chile are still very much in the process of recovering their ancestral lands and resources as well as obtaining official legal recognition of those lands and resources.¹⁴² Although vast regions of Chile are generally understood to be the ancestral homelands of certain Indigenous communities—for example, Easter Island belonging to the Rapa Nui,¹⁴³ or the regions extending south of the Bío Bío River belonging to the Mapuche¹⁴⁴—official recognition has taken place very slowly.¹⁴⁵ Where

140. See, e.g., Law No. 20.584 que regula los derechos y deberes que tienen las personas en relación con acciones vinculadas a su atención en salud, art. 7 (2012) (specifying that in regions with a high concentration of indigenous population, public health agencies must protect the right of indigenous individuals to culturally appropriate health services through intercultural health programs that have been approved by the indigenous peoples).

141. See, e.g., Decreto 50 del Ministerio de Economía, Fomento y Turismo que fija procedimiento para otorgamiento de concesiones turísticas en áreas silvestres protegidas del Estado (2012) (requiring the State to consider Indigenous peoples when granting tourism concessions within protected areas).

142. INFORME ANUAL 2010, *supra* note 112, at 104-05; *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Chile*, *supra* note 102; *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: The Situation of Indigenous Peoples in Chile: Follow Up to the Recommendations Made by the Previous Special Rapporteur*, U.N. Doc. A/HRC/12/34/Add.6 (Oct. 2009) [hereinafter *Follow Up to the Recommendations Made by the Previous Special Rapporteur*].

143. See generally INFORME DE LA COMISIÓN DE VERDAD HISTÓRICA Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS 259-63 (2008). Notably, this same government report explained the history of Rapa Nui's annexation to Chile in the late 1880s through the *Acuerdo de Voluntades*. The treaty was written in both Spanish and a mix of Rapanui and Tahitian and this government report acknowledged for the first time the significant differences in the translations which raise doubts as to whether sovereignty and territorial rights were actually ever ceded to the Chilean state during this period of annexation. *Id.*

144. See generally *id.* at 317-23. As explained in this report, the Mapuche population once stretched as far north as the Metropolitan Region and present-day Santiago. During the period of colonization, a series of *parlamentos* (dialogues) between the Spanish and the Mapuche led to the creation of a border along the Bío Bío River, to the south of which was autonomous Mapuche territory that was never successfully conquered by the Spanish. This area was only incorporated into Chile in the late 1800s during a process known as the Pacification of the Araucanía. *Id.*

145. Between 1994 and 2010 a total of 667,457 hectares have been acquired and transferred to Indigenous individuals and communities. INFORME ANUAL 2010, *supra* note 112, at 104. The estimate of the total land area that is "Indigenous" per the terms of the

official recognition has occurred, it frequently involves relatively small parcels of land that are titled to Indigenous individuals or single Indigenous communities. The patchwork of Indigenous lands created by Chile's policy is a direct result of the nation's Indigenous Law, which requires individuals and/or communities to register with the government before being eligible for Indigenous lands.¹⁴⁶ Because the registration process favors smaller entities and explicitly forbids the formation of confederations of communities,¹⁴⁷ lands recognized officially as Indigenous lands tend to be titled to a single family or community and tend not to be larger, contiguous pieces of land owned by an Indigenous people as a whole.

Though Chile does not have a land reservation system, the nation does recognize *Áreas de Desarrollo Indígena* (Indigenous Development Areas) or ADIs. ADIs are designated geographic regions within which the Chilean government has decided to focus its attention on improving the lives of the Indigenous individuals living there.¹⁴⁸ The purpose of the ADIs is not to establish a land base belonging to Indigenous peoples, but rather to promote "development" within traditional Indigenous territory.¹⁴⁹ As of May 2013, there were eleven ADIs in Chile.¹⁵⁰ Under Chilean law, an ADI may only

Indigenous Law exceeds 1,161,074 hectares. *Id.* The estimate of total Indigenous land is likely low given the restrictive stance of the Indigenous Law compared to international law principles. *See Follow Up to the Recommendations Made by the Previous Special Rapporteur, supra* note 142, at para. 24-32.

146. José Aylwin, *Derechos territoriales de pueblos indígenas en América Latina: Situación Jurídica y Políticas Públicas*, OBSERVATORIO CIUDADANO, 27-31 (Jan. 21, 2011), http://www.observatorio.cl/sites/default/files/biblioteca/presentacion_jose_aylwin.pdf.

147. According to the Indigenous Law, Article 9, a single Indigenous Community must be created on the basis of one of the following criteria: the members descend from the same family lines, the members have a shared traditional leader, the members possess or have possessed land in common or the members descend from the same ancient village. Law No. 19.253, art. 9, September 28, 1993 (Chile). Regarding Indigenous Associations, the Indigenous Law is clearer, stating in Article 36 that Indigenous Associations may not represent Indigenous Communities. *Id.* art. 36.

148. *Id.* arts. 26-27.

149. The Indigenous Law, in Article 26, defines Indigenous Development Areas as territorial spaces in which state administrative agencies will focalize their action for the "harmonious development" of Indigenous peoples and their communities. [Needs cite] Generally speaking, the decrees that create ADIs reference high levels of poverty, lack of access to employment, and various socio-economic indicators such as access to housing, education and healthcare and water. *Id.* art. 26. Development in this context is targeted at improving service delivery and closing the gaps between these indigenous populations and the general population. *Id.*

150. Currently, the following ADIs have been established by Decree of the Ministry of Social Development (formerly the Ministry of Planning and Development): Ercilla (Decree

be established where there are ancestral Indigenous lands, but the existence of the ADI is silent on who may hold title to ADI lands.¹⁵¹ Thus, ADIs can and do cover areas that include state-owned lands, private property, and Indigenous property.

Second, Chile, unlike the United States, does not recognize any degree of Indigenous sovereignty. This lack of sovereignty flows naturally from the lack of an Indigenous land base—without land over which to exercise sovereignty, it is difficult to exercise any meaningful control. But even if Indigenous peoples in Chile had a recognized land base, the current Chilean explicitly rejects exercises of sovereignty by any individuals or groups of people other than the Chilean national government.¹⁵² Additionally, the legal-political framework created under Chile's current constitution has resulted in a single, powerful, centralized government.¹⁵³ Thus, unlike the United States' tradition of federalism with a national government of limited powers and multiple sovereigns, Chile's legal-political framework has all but eliminated the space for any co-sovereign entity to act.

Third, whereas the United States explicitly allows for, and promotes, Native nation governments, Chile does not recognize any Indigenous entity—whether it is an Indigenous Community or an Indigenous Association—as a government. This difference is, of course, closely related to the fact that Chile does not identify Indigenous peoples as having any sovereign status.¹⁵⁴ Although Chile does not acknowledge any Indigenous entity as a government, Indigenous individuals and communities can choose to organize under the Indigenous Law as “Indigenous Communities” or as “Indigenous Associations.”¹⁵⁵

Indigenous Communities are a type of Chilean legal entity formed on the basis of community members sharing an ancestral lineage, recognizing a traditional leader, having overlapping traditional land occupation, and/or descending from the same ancient settlement.¹⁵⁶ Chilean law forbids

67 of 2013); Cabo de Hornos (Decree 279 of 2006); Alto Andino Arica-Parinacota (Decree 224 of 2005); Rapa Nui (Decree 111 of 2004); Puel Nahuelbuta (Decree 168 of 2004); Alto El Loa (Decree 189 of 2003); Lago Llu Llu (Decree 60 of 2001); Jiwasa Oraje (Decree 67 of 2001); Lago Budi (Decree 71 of 1997); Algo Bío Bío (Decree 93 of 1997); and Atacama La Grande (Decree 70 of 1997).

151. Law No. 19.253, art. 26.

152. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 5.

153. DESAFÍOS PARA UNA CIUDADANÍA PLENA EN CHILE HOY at 11-23 (Jorge Rowlands & José Aylwin eds., 2012).

154. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 5.

155. Law No. 19.253, arts. 9, 36.

156. *Id.* art. 9.

Indigenous Communities from banding together and forming federations.¹⁵⁷ Thus, the law's definition necessitates that Indigenous Communities are extremely local entities with small membership numbers. The requirements for forming an Indigenous Community, selecting leadership, and making decisions are all carefully spelled out by law.¹⁵⁸ Once formed, Indigenous Communities have legal personality and can enter into contracts, own assets, seek and administer government subsidies, and take legal action on behalf of the Community's interests, among other things.¹⁵⁹ However, given that the Communities are not "governments" vested with "sovereign" powers, Communities do not have legislative or regulatory authority; nor would they have the authority to enforce any legislative or regulatory action if they were to take it. In other words, a Community's power over its members relies on those members' personal choice to belong to the Community and to voluntarily consent to any Community action.

Despite the limited powers Indigenous Communities possess within the Chilean legal system, Indigenous Communities most closely approximate the role of United States Native nations. Generally, after recognizing an Indigenous Community, the Chilean government considers the Community entity to be the primary representative institution for the Indigenous individuals who fit within the Community's scope of membership.¹⁶⁰

The "Indigenous Association" is the primary alternative to organizing as an Indigenous Community. Rather than being formed around a common ancestry, traditional leadership structure, or traditional settlement, Indigenous Associations are formed on the basis of a particular thematic interest.¹⁶¹ For example, there are many Indigenous Associations created for the purpose of promoting Indigenous education, health, or language. By their nature, Indigenous Associations are more commonly formed in urban areas where Indigenous individuals from diverse geographic areas and from different traditions can join together to address issues of common interest.

157. *Id.*

158. *Id.* arts. 9, 36.

159. *Id.*

160. For example, the most recent round of nationwide consultation sessions announced by the government invited Indigenous communities and associations recognized pursuant to the Indigenous law to participate. CONSULTA INDÍGENA, <http://www.consultaindigena.gob.cl/> (last visited Oct. 26, 2014). In addition, newly passed Decree 66, which regulates consultation in Chile, states that Indigenous peoples shall define their own representative institutions for purposes of consultations but also specifically references communities and associations recognized under the Indigenous Law as likely representative institutions. Decree No. 66, art. 6 (2014).

161. Law No. 19.253, art. 36.

Just like Indigenous Communities, Indigenous Associations lack legislative, regulatory, or judicial authority over both members and non-members. Indigenous Associations do enjoy legal personality and can enter into contracts, own assets (excluding Indigenous land), receive government funding, and commence legal action on behalf of their members. Participation in an Indigenous Association is strictly voluntary.¹⁶² Furthermore, Indigenous Associations cannot represent the interests of a community nor act as the representative institution for a group of communities.¹⁶³ In practice, however, there are a few examples of Indigenous Associations that effectively act as umbrella organizations for coordination among multiple communities.¹⁶⁴

III. Indigenous Self-Determination in Chile

In Part III, we have selected three stories of Indigenous self-determination to share and have laid out each story similarly: first, we present some basic background on the community involved; next, we explain each community's self-determination goal and the steps taken to achieve it; and finally, we analyze each community's actions for evidence of the applicability of the Nation Building principles.

A. Case Study Number One: The Valle de la Luna Indigenous Association

1. Background

The Atacama Desert covers a vast amount of land in present-day Chile, including the area known as the Antofagasta Region. It is a harsh and remote landscape rising from the Pacific Ocean towards the peaks of the Andes, and including the international boundary point where Argentina, Bolivia, and Chile meet. The landscape is dotted with huge salt flats, unique geologic formations, dozens of active volcanoes, *bofedales* (or high-altitude wetlands), thermal hot springs, and small waterways that open to oases of vegetation.¹⁶⁵

162. *Id.* arts. 36-37; Law no. 19.418 que establece normas sobre juntas de vecinos y demas organizaciones comunitarias, Oct. 9, 1995 (Chile).

163. Law No. 19.253, art. 36.

164. *See, e.g.*, discussion *infra* regarding the Consejo de Pueblos Atacameños, and Identidad Territorial Lafkenche.

165. Decree of the Ministry of Social Development No. 70 (Chile 1997) [hereinafter Decree 70].

Despite its remote location and unforgiving environment, the Atacama Desert of northern Chile has been home to the Likan Antai¹⁶⁶ Indigenous people for over ten thousand years.¹⁶⁷ The Likan Antai people's presence in the region pre-dates the Chilean state, the arrival of Spanish settlers, and even the expansion of the Inca Empire into present-day Chile.¹⁶⁸ Historically, the Likan Antai people engaged in a range of economic and subsistence activities including farming, herding, hunting, mining, and trading.¹⁶⁹

Today, the total Likan Antai population in Chile is between 6,100¹⁷⁰ and 23,000¹⁷¹ depending on what data is used to make the determination. The vast majority of Likan Antai individuals — approximately 75%-90% — live in the Antofagasta Region of Chile.¹⁷² There are thirty-five legally-recognized Indigenous Communities and ninety-four legally-recognized Indigenous Associations, nearly all of which are Likan Antai in nature.¹⁷³ Geographically speaking, many of the Likan Antai communities are located precisely where their ancestors settled thousands of years prior.¹⁷⁴

Although the Likan Antai were contacted by the Spanish in the sixteenth century and became a part of the Chilean state in the nineteenth century, they remained relatively isolated from the non-Indigenous population until the 1980s.¹⁷⁵ This relative isolation dramatically changed in the late 1980s and early 1990s when the "tourism boom" came to the area.¹⁷⁶ The tourism boom centered on the small town of San Pedro de Atacama, which lies along the San Pedro River Valley.¹⁷⁷ In the past, visitors to San Pedro de

166. Oftentimes referred to as the "Atacameño" people.

167. SEELAU & SEELAU, *THE PUKARÁ OF QUITOR*, *supra* note 13, at 7.

168. LAUTARO NÚÑEZ, *VIDA Y CULTURA EN EL OASIS DE SAN PEDRO DE ATACAMA* 17-70 (1991).

169. *Id.* at 17-78.

170. CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN, *supra* note 81, at 172.

171. PUEBLOS ORIGINARIOS CASEN 2011, *supra* note 82 (stating that Likan Antai are 1.7% of the total Indigenous population of 1,369,000).

172. *Id.* (stating that 16,000 of 23,000 Likan Antai individuals live in the Antofagasta Region); CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN, *supra* note 81, at 172, 177 (2012) (stating that 5,338 of 6,101 Likan Antai individuals live in the Antofagasta Region).

173. Ministerio de Desarrollo Social, *supra* note 83.

174. *See generally* NÚÑEZ, *supra* note 168; COMISIONADO PRESIDENCIAL PARA ASUNTOS INDÍGENAS DE CHILE, INFORME DE LA COMISIÓN DE VERDAD HISTÓRICAL Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS 139-92 (2008) [hereinafter INFORME DE LA COMISIÓN DE VERDAD HISTÓRICAL Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS].

175. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 131-39.

176. *Id.*

177. *Id.*

Atacama were greeted with a large variety of geographical features and beautiful landscapes, but no lodging establishments. San Pedro de Atacama sported only a handful of restaurants, and almost nothing in the way of tourism infrastructure.¹⁷⁸ Within only a few years, however, non-Indigenous entrepreneurs and corporations seized the opportunity to develop the area and brought with them hostels, hotels, restaurants, and tourist agencies offering excursions to the area's many archaeological, cultural, geological and historical attractions.¹⁷⁹ In less than a quarter of a century, more than 215,000 tourists from around the world visit San Pedro de Atacama and the surrounding area annually—making it one of the most popular tourist areas in all of Chile.¹⁸⁰

For the Likan Antai people, the tourism boom has created many problems. First, many of the attractions visitors come to see, from thermal hot springs to the Atacama Salt Flat to the eight-hundred-year-old stone fortresses, are located on Likan Antai ancestral lands, and are sites that hold both cultural and historical significance for the Likan Antai people.¹⁸¹ Second, the tourism industry has grown so quickly that it has largely outpaced meaningful regulation.¹⁸² Thus, for many, many years, tourist agencies had no limits on the number of people they could bring to cultural sites and no restrictions on how tourists behaved once at those sites.¹⁸³ This has resulted in significant theft and vandalism of cultural property over the years.¹⁸⁴ Third, the Likan Antai people receive essentially none of the economic benefits of the tourism industry even though it is all takes place within their ancestral territory.¹⁸⁵ Instead, the money flows to the non-Indigenous, private businesses established to cater to tourists.¹⁸⁶

178. *Id.* at 137.

179. *Id.*

180. Instituto Nacional de Estadísticas, *Turismo, Informe Anual 2012* at 52 (May 2013) (reporting that over 218,000 tourists visited the Los Flamencos Reserve in 2012).

181. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 137-38.

182. R. Bushell & J. Salazar, *Estudio de prefactibilidad: Turismo indígena en San Pedro de Atacama Chile* at 24-26 (Fundación Minera Escondida, 2009).

183. R. Bushell & J. Salazar, *Estudio de prefactibilidad: Turismo indígena en San Pedro de Atacama Chile* at 24-26 (Fundación Minera Escondida, 2009).

184. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 137.

185. *See generally* IVONNE VALENZUELA, *MODELO DE GESTIÓN ASOCIATIVO EN LA RESERVA NACIONAL LOS FLAMENCOS: UNA DÉCADA DE APRENDIZAJES* (2005).

186. *See generally id.*

2. Self-Determination in Action

The communities knew that something needed to be done to preserve their lands, resources and their cultural patrimony, and the opportunity to do so arose in connection with an area of land known as the *Reserva Nacional Los Flamencos* (*Los Flamencos*). *Los Flamencos* is a national reserve comprised of seven non-contiguous plots that together encompass: archeological sites; forested areas; high-altitude lakes; thermal hot springs; three salt flats; and *Valle de la Luna* (Valley of the Moon), an area of geologic interest within the *Cordillera de la Sal* (Salt Mountain Range) just outside the town of San Pedro de Atacama.¹⁸⁷ *Los Flamencos* is located entirely within the *comuna* (commune) of San Pedro de Atacama.¹⁸⁸ It was created in 1990 by decree of the Ministry of Agriculture.¹⁸⁹ Legally speaking, control and administration of *Los Flamencos* falls to the *Corporación Nacional Forestal* (National Forestry Corporation), or CONAF, which is the government entity that oversees all protected areas in Chile.¹⁹⁰

Los Flamencos was created prior to the passage of the Indigenous Law, meaning there were no legal protections in place for Indigenous peoples' rights at the time of its formation.¹⁹¹ Thus, although *Los Flamencos* is located entirely within the ancestral land base of the Likan Antai people, the Likan Antai were neither involved in the reserve's creation nor in the early years of its administration and management.¹⁹² Although formal recognition of Indigenous peoples rights had not yet occurred, the Likan Antai organized to take action as best they could under the law.¹⁹³ Specifically, the Likan Antai communities organized as *juntas de vecinos* (neighborhood associations).¹⁹⁴ These neighborhood associations were not Indigenous-specific identities, but the Likan Antai communities were able to use them to interact with local government authorities.¹⁹⁵

187. Decree 50 que crea reserva nacional Los Flamencos en terrenos fiscales de la II región y la declara lugar de interés científico para efectos mineros (Ministerio de Agricultura de Chile, Oct. 17, 1990).

188. *Id.*

189. *Id.*

190. *Id.* art. 6.

191. Decree 50 was passed in 1990 and the Indigenous Law was passed in 1993.

192. VALENZUELA, *supra* note 185, at 1-22.

193. INFORME DE LA COMISIÓN DE VERDAD HISTÓRICA Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS, *supra* note 174, at 181-91.

194. *Id.*

195. *Id.*

When Chile passed the Indigenous Law in 1993, new opportunities for Indigenous peoples to organize and assert their rights opened up.¹⁹⁶ The Likan Antai communities surrounding San Pedro de Atacama took advantage of these opportunities and began the process of forming Indigenous Communities under the terms of that law shortly after its passage.¹⁹⁷ Today, in the *comuna* (commune) of San Pedro de Atacama, there are seventeen Likan Antai Indigenous Communities.¹⁹⁸ In the mid-1990s, these communities came together to create the *Consejo de Pueblos Atacameños* or Council of Atacameño People (Consejo), an Indigenous Association created in accordance with the Indigenous Law.¹⁹⁹ The *Consejo* enabled and continues to enable the communities to collaborate on certain projects and to coordinate decision-making and planning within the ancestral territory.²⁰⁰

In 1997, another legal development occurred that helped pave the way for the Likan Antai communities to assert control over their ancestral territory.²⁰¹ In that year, Chile's Ministry of Planning and Cooperation created the first Indigenous Development Area (ADI), *Atacama La Grande*.²⁰² The boundaries of *Atacama La Grande* precisely coincide with the boundaries of the San Pedro de Atacama *comuna* and thus, *Los Flamencos* was suddenly entirely encompassed within the ADI.²⁰³ The creation of *Atacama La Grande* was significant for three reasons.

196. Law No. 19.253 (1993).

197. INFORME DE LA COMISIÓN DE VERDAD HISTÓRICAL Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS, *supra* note 174, at 187-91.

198. According to data from CONADI, there are thirty-five Indigenous communities organized through the San Pedro de Atacama Indigenous Affairs Office. This includes some Quechua communities as well as Likan Antai communities in the *comunas* of Calama and Ollagüe. Conversations with Likan Antai leaders who serve on the *Consejo de Pueblos Atacameños* confirm that there are seventeen communities that participate in the *Consejo* within the *Atacama La Grande* ADI.

199. At the time of its creation, the *Consejo* included not only the communities in San Pedro de Atacama, but also in the neighboring *comuna* of Ollagüe. Today, the *Consejo* has two divisions, one for San Pedro de Atacama and one for Calama-Ollague.

200. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 132-33; Sergio Avendaño, Áreas de desarrollo indígena en el norte de Chile: Negociaciones y disputas en torno a espacios territoriales 114-16 (Dec. 2009) (unpublished M.S.S. thesis, Universidad de Chile Facultad de Ciencias Sociales), available at http://www.tesis.uchile.cl/tesis/uchile/2009/cs-avendano_s/pdfAmont/cs-avendano_s.pdf.

201. Decree 70, *supra* note 165.

202. *Id.*

203. *Id.*

First, the Indigenous Law specifies that:

in the administration of wilderness protected areas, located within Indigenous Development Areas, the participation of the communities there shall be considered. The National Forestry Corporation . . . and [CONADI], by common agreement, will determine in each case the appropriate form and extent of Indigenous Communities' participation as it relates to rights of use.²⁰⁴

Although not clearly spelled out in any policy directive, nor supported by any prior experiences of the Chilean government, this mandate served to open the door to the possibility that the Likan Antai communities might be involved to some degree in the management of *Los Flamencos*.²⁰⁵

Second, the decree creating *Atacama La Grande* acknowledged that the ADI "constitutes a territory that has ancestrally been inhabited by [I]ndigenous communities of [A]tacameño ethnicity," and officially noted archeological and historical evidence tracing Likan Antai occupation of the lands back to at least the sixteenth century.²⁰⁶ The decree also acknowledged that the current Likan Antai communities historically occupied and possessed the lands in question, and noted the close relationship between the communities and their lands and resources.²⁰⁷ While such words do not constitute an official recognition of Likan Antai land rights, they nonetheless serve an important role in providing a foundation for the communities' interest in being involved in the management of *Los Flamencos*.

Finally, the creation of the *Atacama La Grande*, ADI increased dialogue and cooperation between the Likan Antai Indigenous Communities and various Chilean government agencies.²⁰⁸ As is often the case, once dialogue started happening more consistently, positive results—for both the Likan Antai communities and the Chilean government—soon followed.²⁰⁹

204. Law No. 19.253, art. 35, September 28, 1993 (Chile). ("En la administración de las áreas silvestres protegidas, ubicadas en las áreas de desarrollo indígena, se considerará la participación de las comunidades ahí existentes. La Corporación Nacional Forestal...y la Corporación, de común acuerdo, determinarán en cada caso la forma y alcance de la participación sobre los derechos de uso que en aquellas áreas corresponda a las Comunidades Indígenas.") (English translation by authors).

205. VALENZUELA, *supra* note 185, at 7, 20-21.

206. Decree 70, *supra* note 165 (English translation by authors).

207. *Id.*

208. VALENZUELA, *supra* note 185, at 23. *See generally* Avendaño, *supra* note 200.

209. VALENZUELA, *supra* note 185, at 23. *See generally* Avendaño, *supra* note 200.

It was within this legal and political framework that negotiations between CONADI, CONAF, and the Indigenous Communities in San Pedro de Atacama came to pass.²¹⁰ During these negotiations the Likan Antai indicated a desire to be involved in park operations and management. Ultimately, CONAF signed co-administration agreements with a number of Likan Antai communities located within or near one of the seven sectors of *Los Flamencos*.²¹¹ The first agreement, signed in 1998, was an agreement between the Chilean government and the Indigenous Community of Coyo.²¹² The agreement enabled Coyo to assume the on-site administration of an archeological site of great significance called the *Aldea de Tulor* (Village of Tulor).²¹³ Building off of this first agreement, six Indigenous Communities came together to form the Valle de la Luna Indigenous Association in 2002.²¹⁴ This group of communities ultimately signed a contract with CONAF to administer the largest and most-visited sector of *Los Flamencos*, an area of geological wonders known as *Valle de la Luna*.²¹⁵ In the following years, the Indigenous Community of Socaire assumed authority over two high-altitude lakes;²¹⁶ the Indigenous Community of Solor assumed administration of a group of lakes within the nearby salt flats;²¹⁷ and the Indigenous Community of Toconao took control of a tourist site within the *Salar de Atacama* (Atacama Salt Flat).²¹⁸ Other Indigenous Communities—communities not directly adjacent to one of the sectors of *Los Flamencos*—were motivated by the success of these efforts and began developing projects within their own communities. For example, the Indigenous Community of Quito signed an agreement with the National Monument Council to assume control over the Pukará of Quito—an ancient fortress and site of great cultural and historical value.²¹⁹

Today, the Indigenous Communities that oversee the day-to-day operations of many sites within *Los Flamencos*.²²⁰ The Indigenous

210. See generally VALENZUELA, *supra* note 185.

211. *Id.* at 39-52.

212. IVONNE VALENZUELA V, CORPORACIÓN NACIONAL FORESTAL, MODELO DE GESTIÓN ASOCIATIVO EN LA RESERVA NACIONAL LOS FLAMENCOS: UNA DÉCADA DE APRENDIZAJES 39 (2005).

213. VALENZUELA, *supra* note 185, at 39.

214. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 142-43.

215. *Id.* at 143.

216. *Id.*

217. *Id.* at 145.

218. *Id.* at 143.

219. SEELAU & SEELAU, THE PUKARÁ OF QUITO, *supra* note 13, at 7.

220. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 143-48.

Communities set and collect admissions fees, provide park rangers, establish park rules and regulations, and provide for general park maintenance.²²¹ Over the years, using income generated from the sites in conjunction with other funding sources, the Likan Antai communities have built museums, signage, trails, visitor centers, and other infrastructure.²²² The communities employ their own members to work on-site or behind the scenes—training many of these members in fields like business, conservation, cultural history and tourism.²²³ More recently, at *Valle de la Luna*, the Valle de la Luna Indigenous Association has started its own “special interest” tours through which visitors can participate in astronomy programs focused on southern hemisphere and Likan Antai astronomy, and caving tours focused on the mining history of the Likan Antai people.²²⁴ Many Likan Antai communities now operate with business operation plans, strategic plans, and have new ideas and projects on the horizon.²²⁵ While most of the communities’ work has focused on tourism administration, there is an increasing amount of involvement in conservation and land management, and a hope that involvement in broader management areas will steadily grow in years to come.²²⁶

Through the use of co-administration agreements, the Likan Antai communities have been able to respond to many of the problems the sudden burst of large-scale tourism ventures brought to the area.²²⁷ While the communities still do not have title to their ancestral lands, they have a stronger voice in how those lands are managed.²²⁸ Through years of hard work—often butting up against the wishes of the private sector—the communities have successfully established some level of control and protection over the sites that are so significant to them.²²⁹ In exercising this control, the communities also reap some of the economic benefits that the growth of the tourism industry has brought and use these benefits to expand their reach and take care of their own people.²³⁰

221. *Id.*

222. *Id.* at 148-50.

223. *Id.*

224. *Id.* at 150.

225. *Id.* at 143-50.

226. *Id.* at 151-58.

227. *Id.* at 148-50.

228. *Id.* at 151-58.

229. *Id.* at 151-60.

230. *Id.* at 148-50.

3. Nation Building Principles

Despite the success of the co-administration arrangements—from the perspectives of the communities as well as the Chilean government—these types of agreements have not been replicated to the same extent anywhere else within Chile.²³¹ The lack of similar agreements remains true even though ten other ADIs and at least eighteen protected wilderness areas overlap with ancestral Indigenous lands throughout Chile.²³² An important question to answer then is: Why were the Likan Antai people able to create a relationship with the Chilean government and take meaningful control over many of their cultural, historical, and sacred sites, when similar relationships have not emerged in other contexts? The Nation Building principles offer some possible answers to this difficult question.

One possible explanation for the Likan Antai communities' success is found in the Nation Building principle of *practical sovereignty* or *self-rule*. In this case, practical sovereignty can be seen in the Indigenous Communities' ability to administer and manage their traditional sites through the co-administration agreements with the Chilean government. Co-administration in *Los Flamencos*, however, depended on a confluence of legal and political factors. Legally, the Indigenous Law's mandate for Indigenous participation and the subsequent creation of *Atacama La Grande* ADI converged to provide a backdrop for the Likan Antai people's assertions of self-determination and land rights.²³³ Politically, the existence of the ADI meant greater coordination of public funding and programming for the benefit of Indigenous peoples.²³⁴ These factors combined so that Indigenous peoples, for the first time under Chilean law, had a real opportunity to exercise control over portions of their ancestral territory.²³⁵ The mere existence of legal and political space to exercise some level of practical sovereignty, however, has proven insufficient to produce results. Throughout Chile, many Indigenous Communities had opportunities to act in a manner similar to the Likan Antai people, but have not.²³⁶ Why is this?

The answer to this question may stem from another Nation Building principle—*public-spirited leadership*. The Chilean government—through statements made by CONAF officials—has indicated that the success of the

231. VALENZUELA, *supra* note 185, at 3-4.

232. *Id.* at 5.

233. Law No. 19.253, art. 35, September 28, 1993 (Chile); Decree 70, *supra* note 165.

234. See generally VALENZUELA, *supra* note 185.

235. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 151-60.

236. See generally VALENZUELA, *supra* note 185.

Likan Antai communities should be replicable in other regions of Chile.²³⁷ When asked why, then, is *Los Flamencos* one of the only true examples of government-Indigenous collaboration, the answer frequently focuses on community leadership.²³⁸ The leaders of the various Likan Antai communities are known for being very pro-active.²³⁹ In the late 1980s and early 1990s, community leadership spoke out about the need to do something—anything—to stop the destruction of their lands and culture by the booming tourism industry.²⁴⁰ Although their options were initially limited, leaders united their people and formed neighborhood associations to try and gain some control.²⁴¹ As the Chilean legal framework developed to include the Indigenous Law, the *Los Flamencos* reserve, and the *Atacama La Grande* ADI, additional opportunities presented themselves.²⁴² Again, the leaders united their communities and took action. The actions were small to begin with, but once the Likan Antai community leaders had their collective foot in the door, they were able to build on small successes and prove to everyone—most especially the Chilean government—that they could be trusted with more and more responsibility.²⁴³ The takeaway, perhaps, is that the communities and their leaders did not wait for the Chilean government to come to them; they started doing what they could to protect their sites even before any agreements were signed. Specifically, the community leaders refused to wait for Chile to make a “perfect” offer—i.e. an offer to return all land rights to the Likan Antai communities—and they refused to do nothing until Chile responds to their (still pending) land rights claims.²⁴⁴ Instead, the communities’ leadership acted with practical sovereignty and seized the opportunity that was in front of them.

In the end, however, even the Likan Antai communities’ strong leadership coupled with space for self-rule likely would not have achieved as much as it has without *effective institutions*—another one of the Nation Building principles. As discussed previously, the Likan Antai communities

237. *Id.* at 60-64.

238. Interview with Gorge Retamal, Regional Director, CONAF-Antofagasta (Apr. 18, 2011); Interview with Juan Pablo Contreras, Former-Regional Director, CONAF-Antofagasta (Apr. 18, 2011).

239. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 160-64.

240. *Id.* at 136-41.

241. INFORME DE LA COMISIÓN DE VERDAD HISTÓRICAL Y NUEVO TRATO CON LOS PUEBLOS INDÍGENAS, *supra* note 174, at 181-91.

242. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 151-60.

243. See VALENZUELA, *supra* note 185.

244. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 151-58.

in San Pedro de Atacama have a long, stable history of organization.²⁴⁵ Beginning in the 1980s, the communities organized as neighborhood associations, and while some of these associations continue to operate, the various communities also organized under the Indigenous Law as Indigenous Communities and Indigenous Associations to better advance their visions for the future.²⁴⁶ The decision to form legally-recognized entities under Chilean law allowed the Likan Antai communities to both enter into agreements with the government and to access essential government funding used to begin the various co-administration projects.²⁴⁷

Beyond the actions of the individual communities, the role of an effective and stable decision-making institution is most clearly seen in the Valle de la Luna Indigenous Association. Unlike other legally-recognized Indigenous entities within Chile, the Valle de la Luna Indigenous Association is a governing institution comprised of six communities, which have come together for the purpose of managing the *Valle de la Luna* site.²⁴⁸ It took planning and time to create a functioning inter-community governing institution, but the Likan Antai people knew that they would never regain control over the *Valle de la Luna* ancestral lands if they did not do so.²⁴⁹ Ultimately, the institutional structure includes a representative from each of the six communities involved, but overall the Valle de la Luna Indigenous Association operates autonomously and is relatively isolated from the political issues that can arise at the individual community level.²⁵⁰ Under Chilean law, Indigenous Communities typically hold elections every two years, meaning the leadership of a community can change drastically.²⁵¹ But having six community leaders sitting on one governing body helps cull that kind of complete and sudden turnover.²⁵² Additionally, the Valle de la Luna Indigenous Association has a full-time employee who serves as “administrator” of the legal entity.²⁵³ The administrator position helps create a long-term institutional memory and further promotes

245. See *supra* Part III.A.

246. See Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13.

247. See VALENZUELA, *supra* note 185.

248. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 132-33.

249. *Id.* at 136-39.

250. *Id.* at 145-46.

251. See, e.g., SEELAU & SEELAU, *THE PUKARÁ OF QUITOR*, *supra* note 13, at 11.

252. While it is certainly possible that all six community leaders could be voted out at the same time by their respective six communities, common sense dictates that such an all-encompassing turnover is likely to occur far less frequently than if there were only one leader of the association.

253. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 146.

stability.²⁵⁴ Finally, the Valle de la Luna Indigenous Association has become an effective and stable governing institution, in part, because its members have worked hard over the past ten years to formalize internal procedures for future governing members.²⁵⁵

A final hallmark of the Likan Antai communities' successes can be explained by another Nation Building principle—*strategic planning*. Perhaps the most striking aspect of the Likan Antai story is that it started with very small steps, and through the aid of a long-term vision and a plan for achieving that vision, it grew into something much more robust. When the Likan Antai communities began entering into co-administration agreements concerning their traditional sites, each and every community established a clearly defined vision for the future of the site they were put in charge of.²⁵⁶ These visions, or site plans, were guided by some very basic principles: conservation and protection of their ancestral lands, and promotion of Likan Antai culture and history.²⁵⁷ While the site plans vary from community to community, they routinely address both immediate and long-term goals.²⁵⁸ For example, when the Indigenous Community of Quito signed its co-administration agreement and was placed in charge of the nearby *Pukará*—a traditional stone fortress—their first goal was simply to setup a table at the entrance to the fortress and collect a modest admission fee.²⁵⁹ Over the long-term, their goals—all of which were achieved within a decade—included the construction of bathrooms, a visitor's center, a museum, paths, signs and a first-aid center.²⁶⁰ One by one the Indigenous Community of Quito stuck with their long-term plan and achieved their initial set of goals.²⁶¹ Likewise, the Valle de la Luna Indigenous Association worked to create more formal declarations of their strategic plan.²⁶² The Association has worked over the years to produce a formal development plan, an operating plan, an annual budget, and a project portfolio.²⁶³ These documents are used to prioritize projects, monitor

254. *Id.*

255. *Id.* at 146-48.

256. VALENZUELA, *supra* note 185, at 24-25.

257. *Id.* It is worth noting that the Chilean government, through CONAF, has played an important supporting role by working with communities to generate these site plans for each of the sectors of *Los Flamencos*.

258. *Id.*

259. SEELAU & SEELAU, *THE PUKARÁ OF QUITO*, *supra* note 13, at 13.

260. *Id.* at 14-16.

261. *Id.*

262. VALENZUELA, *supra* note 185, at 24-25.

263. Seelau & Seelau, *Protegiendo sus territorios*, *supra* note 13, at 146-48.

progress on various projects, and serve as the basis for making any adjustments to the strategic plan that may be necessary.²⁶⁴

The efforts of the Likan Antai people, through the Valle de la Luna Indigenous Association and through their own community efforts, are nothing short of impressive. In the span of twenty years, the Likan Antai people went from being victims of outside encroachment on their territory to a community actively re-gaining control over that same territory. Their efforts are clearly self-determination in action and are a compelling example that the Nation Building principles have applicability outside the British colonial context.

B. Case Study Number Two: Mapu Lahual Community Parks Network

1. Background

The Mapuche people are the most populous Indigenous group in Chile, accounting for over one million individuals and over 85% of the total Indigenous population.²⁶⁵ Within the Mapuche people group are a number of sub-groups,²⁶⁶ which are not treated or counted as separate Indigenous peoples by the Chilean government.²⁶⁷ But the Mapuche sub-groups have played, and continue to play, a strong role in how individuals and communities identify themselves and organize themselves. The Mapuche sub-groups are defined in reference to their geographic location and, among others, include: the Huilliche (people of the south); the Lafkenche (people of the coast); the Pehuenche (people of the mountains); and the Pikunche (people of the north).²⁶⁸

Historically, the Huilliche people occupied a vast area of land stretching from the Pacific Ocean to the Andes Mountains and extending from the southern portion of the Araucanía Region through parts of the Los Lagos Region, including the large island of Chiloé.²⁶⁹ Today, many Huilliche

264. *Id.*

265. TAYLOR, *supra* note 42.

266. PATRICIO RODOLFO ORTIZ, INTERCULTURAL BILINGUAL EDUCATION, INDIGENOUS KNOWLEDGE AND THE CONSTRUCTION OF ETHNIC IDENTITY: AN ETHNOGRAPHY OF A MAPUCHE SCHOOL IN CHILE 16 (2007).

267. CENSO 2012: RESULTADOS XVIII CENSO DE POBLACIÓN, *supra* note 81. Even among the Mapuche people, there is some debate over whether these sub-groups are distinct peoples that should be recognized and treated as such or whether all should simply be considered "Mapuche."

268. ORTIZ, *supra* note 266, at 16.

269. JAMES STUART OLSON, THE INDIANS OF CENTRAL AND SOUTH AMERICA: AN ETHNOHISTORICAL DICTIONARY 149 (1991).

communities continue to exist within this traditional territory.²⁷⁰ According to the Chilean government, more than one thousand Indigenous Associations and Communities are registered in the area.²⁷¹ The traditional Huilliche homeland is known for its plentiful lakes and rivers, and for the temperate rain forests that cover much of the land.²⁷² Chilean roads end in the southern portion of Huilliche territory and give way to glacier fields and the Patagonian wilderness.²⁷³ In terms of development, the traditional Huilliche homeland is where some of Chile's largest hydroelectric projects, massive logging operations, salmon fisheries and cellulose plants are located.²⁷⁴ Portions of the territory are also popular tourist destinations.²⁷⁵

Similar to other Indigenous peoples in Chile, the Huilliche people have long struggled to gain legal protection for their lands and natural resources. Their demands frequently have come into conflict with the interests of the industries that serve as the economic engine for southern Chile.²⁷⁶ Faced

270. *Id.*

271. Ministerio de Desarrollo Social, *supra* note 83.

272. Samjhana Bista, Impact Analysis and Decision Making Process in Indigenous Park Management Under the Valdivian Ecoregion, Chile at 2 (conference paper presented at Sustaining Commons: Sustaining Our Future, the Thirteenth Biennial Conference of the International Association for the Study of the Commons, Hyderabad, India: January 10-14, 2011), available at <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7286/1280.pdf?sequence=1>.

273. RICHARD L. LUTZ & DICK LUTZ, PATAGONIA: AT THE BOTTOM OF THE WORLD 128 (2002).

274. See, e.g., *Chile Expedition*, NAT'L GEOGRAPHIC (Jan. 2011), <http://travel.nationalgeographic.com/travel/enduring-voices/chile-expedition/> ("Both [Huilliche] communities are promoting eco-tourism, have modern small-scale industries (hydroelectric power, sawmills, greenhouse cultivation), and are well connected by mobile phone networks and internet."); Laura Seelau, *Threat of Dam Construction for Huilliche Communities in Los Rios Region*, INDIGENOUS NEWS.ORG (Nov. 28, 2011), <http://indigenousnews.org/2010/11/28/threat-of-dam-construction-for-huilliche-communities-in-los-rios-region/>.

275. See, e.g., *Chiloé: The Magical Island*, CHILE: THE OFFICIAL TRAVEL GUIDE TO CHILE, <http://chile.travel/en/where-to-go/chiloe/> (last visited Mar. 13, 2015); Jorge López Orozco, *Life with the Huilliches on Lake Ranco*, CHILE: TOURISM NEWS (Sept. 21, 2009), <http://www.thisischile.cl/2009/09/life-with-the-huilliches-on-lake-ranco/?lang=en>.

276. See, e.g., Manuel Secundino Vera Millaquen por la Comunidad Mapuche Huilliche Pepiukelen c/ Empresa Pesquera Los Fiordos Ltda., Corte Suprema, Rol. 5757-2010 (Sept. 15, 2010), available at <http://casos.libredeterminacion.org/chile/2010/09/15/manuel-secundino-vera-millaquen-por-la-comunidad-mapuche-huilliche-pepiukelen-c-empresa-pesquera-los-fiordos-ltda/> (case against a company trying to construct a contaminated water holding pond on ancestral lands); José Omar Guentelican Maldonado, Presidente de la Comunidad indígena "Antu Lafquen de Huentetique c/ Comisión Regional del Medio Ambiente de la Región de Los Lagos, Corte Suprema, Rol. 10090-2011 (Mar. 22, 2012), available at <http://casos.libredeterminacion.org/chile/2012/03/22/jose-omar-guentelican->

with these challenges, a small group of Huilliche communities have come together over the past decade to develop the *Red de Parques Comunitarios Mapu Lahual* (Mapu Lahual Community Parks Network).²⁷⁷ The *Red de Parques Comunitarios Mapu Lahual* is an innovative approach to protecting Huilliche land rights, exercising control over traditional Huilliche territory, conserving native forests, and bringing much-needed development to Huilliche communities.²⁷⁸

2. Self-Determination in Action

The *Red de Parques Comunitarios Mapu Lahual* is a project involving nine Huilliche Indigenous Communities and is located between the Pacific Ocean and the *Cordillera de la Costa* (Coastal Mountain Range), west of the city of Osorno in the Los Lagos Region.²⁷⁹ The name, Mapu Lahual, means “land of the larch trees” and is descriptive of the local landscape, which is home to the larch tree—a native species to the area that is protected under Chilean law.²⁸⁰ In total, the network of parks includes seven community parks within the sixty thousand hectares of land considered to be the communities’ ancestral territory.²⁸¹

Although the *Red de Parques Comunitarios Mapu Lahual* did not open until 2001, the seeds for its creation were planted in 1998.²⁸² In that year, several Huilliche communities collaborated with the Chilean government

maldonado-presidente-de-la-comunidad-indigena-antu-lafquen-de-huentetique-c-comision-regional-del-medio-ambiente-de-la-region-de-los-lagos/ (case against the Regional Commission of the Environment in the Los Lagos Region alleging lack of consultation on a parks project in Mapuche-Huilliche territory); Millaray Virginia Huichalaf Pradines y otros c/ Juan Heriberto Ortíz Ortíz, Corte Suprema, Rol. 3863-2012 (Sept. 21, 2012), available at <http://casos.libredeterminacion.org/chile/2012/09/21/millaray-virginia-huichalaf-pradines-y-otros-c-juan-heriberto-ortiz-ortiz-2/> (case to protect cutting down of sacred trees).

277. See generally Luis Cárdenas, *Red de Parques Comunitarios Mapu Lahual: una experiencia de las comunidades indígenas de la cordillera de la Costa*, in BOSQUES Y COMUNIDADES DEL SUR DE CHILE 308 (Rodrigo Catalán et al. eds., 2006).

278. See generally *id.*

279. *Id.* at 308. The nine Huilliche communities are: Maicolpi, Maicolpi Río Sur, Hueyelhue, Nirehue, Caleta Cóndor, Manquemapu, Mahui Dantu, and Melillanca Huanque. *Id.*

280. *Id.*; Law No. 490, Enero 10, 1976 (Chile) (del Ministerio de Agricultura que declara monumento natural a la especie forestal alerce).

281. *Mapu Lahual*, WORLD WILDLIFE FOUND.: CHILE, http://chile.panda.org/que_hacemos/protegiendo_biodiversidad/conservacion_comunidades/mapu_lahual/ (last visited Mar. 13, 2015; Cárdenas, *supra* note 277, at 309).

282. Cárdenas, *supra* note 277, at 310.

on a project designed to protect native forests.²⁸³ The specifics of the project included involving local Huilliche communities in forest fire prevention efforts and in monitoring the area to prevent illegal cutting of protected native species.²⁸⁴ In addition to the stated goals of the project, two other benefits came out of this collaboration: first, the project raised awareness among the Huilliche people of the need to protect their traditional natural resources; and second, the project provided opportunities for disperse Huilliche communities to come together and discuss shared issues.²⁸⁵

Ultimately, the native species protection project led the Huilliche people to start their own program geared towards sustainable development and forestry management within their own communities.²⁸⁶ This project required funding, which was obtained from the government for a period of four years.²⁸⁷ During these four years, the communities had the opportunity to form a permanent working group amongst themselves and gain valuable experience interacting with both governmental agencies and environmental groups operating in the area.²⁸⁸

Having built up capacity in the area of conservation and forestry management, the Huilliche community of Maicolpi took the next step and created a park in 2000. This would be the first park of the *Red de Parques Comunitarios Mapu Lahual*.²⁸⁹ The Huilliche community of Maicolpi created this park through a joint funding program involving the World Wildlife Fund (WWF) and the *Comité Nacional Pro Defensa de la Flora y Fauna* (National Committee for the Defense of Flora and Fauna or CODEFF), a Chilean environmental NGO.²⁹⁰ The park was designed to be a pilot project that, if successful, would result in the creation of additional parks in other Huilliche communities.²⁹¹

It became evident very early on that the Maicolpi park project was going to be a success, and so the Huilliche communities quickly began taking steps to build on that success.²⁹² Working together, a group of Huilliche

283. *Id.* at 310.

284. *Id.*

285. *Id.*

286. *Id.* at 310-11.

287. *Id.* at 311.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 311-12.

communities wrote a proposal for continued WWF-CODEFF funding.²⁹³ This funding proposal suggested the creation of a temporary organizational structure that sought a balance between local and centralized control of future park development.²⁹⁴ Under the proposal—which was eventually granted—each individual community worked to develop its own park, but all the individual community efforts were overseen and coordinated by a commission composed of: the presidents of each Huilliche community; a member of the *Junta General de Caciques* (a council of traditional Huilliche leaders), and representatives from three government agencies—CONADI, CONAF and *Servicio Nacional de Turismo* or SERNATUR (National Tourism Service).²⁹⁵ The commission was charged with managing finances, overseeing technical assistance for the communities, and drafting the organizational documents necessary for the formation of a new Indigenous Association that would manage the park system.²⁹⁶

As a result of these efforts, the *Red de Parques Comunitarios Mapu Lahual* was born in 2001.²⁹⁷ Within the next year an Indigenous Association named *Mapu Lahual of Butahuillimapu* was legally formed under the Indigenous Law.²⁹⁸ In the years that followed its formation, funding and technical assistance from CONAF, SERNATUR, and WWF, helped build the Huilliche communities' capacities so that they were able to: strengthen their institutions; incorporate another community into the network; expand the services offered to tourists visiting the parks; and improve upon conservation and management plans.²⁹⁹

More than a decade later the *Red de Parques Comunitarios Mapu Lahual* is an undisputed success and a glowing example of Indigenous self-determination within Chile. As a testament to the parks' success, in 2007, Chile awarded the Huilliche communities the Bicentennial Seal for their accomplishments in local governance and sustainable living.³⁰⁰ In 2011, during the International Year of Forests, the United Nations Food and Agriculture Organization recognized the Huilliche communities as an

293. *Id.* at 312.

294. *Id.*

295. *Id.*

296. *Id.* at 312-13.

297. *Id.* at 310.

298. *Id.* at 312.

299. *Id.* at 312-13.

300. *WWF te invita a apoyar a comunidades huilliche en la conservación del alerce*, WORLD WILDLIFE FOUND.: CHILE (June 10, 2013), <http://chile.panda.org/?209003/wwfalerceampaagroupn>.

example for the entire South America continent of a successful forestry management project.³⁰¹

Today, the Huilliche communities participating in the *Red de Parques Comunitarios Mapu Lahual* offer an impressive array of services to individuals who visit their ancestral territory.³⁰² Although each park in the network is different—reflecting the differences between the land and the Huilliche communities themselves—together, the participating communities offer activities such as boating, camping, fishing, guided tours, hiking, and horseback riding.³⁰³ Additionally, food and lodging is available in the area and is provided either by community-operated establishments or by individual Mapuche families.³⁰⁴ Ultimately, visitors to the *Red de Parques Comunitarios Mapu Lahual* not only have an opportunity to visit one of Chile's most unique environmental habitats, but also have the chance to immerse themselves in the Huilliche way of life and learn about Huilliche culture, history, and values.

3. Nation Building Principles

As with the Likan Antai communities, the Huilliche communities' experiences illustrate the Nation Building principles in action. The *Red de Parques Comunitarios Mapu Lahual* would never be possible without the principle of *practical self-rule*. The Huilliche communities recognized a number of problems in their communities—lack of economic development, lack of control over their ancestral lands, and lack of protection for the native forest surrounding them—and took concrete steps to develop solutions to those problems.³⁰⁵ Although the project greatly benefitted from the institutional and technical support provided by the Chilean government agencies such as CONAF, and NGOs such as WWF-CODEFF, the communities sought those partnerships and, at each turning point, propelled the initiative forward.³⁰⁶ The Huilliche communities' actions are particularly noteworthy because, unlike the example of co-administration in *Los Flamencos*, there was no precise legal framework or policy directive in place obligating the Chilean government to collaborate with the

301. *FAO reconoce a huilliches por cuidado forestal*, FUNDACIÓN TERRAM, http://www.terram.cl/2011/03/01/fao_reconoce_a_huilliches_por_cuidado_forestal/ (last visited Mar. 26, 2015).

302. Cárdenas, *supra* note 277, at 310-11.

303. *Id.*

304. *Id.* at 310.

305. *Id.* at 310-12.

306. *Id.* at 312-14.

communities. Instead, the communities had to be ready and willing to take full advantage of the opportunities that were already available. They did so and over the course of the next fifteen years, they continued to grow the scope of their authority and their own internal administrative and governance capacities.³⁰⁷

The Huilliche example also confirms the importance of having *capable and stable governing institutions*. From a very early stage, the communities began the hard work of developing and implementing an institutional framework to meet the communities' individual and collective needs. The Huilliche people started with local organization by forming Indigenous Communities under Chile law.³⁰⁸ Over time, those communities began working together and realized that they needed an institutional structure that could operate across communities. To address this issue, the Huilliche communities formed a working group that included representatives from all the affected communities, and, ultimately, formed an Indigenous Association that allowed for coordinated activities across a much larger geographical area.³⁰⁹ Without a large and stable institutional structure, cooperation between the various Huilliche communities would likely have been very difficult or would not have occurred. The institution's stability has not only meant cooperation between communities, but has allowed for long-term networks to be formed and nurtured with funders, government agencies, and NGOs—each of which have proven to be vital to the success of the *Red de Parques Comunitarios Mapu Lahual*.³¹⁰

The Huilliche communities' efforts to organize have been effective, in part, because they reflect the traditional understanding of how power is divided among communities—in other words, there was *cultural match* between the organizational institutions and the expectations of the Huilliche people.³¹¹ The Huilliche people—like all Mapuche people—traditionally organize in a very decentralized fashion with local communities exercising enormous amounts of autonomy over their own affairs.³¹² Historically, however, a portion of this local autonomy is surrendered to a larger federation of communities in order to confront certain wide-reaching issues.³¹³ The structure created by the Huilliche people to run the *Red de*

307. *Id.* at 313-17.

308. *Id.* at 308.

309. *Id.* at 311-12.

310. *See generally id.*

311. *Id.* at 311-12, 314, 316.

312. JOHN L. RECTOR, *THE HISTORY OF CHILE* 29-30 (2005).

313. *Id.*

Parques Comunitarios Mapu Lahual reflects this understanding of power dynamics. Under the Indigenous Association created, individual Huilliche communities have autonomy over the parks in their territory and the services offered there; but larger issues of funding, long-term planning, and the coordination of technical assistance take place at a centralized level.³¹⁴

Finally, the *Red de Parques Comunitarios Mapu Lahual* also demonstrates the importance of having a *strategic orientation* when acting. The Huilliche communities did not exercise practical self-rule, develop capable governing institutions, or take any other actions on a whim. Rather, from the very early stages of development, the communities were guided by a set of core goals related to the conservation and protection of their ancestral lands and to the strengthening of their control over those lands.³¹⁵ Every decision made was made to further these goals. And the decisions made were done so after deliberation and planning. The end result of the Huilliche communities' strategic planning is not just the *Red de Parques Comunitarios Mapu Lahual*, but also a set of concrete plans and strategies for land management, resource conservation, and tourism development that will help guide the Huilliche peoples' actions for years to come as they continue to exercise even greater amounts of self-determination.³¹⁶

C. Case Study Number Three: *Identidad Territorial Lafkenche and the Ley Lafkenche*

1. Background

The Lafkenche people—like the Huilliche people—are a sub-group of the larger Mapuche population.³¹⁷ In the Mapuche language, “Lafkenche” literally means “people of the sea,” and it aptly described the Lafkenche people and their way of life.³¹⁸ The Lafkenche people live in communities scattered along an extensive stretch of Chile's southern coastline.³¹⁹ The Lafkenche people's culture, economy, and traditions are all closely tied to the ocean and, more specifically, its coastal waters.³²⁰

314. See generally Cárdenas, *supra* note 277.

315. *Id.* at 308, 310, 314, 316.

316. See generally *id.* at 311-12, 314, 316; *Mapu Lahual*, *supra* note 281.

317. ORTIZ, *supra* note 266, at 16.

318. *Id.*

319. Gonzalo Delamaza & Fabián Flores, *Incidencia del movimiento indígena en la ley que crea el Espacio Costero Marino de los Pueblos Originarios en Chile*, in DEFENSA DE LOS DERECHOS TERRITORIALES EN LATINOAMÉRICA, *supra* note 13, at 93, 99, 104.

320. *Id.* at 2, 6-8.

Unfortunately, starting in 1989, the Lafkenche peoples' rights with respect to their traditional coastal waters were placed in jeopardy.³²¹ In that year, the *Ley de Pesca y Acuicultura* (Fishing and Aquiculture Law) was passed,³²² which established the legal framework governing fishing activities nation-wide, but it neither considered the rights of Indigenous peoples nor did it take into account the Lafkenche people's traditional use of the coastline and coastal waters for subsistence activities and other cultural practices.³²³ For the Lafkenche people, the *Ley de Pesca y Acuicultura* meant reduced ability to access, control, and use traditional coastal waters for cultural and/or economic purposes.³²⁴ In fact, under the *Ley de Pesca y Acuicultura*, a Lafkenche community seeking to make use of coastal water was required to obtain an extraction or use concession from the government.³²⁵ The concessions were available not just to Indigenous communities, but to all individuals and businesses as well, and although they carried with them some administrative rights, they also required the owner to pay taxes on the concession.³²⁶

In reality, the *Ley de Pesca y Acuicultura* was not concerned about Lafkenche traditional usage rights, but with Chile's fishing industry.³²⁷ The new law significantly bolstered the fishing industry by strengthening both small- and large-scale fishing operations.³²⁸ More than twenty years after the passage of the *Ley de Pesca y Acuicultura*, the fishing industry constitutes 1% of Chile's gross domestic product and directly employs more than 120,000 people—including eighty thousand *pescadores artesanales* (traditional, local fishermen).³²⁹ Chile's fishing industry is the

321. *Id.* at 102; VICTOR TOLEDO LLANCAQUEO, ESTO TAMBIÉN VA HACIENDO AUTONOMÍA: LA ESTRATEGIA TERRITORIAL DE LAS COMUNIDADES LAFKENCHES DE TIRÚA, ESPACIOS LOCALES Y DESARROLLO DE LA CIUDADANÍA 3-4 (2001).

322. Delamaza & Flores, *supra* note 319, at 94.

323. *Id.* at 102; LLANCAQUEO, *supra* note 321, at 9.

324. Delamaza & Flores, *supra* note 319, at 102.

325. LLANCAQUEO, *supra* note 321, at 9.

326. UNIVERSIDAD DE LA FRONTERA, INSTITUTO DE ESTUDIOS INDÍGENA, LOS DERECHOS DE LOS PUEBLOS INDÍGENAS EN CHILE INFORME DEL PROGRAMA DE DERECHOS INDÍGENAS 220-23 (2003).

327. Mensaje de S.E. El Presidente de la República con el que modifica en el ámbito de la sustentabilidad de recursos hidrobiológicos, acceso a la actividad pesquera industrial y artesanal y regulaciones para la investigación y fiscalización, la Ley General de Pesca y Acuicultura contenida en la Ley N° 18.892 y sus modificaciones, Boletín 8091-21 at 1 (Dec. 14, 2011) (text of legislative proposal from President Sebastián Piñera).

328. *Id.*

329. *Id.*

seventh most productive in the world,³³⁰ with traditional local fishing accounting for 50% of Chile's total production.³³¹ However, due to the shortcomings of the *Ley de Pesca y Acuicultura*, the Lafkenche people were largely marginalized from this growing industry and losing their ability to rely on the coastal waters to live the way they had for centuries.³³²

2. *Self-Determination in Action*

In response to the legal and commercial developments affecting their traditional territory, the Lafkenche people began organizing in the early 1990s to obtain legal recognition of their coastal access, use, and resource rights.³³³ The process started when Lafkenche leaders from diverse communities began a dialogue amongst themselves about the consequences the *Ley de Pesca y Acuicultura* was having on their communities.³³⁴ Over time, this group of leaders grew as Lafkenche communities all along the Chilean coastline began feeling the effects of the new law on their communities. Together, these leaders began to explore different avenues of addressing the issues and challenges that the Lafkenche communities faced. Many options were considered, including, modifying the *Ley de Pesca y Acuicultura*, drafting and trying to pass new legislation, and not taking any action at all.³³⁵

Most of the early discussions were spearheaded by two of the leading Lafkenche organizations at that time: *Pu Lafkenche* and *Newen Pu Lafkenche*. These two organizations worked to generate dialogue among the communities, as well as between the communities and public officials.³³⁶ By 1998, the efforts of these organizations coalesced into a larger, and ultimately more powerful, organization named *Identidad Territorial Lafkenche* (Lafkenche Territorial Identity), which brought together leaders from diverse communities between Tirúa and Puerto Saavedra.³³⁷ Specifically, *Identidad Territorial Lafkenche*'s reach begins at the northern edge of Chile's Eighth Region of Bío-Bío and extends south through Chile's Ninth Region, including the coastal areas of Arauco, Tucapel,

330. *Id.*

331. *Id.* at 16.

332. Delamaza & Flores, *supra* note 319, at 99; LLANCAQUEO, *supra* note 321, at 3-4.

333. Delamaza & Flores, *supra* note 319, at 103-04; LLANCAQUEO, *supra* note 321, at 12.

334. Delamaza & Flores, *supra* note 319, at 103-04; LLANCAQUEO, *supra* note 321, at 13.

335. Delamaza & Flores, *supra* note 319, at 104.

336. *Id.*

337. *Id.*

Tirúa, Bajo Imperial, Budi and Toltén.³³⁸ Additionally, throughout Chile's Los Ríos and Los Lagos regions are a number of coastal Huilliche communities that also form part of the vast network of communities working to protect Indigenous coastal rights including communities in the areas of Valdivia, Osorno, Llanquihue, Chiloé and Palena.³³⁹ In total, the participating communities are scattered over more than 420 miles (680 kilometers) of coastline.³⁴⁰ Although its territorial reach is extensive, *Identidad Territorial Lafkenche* has always had a singular purpose—to serve as the focal point for collective action promoting Lafkenche rights to coastal areas and waters.³⁴¹

Between 1997 and 2004, many Lafkenche (and Huilliche) communities came together to bring attention to their concerns in a number of ways, including by: organizing public marches; holding community workshops to raise awareness about the issues; and arranging meetings with public officials.³⁴² The leaders began working on drafting their own modifications to the *Ley de Pesca y Acuicultura*, which required working closely with Lafkenche communities to understand everyone's visions for the *borde costero* (coastal area).³⁴³ These efforts culminated in an attempt to access the legislative process when, in 2001, the Chilean Congress was debating modifications to the *Ley de Pesca y Acuicultura*.³⁴⁴ During these debates the Lafkenche communities presented their own set of modifications to Congress, but their suggestions were, ultimately, not incorporated into the law.³⁴⁵

Shortly after their initial attempts to reform the *Ley de Pesca y Acuicultura* failed, the Lafkenche communities efforts were reinvigorated when one of their principal leaders—a man named Adolfo Millabur—was

338. *Quiéns Somos*, IDENTIDAD TERRITORIAL LAFKENCHE, http://www.identidadlafkenche.cl/laf/?page_id=2 (last visited Nov. 30, 2013).

339. *Id.*

340. *Id.*

341. LLANCAQUEO, *supra* note 321, at 1.

342. *Id.* at 14, 18-19.

343. Adolfo Millabur, Seminario Internacional: La Defensa de los Derechos Territoriales desde las Comunidades Locales en Latinoamérica: Experiencias y Lecciones, *Identidad territorial lafkenche: Logros y limitaciones de la Ley No. 20.249 (Ley Lafkenche) en el reconocimiento de los usos consuetudinarios del borde costero* (Aug. 18-19, 2011) (presentation).

344. Delamaza & Flores, *supra* note 319, at 104; Victor LLANCAQUEO, *supra* note 321, at 13.

345. Delamaza & Flores, *supra* note 319, at 104; LLANCAQUEO, *supra* note 321, at 13.

elected *alcalde* (mayor) of Tirúa.³⁴⁶ While not a high-ranking elected office, Adolfo Millabur's government position served to open the door to the bureaucratic and political networks necessary to continue moving the Lafkenche's legislative goals forward and to make negotiation possible.³⁴⁷ By leveraging new political connections, the Lafkenche leaders signed a cooperative agreement in 2003 with the *Coordinador de Política Indígena* (National Indigenous Policy Coordinator) and the Fishing Subsecretary of the Ministry of Economy, Development and Tourism to work jointly on developing a strategy to address the Lafkenche people's concerns.³⁴⁸ Ultimately, this new agreement and the dialogue it produced led to a strategic decision by the Lafkenche communities to focus on drafting an entirely new piece of legislation to protect their rights, rather than make another attempt at modifying the existing *Ley de Pesca y Acuicultura*.³⁴⁹

Continuing to leverage political connections, Adolfo Millabur pushed for the creation of an inter-sectoral working group to draft what would ultimately become known as the *Ley Lafkenche* (Lafkenche Law).³⁵⁰ This working group included representatives from CONADI, representatives from the Ministry of Planning and Development, the Fishing Subsecretary, the Marine Subsecretary, a number of technical assistants and, of course, Indigenous leaders.³⁵¹ In 2005, after ten months of sessions, the Lafkenche people were ready to present their proposed legislation to Congress.³⁵² On August 21, 2005, President Ricardo Lagos presented the *Ley Lafkenche* to Congress on behalf of the Lafkenche people.³⁵³ Eventually, after three years of debates in the Congress,³⁵⁴ the *Ley Lafkenche* was passed at the end of 2007, and went into effect in 2008.³⁵⁵ Regulations to implement the law

346. Delamaza & Flores, *supra* note 319, at 104; LLANCAQUEO, *supra* note 321, at 22.

347. Delamaza & Flores, *supra* note 319, at 104-05; LLANCAQUEO, *supra* note 321, at 22-23.

348. Delamaza & Flores, *supra* note 319, at 105.

349. *Id.* at 105-06.

350. *Id.* at 106-07.

351. *Id.* at 107.

352. *Id.*

353. Millabur, *supra* note 343; Boletín 3968-12 (Aug. 31, 2005).

354. During this time Chile held its Presidential elections, ending Ricardo Lagos's administration and ushering in Michelle Bachelet's presidency. This political change and the shift in priorities that followed slowed the negotiations that had been taking place in Congress.

355. Ley No. 20.249 (Ley Lafkenche) (2008) (Chile).

were adopted—again with the participation of Lafkenche leaders—in 2009.³⁵⁶

The *Ley Lafkenche* contains several features—unprecedented in Chilean law—officially protecting and promoting Indigenous rights to coastal resources.³⁵⁷ At its core, the *Ley Lafkenche* creates a new geographic-administrative designation known as an “[I]ndigenous peoples’ marine coastal area.”³⁵⁸ These regions are ones where the Chilean government’s stated objective is “protecting the customary use of such spaces, in order to maintain the traditions and natural resource use of communities connected with the coastline”.³⁵⁹ Any Indigenous community or group of Indigenous communities that establishes its customary use of the coastline can request that a designated area be set aside for their use and administration.³⁶⁰ In order to obtain this designation, the *Ley Lafkenche* establishes an elaborate bureaucratic procedure that communities must go through.³⁶¹ However, once the Chilean government recognizes a designated area, Indigenous communities enjoy relatively broad authority over the coastal area and are able to implement their own community-drafted, government-approved administration plan.³⁶² This administration plan lays out the permitted activities and uses for both community members and non-community members.³⁶³ If the permitted activities include resource exploitation, then the communities must also have a management plan in place.³⁶⁴ Finally, the *Ley Lafkenche* grants the communities some authority to engage in conflict resolution should disputes arise between individual users and the community.³⁶⁵

Although the *Ley Lafkenche* offers new opportunities to exercise self-determination within recognized Indigenous peoples’ marine coastal areas, the law is not without its shortcomings.³⁶⁶ First, while the authority granted to communities can be extensive, it is not an absolute grant of rights over coastal areas, nor does it extend authority to any activities unrelated to use

356. Decree No. 134 Ministerio de Planificación que aprueba reglamento de la Ley No. 20.249 que crea el espacio costero marino de los pueblos originarios (May 16, 2009).

357. Delamaza & Flores, *supra* note 319, at 111-13.

358. *Ley Lafkenche*, art. 3.

359. *Id.*

360. *Id.* arts. 4, 8.

361. Delamaza & Flores, *supra* note 319, at 113-17.

362. *Ley Lafkenche*, art. 11; Delamaza & Flores, *supra* note 319, at 111-13.

363. *Ley Lafkenche*, art. 11.

364. *Id.* art. 11(c).

365. *Id.* art. 14.

366. Delamaza & Flores, *supra* note 319, at 113-17.

of coastal areas.³⁶⁷ Second, the bureaucratic processes and standards set-up for obtaining a designation of a marine coastal area have been criticized as being overly burdensome and time-consuming.³⁶⁸ Third, the *Ley Lafkenche* does not protect Indigenous communities' rights of usage from being altered by other laws and regulations that more generally govern the fishing industry, including those related to environmental protection.³⁶⁹ Finally, among the largest criticisms of the *Ley Lafkenche* has been the Chilean government's reluctance to designate any Indigenous marine coastal areas even after Indigenous communities successfully navigate the bureaucratic process required under the law.³⁷⁰

Despite the law's current shortcomings, the *Ley Lafkenche* continues to be one of the most significant pieces of Chilean legislation with respect to the recognition and protection of Indigenous rights.³⁷¹ It remains one of the only pieces of Chilean legislation that promotes self-determination within a specific thematic area of law.³⁷² And, on top of that, the *Ley Lafkenche* stands as a shining example of the positive impacts collective, strategic, and sustained actions by Indigenous peoples can have on law and policy.³⁷³

3. Nation Building Principles

The Lafkenche communities' efforts to secure their own rights—through the *Identidad Territorial Lafkenche* organization—once again illustrate that the Nation Building principles have significance within the Chilean context. First, as with the other two case studies examined, is the principle of *practical self-rule*. In this case, the Lafkenche leaders were swift to respond

367. *Ley Lafkenche*, art. 30.

368. To date, since the law was enacted there have been twenty-one submissions for the designation of ECMPO; only one has successfully passed through every step of the process, ending with the destination of the area to the control of an indigenous community. See *Espacios Costeros Marinos Pueblos Originarios*, SUBSECRETARÍA DE PESCA Y ACUICULTURA, GOBIERNO DE CHILE, <http://www.subpesca.cl/institucional/602/w3-property-value-50834.html> (last visited Nov. 29, 2013).

369. *Ley Lafkenche*, art. 11.; see, e.g., *Gobierno permite acceso a extranjeros a recursos pesqueros, pero lo niega a pueblos originarios*, OBSERVATORIO CIUDADANO (Nov. 13, 2012), <http://www.observatorio.cl/2012/gobierno-permite-acceso-extranjeros-recursos-pesqueros-pero-lo-niega-pueblos-originarios>.

370. Delamaza & Flores, *supra* note 319, at 113.

371. *Id.* at 117-20.

372. Laura M. Seelau & Ryan Seelau, *Implementación del derecho a la libre determinación indígena en Chile*, in *EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN* 257 (Jorge Contesse Singh, ed., 2012).

373. Delamaza & Flores, *supra* note 319, at 117-20.

to the passage of the *Ley de Pesca y Acuicultura* in 1991—they had a “take charge” attitude that not only sought to raise awareness of rights violations, but also to develop concrete solutions to the issues that stood before them. The *Ley de Pesca y Acuicultura* presented an immediate threat to the Lafkenche people’s way of life and effectively excluded them from an industry that would prove to be of significant economic value in Chile.³⁷⁴ The Lafkenche leaders wasted no time in beginning a dialogue amongst themselves about what they were going to do to confront this new challenge. Their posture throughout the entire process was one of self-determination in action—the Lafkenche people knew that the solutions to their problem had to come from within their own communities because they were in the best position to develop a legislative response. In fact, for years the Lafkenche people worked to generate awareness, consensus and strategies without any assistance from outsiders. Many of the leaders were driven, in part, by the recognition that they, as the Lafkenche people, could confront this problem on their own.

In order to seriously address the issues created by the *Ley de Pesca y Acuicultura*, the creation and maintenance of *stable governing institutions* were crucial.³⁷⁵ The need for such institutions was even highlighted by Adolfo Millabur in a presentation about the lessons learned from the Lafkenche experience.³⁷⁶ He specifically identified the creation of “an institutional counterpart” to the government as a key factor in their success.³⁷⁷ The process that ultimately led to the passage of the *Ley Lafkenche* began with the work of two strong Indigenous organizations—*Pu Lafkenche* and *Newen Pu Lafkenche*—and continued after the creation of a new, larger organization—*Identidad Territorial Lafkenche*.³⁷⁸ *Identidad Territorial Lafkenche* served the role Millabur identified because it was the Lafkenche people’s institutional counterpart to the Chilean government when it came time to negotiate and formulate legislative and political proposals.³⁷⁹ A strong institutional framework was necessary to bring together dozens of Lafkenche and Huilliche communities, make them a part of the *Ley Lafkenche* process, and then sustain their involvement in that process for over a decade.³⁸⁰

374. *Id.* at 99-100.

375. *Id.* at 102-07; LLANCAQUEO, *supra* note 321, at 12-19.

376. Adolfo Millabur, *supra* note 343.

377. Millabur, *supra* note 343.

378. Delamaza & Flores, *supra* note 319, at 104.

379. *Id.* at 107.

380. *Id.* 120-21; LLANCAQUEO, *supra* note 321, at 14-21.

Part of the reason *Identidad Territorial Lafkenche* has had success in creating change is due to its *strategic orientation* and decision-making. The entire *Ley Lafkenche* process began very simply with the identification of a shared problem.³⁸¹ Once the problem was identified, a lengthy process of dialogue took place. This dialogue was necessary to identify all available options for action, study their strengths and weaknesses, and, ultimately, to achieve consensus on what strategic direction to take as a collective. Throughout the entire process the communities were guided by a single strategic goal: to protect their culture, traditions, and economic activities through legislative action. That strategic goal guided their decisions to engage in consensus-building work at the community level, to search for political allies, to create the inter-sectoral working groups, and to formulate a legislative proposal for the protection of their rights.

Finally, the *Ley Lafkenche* study demonstrates just how significant the principle of *public-spirited leadership* can be in any instance of Indigenous self-determination. The Lafkenche experience demonstrates a key role required of many Indigenous leaders—networking and consensus-building. Without consistent efforts by Lafkenche leadership to reach out to affected communities, involve them in the process, and build consensus around decision-making, it is unlikely that *Identidad Territorial Lafkenche* would have become as large and powerful as it did. Without that same hard work by Lafkenche leaders, it is also unlikely that *Identidad Territorial Lafkenche* could have sustained its efforts over the years necessary to achieve its strategic goal. Furthermore, through the actions of Adolfo Millabur upon being elected as *alcalde*, the Lafkenche experience demonstrates how a public-spirit oriented leader can use his or her position to bring about real change. Millabur's efforts to serve as a bridge between *Identidad Territorial Lafkenche* and the Chilean government proved to be crucial in moving the Lafkenche legislative proposals forward. The ultimate result of the Lafkenche leadership's vision and determination was a legislative victory for Indigenous peoples never seen before, and the creation of space in the law for the Lafkenche people to exercise true self-determination over their traditional coastal territories.

Conclusion

In Chile—just as in Australia, Canada, New Zealand and the United States—Indigenous peoples are economically, politically, and socially disadvantaged and marginalized as compared to the non-Indigenous

381. Millabur, *supra* note 343.

population. However, great variation exists among Indigenous peoples within Chile when it comes to the ability to carry out collective action for the betterment of their communities. Although quantitative data is still lacking in Chile, qualitative and anecdotal research indicates that the Indigenous communities that have successfully exercised some amount of self-determination over their own lives and cultures are communities that have closely adhered to the Nation Building principles. Three of the most meaningful examples of Indigenous self-determination from within Chile—the Likan Antai people's management of *Valle de la Luna*, the Huilliche people's *Red de Parques Comunitarios Mapu Lahual*, and the Lafkenche people's passage of the *Ley Lafkenche*—were successful due to the presence, in varying degrees, of practical self-rule, capable governing institutions, cultural match, strategic orientation, and/or public-spirited leadership.

The three Indigenous self-determination case studies demonstrate the applicability of the Nation Building principles in Chile and beyond the English-speaking, common-law countries from which they were originally developed. While there are limitations on drawing broad conclusions from individual examples, the Chilean case studies provide strong evidence that Indigenous communities successfully exercising self-determination adhere to certain Nation Building principles, regardless of their geographic location or specific community goals. In other words, although there are significant historical, legal, and political differences between Chile and the former British colonies, what Indigenous self-determination means and how it can effectively be exercised in practice seems to transcend political boundaries.

This conclusion should come as no surprise to anyone who has been working in the field of Indigenous rights in recent decades. At the international level, discussions have long focused on the shared challenges Indigenous peoples face and it makes sense that the responses and strategies Indigenous peoples use to overcome those challenges would also be shared to some extent. There is already international consensus that the history and values binding Indigenous peoples together globally is far more significant than the differences in the current economic, legal, and political contexts that various Indigenous peoples find themselves living within. Drawing from that shared history and shared experiences of colonization, the Nation Building principles offer guidance on how Indigenous peoples anywhere on the globe can retreat from the effects of colonization and move in the direction of meaningful self-determination.

The preliminary conclusion presented here—that the Nation Building principles have applicability for Indigenous peoples living outside the British colonial context—creates some powerful suggestions for Indigenous rights going forward. Although it is true that recent decades have seen enormous strides made with respect to the development and promulgation of international Indigenous rights, much work remains to be done in the area of implementation. As field practitioners are well aware, there are enormous differences between the official *recognition* of Indigenous rights and the effective *implementation* of Indigenous rights within Indigenous communities. To date, the vast majority of nation-states' and policy-makers' focus has been on what national governments can do to implement Indigenous rights. Significantly less focus has been placed on what Indigenous peoples themselves can and should be doing to bring about their own self-determination. The Nation Building principles fill this void and offer a concrete, straight-forward strategy for Indigenous peoples seeking to exercise self-determination. More than that, the research behind the Nation Building principles informs nation-states and policy-makers that self-determination has never been shown to work for Indigenous peoples *until* space for its implementation is created and the power to exercise the right is firmly placed into the hands of Indigenous peoples.

There are, of course, limitations on what the Nation Building principles have to offer. Most notably it must be understood that the Nation Building principles are not a one-size-fits-all model, but rather are malleable principles that will have to be adapted to fit a variety of contexts. For example, within the Chilean context, the meaning of *practical self-rule*—the first of the Nation Building principles—is slightly different than it is within the United States context because Indigenous peoples in the United States have recognized sovereignty and governments, whereas in Chile Indigenous peoples do not. Likewise, what a *capable governing institution* looks like for Indigenous peoples in Chile is different than in the United States because the laws affecting Indigenous organization are different in those two nations. Similar types of differences exist between all nations and, therefore, how the Nation Building principles will play out in different nation-state contexts is going to be varied as well.

Finally, the conclusion offered here is only preliminary and more research—preferably of the quantitative form—is needed to clearly establish the applicability of the Nation Building principles—not just in Chile, but throughout Latin America and the rest of the world as well. In the United States—and to a lesser extent in Australia, Canada, and New Zealand—the quantitative data at the Indigenous community level exists to

demonstrate the positive impact culturally, economically, politically, and socially that accompanies meaningful self-determination. In other nation-states—including Chile—the lack of data is due, in part, to the fact that Indigenous rights and Indigenous self-determination have not had much time to generate meaningful consequences. The result is an inability to do the before-and-after comparisons needed to demonstrate the causes of meaningful change. Meaningful data is also lacking because governments, policy-makers, and researchers fail to focus time and energy on the role Indigenous peoples themselves can and should be playing in the implantation of their own rights.

Ultimately, however, the success stories of Indigenous peoples in the former British colonies, coupled with the success stories from Chile presented in this paper, provide compelling evidence that the Nation Building principles offer something to both nation-states and Indigenous peoples alike—something powerful enough that it should no longer be ignored. For Indigenous peoples (and those interested in seeing Indigenous rights fully realized), the Nation Building principles offer the best hope of exercising meaningful Indigenous self-determination; for nation-states, the Nation Building principles offer the best hope of improving socioeconomic conditions for millions of Indigenous peoples worldwide. In short, the time is right for all parties interested in the full realization of Indigenous rights to take a careful, deliberate look at the Nation Building principles—the best explanation for how effective Indigenous self-determination comes about—and to determine if they can be of use to the tens of millions of Indigenous peoples trying to overcome the effects of centuries of colonization and assimilation.