

icy conditions for the private sector.⁸⁵ The LAC Bureau also seeks to promote economic diversification, accelerated opportunities for the historically disadvantaged, and sound use of the environment.⁸⁶ Liberalization of land law, like that which has occurred in Mexico and Honduras, is designed to end paternalistic, restrictive economic practices.⁸⁷ In theory, liberalization of these laws will lead to increased opportunities in the market in terms of income, investment, and employment. The disadvantaged were the primary beneficiaries under the agrarian reform programs of these four countries.⁸⁸

These changes in property law could potentially impact the environment. The LAC Bureau's strategic guidelines for programming assistance in agriculture and natural resource management emphasize economic growth.⁸⁹ Not only do the reforms address these concerns on a nationwide basis, they also target their impact most directly on rural citizens engaged in agriculture who were the primary beneficiaries of such reform.⁹⁰ Accordingly, in recent meetings of the Inter-American Development Bank's board of governors, the issues of poverty reduction, environment, and investment were all given renewed emphasis.⁹¹

I. NICARAGUA: LAWS 85, 86, AND 88 (1990) AND DECREE 35-91 (1991)

A. Background

After the most recent Nicaraguan presidential election, the outgoing Sandinista government passed legislation that "legalized" informal confiscations and expropriations that took place under prior land reforms before February 25, 1990.⁹² A coalition led by the *Unión Nacional Opositora* (UNO) then took power. The coalition

⁸⁵ See *id.* at 572.

⁸⁶ See AID PRESENTATION, *supra* note 81, at 572.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.* at 10.

⁹⁰ See *infra* text accompanying notes 378-400.

⁹¹ Carlos Brezina, *Annual Meeting: A Go-ahead for Growth*, THE IDB, June 1992, at 4 (on file with author).

⁹² See J. David Stanfield, *An Analysis of the Current Situation Regarding Land Tenure in Nicaragua* 9 (Oct. 21, 1994) (unpublished manuscript, on file with author) [hereinafter Stanfield, Analysis]; see also Hendrix, *supra* note 2, at 11.

allowed property to be converted from agrarian reform community-held property to fee-simple private property.⁹³

1. Laws 85 and 86

Laws 85 and 86 allow present occupants to maintain possession of property received under prior land reallocation schemes. Law 85 applies mainly to residences and occasionally requires the occupant to pay, over a twenty-year period at three percent interest, for the unit received.⁹⁴ The government retains a mortgage on the property to guarantee payment.⁹⁵ Law 86 applies primarily to vacant lots where possessors wish to build housing.⁹⁶ While often criticized in the press, these laws remain in force in Nicaragua, with minor amendments.

There have been a number of allegations of corruption surrounding the legalization of landholdings under Laws 85 and 86. The press has even referred to the decrees as the *piñata*, drawing an analogy to the children's game in which an object is destroyed to obtain candy.⁹⁷ Because of these negative allegations, the decrees have not been well received.

2. Law 88

Law 88 protects the property of agrarian reform property owners and authorizes civil registrars to convert "provisional" titles, those issued under the agrarian reform, to "definitive" titles.⁹⁸ The law also eliminates restrictions on alienability, setting aside the requirement of government authorization before transfer or sale of agrarian reform land.⁹⁹ Under Law 88, agricultural land can be freely transferred by ordinary registrars without governmental interference.¹⁰⁰

⁹³ See OFFICIAL GAZETTE art. 2, law 88 (Apr. 5, 1990).

⁹⁴ See OFFICIAL GAZETTE art. 1, law 85 (Mar. 30, 1990); Hendrix, *supra* note 2, at 11.

⁹⁵ See OFFICIAL GAZETTE art. 1, law 85 (Mar. 30, 1990); Hendrix, *supra* note 2, at 11.

⁹⁶ See OFFICIAL GAZETTE art. 1, law 86 (Apr. 3, 1990); Hendrix, *supra* note 2, at 11.

⁹⁷ See Hendrix, *supra* note 2, at 11.

⁹⁸ The Agrarian Reform Law of 1981 allowed the state to assign, hand over, and title land inscribed in favor of the state. Yet, most land was never initially assigned to the state. Consequently, the agrarian reform beneficiaries did not have a document which they could use as collateral for commercial credit. Therefore, the government issued "provisional titles" with basic information while it inscribed land to the state. Then, once the land had been inscribed, the provisional titles could be converted into definitive titles. By the 1990 election, the Sandinista government still had not completed this conversion. See Mireya Molina, *Legislación Agraria y su Vigencia Actual 13-14* (July 2, 1992) (unpublished manuscript, on file with author) [hereinafter *Molina, Vigencia*].

⁹⁹ See OFFICIAL GAZETTE art. 2, law 88 (Apr. 5, 1990).

¹⁰⁰ *Id.*

3. Decree Number 35-91

On August 19, 1991, President Violeta Barrios de Chamorro signed a new decree affecting property rights.¹⁰¹ This decree recognized that the *concertación*, or social pact, was taking place in Nicaragua.¹⁰² The decree also created the *Oficina de Ordenamiento Territorial* (OOT), or Territorial Regulation Office, under the auspices of the Ministry of Finance, for the purpose of normalizing property following existing law.¹⁰³ The OOT reviewed land acquired under Laws 85 and 86, as well as under the agrarian reform.¹⁰⁴ Additionally, OOT, coupled with Decree No. 35-91, functioned as an action to quiet title, on a case-by-case basis, for the entire country. Interestingly, it was also given the power to draft the "territorial regulation receipt,"¹⁰⁵ a new document which was broken down into revisions and dispositions.¹⁰⁶

B. Coverage of Laws 85, 86, and 88, and Decree 35-91

Agrarian reform law under the Sandinista government allowed inheritance of agrarian reform property as well as its use as commercial collateral.¹⁰⁷ The law, however, did not allow for unrestricted sale or transfer of the land¹⁰⁸ and described the ownership interest as merely a "use right." The law asserted that property belonged to whomever worked the land.¹⁰⁹ Rental was also controlled by Sandinista legislation.¹¹⁰ The present law allows for unrestricted transfer of property, and rental agreements are common.

C. Implementation and Impact

1. The Historically Disadvantaged

Beginning in July 1979, Sandinista legislation aimed to support organized labor and *campesinos*, especially in the area of agrarian

¹⁰¹ See Decretos del Ejecutivo Sobre la Propiedad, Decree No. 35-91 (1991) (Nicar.).

¹⁰² See *id.* p.mbl. §§ III, IV.

¹⁰³ See *id.* art. 1.

¹⁰⁴ See *id.* art. 2.

¹⁰⁵ See *id.* art. 6.

¹⁰⁶ See Decretos del Ejecutivo Sobre la Propiedad, Decree No. 35-91 (1991) (Nicar.).

¹⁰⁷ See Hendrix, *supra* note 2, at 8.

¹⁰⁸ Ley de Reforma Agraria, arts. 31-32 (Nicar.) (available at the National Assembly in Managua, Nicaragua).

¹⁰⁹ *Id.* art. 1.

¹¹⁰ See Decree 230 of Jan. 5, 1980 (1980) (Nicar.); Decree 263 of Jan. 31, 1980 (1980) (Nicar.); Decree 293 of Feb. 13, 1980 (1980) (Nicar.); Decree 671 of March 11, 1981 (1981) (Nicar.); Ley de Reforma Agraria, art. 40 (1986) (Nicar.). This law remains effective.

reform.¹¹¹ This legislation achieved the most equal land distribution system in Latin America. Nevertheless, it also had a negative impact on the indigenous communities of Nicaragua.

Indigenous areas were further imperiled by the subsequent movement away from Sandinista reforms.¹¹² The communities of these areas, located in the Central, Pacific, and Atlantic regions of the country, are threatened by government attempts to use traditional native land to compensate former owners of agrarian reform land.¹¹³ In the problem of *Agro-Industria del Valle de Sebaco*, the government proposed to use community property for compensation. The state-held company to be used as compensation was located on indigenous land.¹¹⁴ To date, however, traditional lands have been inalienable and nontransferable.¹¹⁵

Another historically disadvantaged group is women. The Agrarian Reform Law and the Cooperatives Law, or *Ley de Cooperativas*, from the Sandinista era, recognized the legal equality of women and men.¹¹⁶ This equality is still recognized.

Despite the changes in agrarian law in Nicaragua, several major obstacles to economic participation remain: (1) Where should the government place former "contras" so they will not again take up arms? (2) Where should the government locate thousands of still landless *campesinos*? (3) Assuming agreements on land ownership and compensation to the owners, how can an indebted nation pay for this? (4) Should the present occupants be evicted and, if so, how? The current law has not conclusively addressed these issues.

2. Trade and Investment

Original agrarian reform legislation prohibited the sale of land received under the reform.¹¹⁷ The law itself designated the title

¹¹¹ See DORNER, *supra* note 8, at 43-46.

¹¹² J. David Stanfield & Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. U. L. REV. 939, 953-54 (1994); see also STANFIELD, *supra* note 58, at 22-23.

¹¹³ J. David Stanfield & Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. U. L. REV. 939, 953-54 (1994); see also STANFIELD, *supra* note 58, at 22-23.

¹¹⁴ J. David Stanfield & Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. U. L. REV. 939, 953-54 (1994); see also STANFIELD, *supra* note 58, at 22-23.

¹¹⁵ J. David Stanfield & Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. U. L. REV. 939, 953-54 (1994); see also STANFIELD, *supra* note 58, at 22-23.

¹¹⁶ See Mireya Molina, *Leyes de Reforma Agraria 11* (Apr. 23, 1991) (unpublished manuscript, on file with author) [hereinafter Molina, *Leyes*].

¹¹⁷ Decree 782, arts. 31-32 (1981) (Peru).

granted under agrarian reform as a use right.¹¹⁸ As defined in the Civil Code, however, these titles did not strictly conform to the requisites of a use right.¹¹⁹ Thus, the legislation implicitly changed the existing definition of use right. Further, the agrarian reform legislation also made the formal transfer of land illegal, thus forcing sales into the informal sector and discouraging formal market participation.¹²⁰

A potentially grave problem involves allegations of abuse of power, especially regarding land.¹²¹ Conservatives claim that the Sandinistas took properties under agrarian reform legislation without following the formalities of their own decree, let alone the expropriation law.¹²² They also argue that the expropriation law should have been applied because it was neither repealed nor amended; thus, it would appear to govern these cases.¹²³ Conservatives conclude that the Sandinistas are guilty of "arbitrary confiscation of property."¹²⁴

Until these political and economic matters are resolved, landholders will continue to feel insecure about their land. Moreover, the legal system will suffer from accusations of illegitimacy. Normally, title to land provides the holder with a reasonable degree of legal certainty of ownership. In Nicaragua, however, legal title does not necessarily convey property ownership security.¹²⁵ Thus, the expected benefits of the removal of ownership restrictions—increased access to credit,¹²⁶ liberated land markets and increased investment—are difficult to obtain, even if the property is duly titled and recorded.

¹¹⁸ See OFFICIAL GAZETTE art. 28, law 14 (1986); Administrative Rules Agreement 22, arts. 21–22 (1986).

¹¹⁹ See C. CIV. arts. 1473–82 (Nicar.). Under the Civil Code, "use rights", or usufructuary interests, allow an individual to mortgage, buy, sell, trade or give away his interest. The individual cannot, however, change the form or substance of the land because, in actuality, the land belongs to someone else. In contrast, the Nicaraguan agrarian reform properties did not belong to anyone other than the beneficiary, but still could not be bought or sold on the market. See *id.*

¹²⁰ See OFFICIAL GAZETTE art. 28, law 14 (1986); Administrative Rules Agreement 22, arts. 21–22 (1986).

¹²¹ Hendrix, *supra* note 2, at 11–12, 14, 20.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; Interview with Oscar Herdocia Lacayo, President of the León Bar Association, in León, Nicaragua (Aug. 18, 1992).

¹²⁵ See Stanfield & Hendrix, *supra* note 112, at 941.

¹²⁶ Credit sources over the past ten years have preferred crops to land as collateral.

3. The Environment

With the effective dismantling of the agrarian reform and the formal land market in disarray, the poor have been forced to invade fragile forests.¹²⁷ They are expanding the agricultural frontier at an alarming rate, causing environmentally-disastrous deforestation.¹²⁸ Newly deforested land is exposed to soil erosion, which, in turn, affects water supplies as rivers become silted.¹²⁹ Clearly, an effective land market in Nicaragua must be created.

II. PERU: LEGISLATIVE DECREE NO. 653, *LEY DE PROMOCIÓN DE LAS INVERSIONES EN EL SECTOR AGRARIO* (1991)

A. Background

The study of Peruvian agrarian reform is generally divided into three periods: the military government of General Velasco (1968–1975), the military government of General Morales Bermúdez (1975–1980), and the period from 1980 to the present.¹³⁰ For many years, Peru has contemplated amending its agrarian reform law.¹³¹ In 1980, Congress passed the “*Ley de Promoción y Desarrollo Agrario*” to more closely align the old agrarian reform law with actual social and economic practice.¹³² An agrarian code was proposed in 1985 to further harmonize written law with perceived rural reality.¹³³ Additional modifications were introduced in 1988.¹³⁴ In 1991, the *Cámara de Diputados* published a bill to amend the reform. The new 1991

¹²⁷ See Stanfield, Analysis, *supra* note 92, at 29–30; Memorandum from Steven E. Hendrix to Chief Brian Rudert, USAID/Nicaragua Agriculture and Development Office 4 (Mar. 15, 1993) (on file with author) [hereinafter Rudert Memorandum]; Telephone Interview with Marisol de la Cadena, Researcher, University of Wisconsin (Madison) Land Tenure Center (Feb. 16, 1993) [hereinafter de la Cadena Interview].

¹²⁸ See Stanfield, Analysis, *supra* note 92, at 29–30; Rudert Memorandum, *supra* note 127, at 4; de la Cadena Interview, *supra* note 127.

¹²⁹ See Stanfield, Analysis, *supra* note 92, at 29–30; Rudert Memorandum, *supra* note 127, at 4; de la Cadena Interview, *supra* note 127.

¹³⁰ See José Manuel Mejía, Propiedad de la Tierra y Ley Agraria, Presentation at the Legislación Agraria y Desarrollo Económico 1 (June 20, 1991) (unpublished manuscript, on file with author) [hereinafter Mejía Presentation].

¹³¹ See *id.*

¹³² See *id.*; Ley de Promoción y Desarrollo Agraria, Decreto Legislativo 02 (1980) (Peru).

¹³³ See Mejía Presentation, *supra* note 130, at 1.

¹³⁴ See Proyecto Especial Desarrollo Agrario, Cooperativo y Comunal, Decreto Supremo 029–88–AG (Mar. 1988).

Fujimori law reverses much of the early agrarian reform law that has been constitutionally fundamental to the nation.¹³⁵

In essence, the 1991 legislation liberalizes farm credit and agricultural property ownership, effectively dismantling the twenty years of agrarian reform.¹³⁶ Under the prior law, food production levels had dropped and farm credit was almost nonexistent.¹³⁷ In response, this reform law allows farm property to be owned by anyone, provides for equal access to credit, and allows farmers to use their land as collateral.¹³⁸

B. Coverage

The 1991 law permits the buying, selling, mortgaging, inheriting, and renting of land, including land received under the agrarian reform.¹³⁹ No governmental authorization is required for the transfer of land.¹⁴⁰ In a legal sense, land has become a commercial asset.¹⁴¹

Size restrictions on land transfers, however, are still maintained.¹⁴² The maximum size for coastal land is 250 hectares of irrigated land. The maximum size for irrigated, cultivated land is sixty hectares in the mountains; 120 hectares in dryland; and 5,000 hectares in natural pastureland.¹⁴³ Fragmenting property into smaller pieces is also

¹³⁵ *Peru Liberalizes Farm Credit, Private Property Laws*, REUTER LIBR. REP., Mar. 31, 1991, available in LEXIS, News Library, Wires File [hereinafter *Peru Liberalizes*]. Indeed, commentators have questioned the constitutionality of the new law. See Mejía Presentation, *supra* note 130, at 2; Laureano del Castillo, *Virtudes, Errores y Vacíos del Decreto Legislativo 653; Una Visión Jurídica*, in LA NUEVA LEY AGRARIA EN DEBATE 49-50 (Epifanio Baca Tupayachi ed., 1992).

¹³⁶ See *Farm Credit, Ownership Liberalized in Peru*, J. COMM., Apr. 2, 1991, available in Westlaw, Dialog Database [hereinafter *Farm Credit*]; *Government Suspends the Power of the Central Bank to Set Interest Rates, Andean Group Regional Report*, LARA, June 27, 1991, available in LEXIS, News Library, LAN File; *New Agrarian Reform*, LATIN AM. WKLY. REP., May 23, 1991, available in LEXIS, News Library, LAN File.

¹³⁷ See *Peru Liberalizes*, *supra* note 135; *Farm Credit*, *supra* note 136; *Interest Rates Freed, Foreign Banks OK'd*, LATIN AM. WKLY. REP., May 16, 1991, available in LEXIS, News Library, LAN File; see also Decreto Supremo No. 011-91-AG arts. 2, 4 (Diario Oficial El Peruano Nos. 95553 & 95554) (Mar. 31, 1991).

¹³⁸ See *Peru Liberalizes*, *supra* note 135; *Farm Credit*, *supra* note 136; *Interest Rates Freed, Foreign Banks OK'd*, LATIN AM. WKLY. REP., May 16, 1991, available in LEXIS, News Library, LAN File.

¹³⁹ See Ley de Reforma Agraria, arts. 2, 5-7 (1991) (Peru).

¹⁴⁰ *Id.* art. 16.

¹⁴¹ See Javier Escobal, *Mercado de Tierras, Rentabilidad y Desarrollo Agrario*, in LA NUEVA LEY AGRARIA EN DEBATE 1, 11 (Epifanio Baca Tupayachi ed., 1992).

¹⁴² See Ley de Reforma Agraria, arts. 7, 12-15 (1991) (Peru).

¹⁴³ *Id.* arts. 7, 16.

allowed, subject to a minimum size regulation.¹⁴⁴ The minimum size for land transfers in each resulting plot at the moment of subdivision is at least three hectares.

In cases of land invasion, the new law creates an opportunity for a judicial inspection of the land, usually within forty-eight hours.¹⁴⁵ A judge can order the disoccupation of the land within twenty-four hours.¹⁴⁶ If this order is not obeyed, the judge can order the removal of the invaders by public force.¹⁴⁷ Abandoned land reverts to the state if left unattended for two or more years, even if the land is left fallow.¹⁴⁸

The constitutional concept of "he who works the land owns the land" has been dropped.¹⁴⁹ Because of the entrenched doctrine in Latin American law of the social policies and functions of land, however, it is likely that some social function of this "land to the tiller" policy remains.¹⁵⁰

C. *Implementation and Impact*

1. The Historically Disadvantaged

The new legislation does not clearly delineate how state and abandoned lands can be distributed to new owners.¹⁵¹ It does, however, require additional steps in order to acquire land, including a performance bond.¹⁵² Presumably, a performance bond is required to demonstrate that the land will actually be used by its occupant. This requirement seems entirely inappropriate for landless or land-poor populations.¹⁵³

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* art. 11.

¹⁴⁶ Ley de Reforma Agraria, art. 11 (1991) (Peru).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* art. 22.

¹⁴⁹ See Mejía Presentation, *supra* note 130.

¹⁵⁰ Reversal of the social function of land and the "land to the tiller" concept by legislative action has been criticized on constitutional grounds. See Guillermo Figallo A., Aspectos Inconstitucionales de la Ley de Promoción de las Inversiones en el Sector Agrario (undated, unpublished manuscript, on file with author).

¹⁵¹ See Mejía Presentation, *supra* note 130.

¹⁵² Letter Opinion from Rolando Eyzaguirre, Instituto Libertad y Democracia, to Steven E. Hendrix, Legal Advisor, University of Wisconsin (Madison) Land Tenure Center (Jan. 8, 1993) (on file with author) [hereinafter Eyzaguirre Letter Opinion].

¹⁵³ See *id.*

Furthermore, the new law introduces several elements which may harm the disadvantaged.¹⁵⁴ For instance, this law does not refer to the *sierra*, community, or *campesino* groups in establishing size limits.¹⁵⁵ Unutilized land is taken by the state rather than given to indigenous groups.¹⁵⁶ Native and *campesino* groups are specifically excluded from obtaining mortgages.¹⁵⁷ These groups are excluded because the law failed to amend Article 163 of the Constitution, which explicitly states that native and *campesino* community lands are inalienable and unmortgageable.¹⁵⁸ Unfortunately, this exclusion applies to one-third of all rural plots, or approximately 600,000 communal small landholders, whose land rights remain only informally recognized.¹⁵⁹

Similar to prior law, the new law provides for land sales in the formal sector.¹⁶⁰ A sale is recognized, therefore, only if inscribed by the registry.¹⁶¹ The new law allows, however, unrestricted sale, transfer, mortgage, and titling of property larger than three hectares.¹⁶² Although many landholders easily satisfy this limit, thirty percent of all rural properties and the majority of the property holders are restricted.¹⁶³ However, the informal sector has ignored, in the past, and can be expected to continue to ignore legal restraints. The legislation's impact, therefore, may be modest.

The Peruvian government has already modified this prohibition against titling any land under three hectares and has recognized the existence of such plots.¹⁶⁴ This law, nonetheless, does not permit registration of lots less than three hectares which were created after

¹⁵⁴ See Ley Reforma Agraria, art. 23 (1991) (Peru). The legislation's impact on women is unclear. The International Fund for Agricultural Development (IFAD) has found that, in Peru, women are engaged in agricultural work in 86% of rural households. Candy Gourlay, *Development: "Invisible Women" Bear Brunt of Poverty*, INTER PRESS SERV., Nov. 23, 1992, available in LEXIS, News Library, Inpres File.

¹⁵⁵ See Ley de Reforma Agraria, art. 23 (1991) (Peru).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* art. 9.

¹⁵⁸ Rafael Ravettino F., 6-7 (July 1991) (untitled, unpublished manuscript, on file with author).

¹⁵⁹ See Eyzaguirre Letter Opinion, *supra* note 152.

¹⁶⁰ See generally RUBÉN GUERVARA MANRIQUE, DERECHO REGISTRAL (1990).

¹⁶¹ See *id.*

¹⁶² See Eyzaguirre Letter Opinion, *supra* note 152.

¹⁶³ See *id.*

¹⁶⁴ See Decreto Supremo No. 018-91-AG (1991) and Decreto Legislativo No. 653, art. 16, which cover the titling of land holdings less than three hectares in existence on May 3, 1991, the date of promulgation of the new law.

the cutoff date.¹⁶⁵ Presumably, the government felt that allowing property owners the chance to register small parcels would deter them from subdividing their land in the future.

The original law stated that in order to register a mortgage, the property owner needed, at a minimum, a five hectare plot.¹⁶⁶ Legislative Decree 653's administrative rules now allow landholders of less than five hectares, in certain cases, to register a mortgage.¹⁶⁷ Even if the Agrarian Bank of Peru denies credit, credit may be obtained through a third party, thereby allowing the small landholder to mortgage the land.¹⁶⁸ It appears that this practice has led to nearly free mortgage of land for registered small landholders who are not members of native or indigenous communities.¹⁶⁹

The Peruvian government has withdrawn funding for both the *Banco Agrario* and the *Cajas Rurales de Ahorro y Crédito*.¹⁷⁰ Additionally, commercial banks are not extending loans.¹⁷¹ Consequently, the only sources of credit for small landholders are commercial intermediaries and brokers, who rarely deal in secured mortgage lending.¹⁷² As a result, the law has had little impact on availability of credit for rural farmers with small landholdings.

New procedures subsequently were announced for simplifying the parcelization of agrarian associations and cooperatives.¹⁷³ These procedures allow the organizations to register land to each of their individual members.¹⁷⁴ Despite these new procedures, in many instances prohibitive transfer costs have reappeared.¹⁷⁵

2. Trade and Investment

Despite Legislative Decree 653's new procedures regarding parcelization of land, several obstacles to increasing trade and invest-

¹⁶⁵ See *id.*; Steven E. Hendrix, *Interplay Among Land Law and Policy, the Environment, the War on Drugs, Narcoterrorism, and Democratization: Perspectives on Peru's Upper Huallaga Valley*, 150 LAND TENURE CENTER PAPER 14 (1993) [hereinafter Hendrix, *Interplay*].

¹⁶⁶ See Ley de Promoción y Desarrollo Agraria, D.L. 02 (1980) (Peru).

¹⁶⁷ See Reglamento de la Ley de Promoción de las Inversiones en el Sector Agrario, Decreto Supremo No. 0048-91-AG/OGA—OAD.UT (1991) (Peru).

¹⁶⁸ *Id.* art. 8.

¹⁶⁹ See Eyzaguirre Letter Opinion, *supra* note 152.

¹⁷⁰ Interview with Dr. Jorge L. Daly, LAC TECH Project Advisor, Chemonics International, in Washington, D.C. (Feb. 16, 1993).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Eyzaguirre Letter Opinion, *supra* note 152.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

ment remain. First, it is unclear whether the government can protect landholdings from terrorists and drug traffickers.¹⁷⁶ Second, as discussed above, it is still difficult for many Peruvians to obtain mortgages. In theory, though, legal access to mortgages will increase the availability of credit, resulting in greater investment. If investment increases, then productivity should increase.

Article 159 of the Constitution also effects trade and investment by prohibiting *latifundios* and proposing to gradually eliminate *minifundios*.¹⁷⁷ Although the new law defines maximum and minimum size limits, these restrictions may prove ineffective because size limitations are based on a per-person acreage.¹⁷⁸ Individuals, therefore, may combine to form a company which is not restricted by a "per person" limit.¹⁷⁹

Decision 24 of the Cartagena Agreement (commonly known as the "Andean Common Market") includes restrictions on foreign ownership of land.¹⁸⁰ Decision 24 became effective in Peru in July 1971.¹⁸¹ Prior to this Presidential Decree, aliens could not directly or indirectly acquire or hold lands, waters, mines, or combustibles within a fifty kilometer zone along the frontiers.¹⁸² Aliens also could not hold or acquire rural property in the border provinces or in the immediate vicinity of military posts.¹⁸³ With the aforementioned exceptions, aliens generally had the same civil rights and duties as citizens.¹⁸⁴

Foreign investment in assets is now permitted, subject to prior authorization.¹⁸⁵ In order to validate the foreign investor's rights, all

¹⁷⁶ But see Ley de Reforma Agraria, Decreto Legislativo No. 653, art. 11 (1991) (Peru), which sets up a procedure for removal of trespassers.

¹⁷⁷ See Ravettino F., *supra* note 158, at 5-6.

¹⁷⁸ Ley de Reforma Agraria, arts. 7, 12-15 (1991) (Peru).

¹⁷⁹ *Id.* According to the new law, companies may own land. This law reverses article 157 of the old agrarian reform law which contemplated only individual ownership.

¹⁸⁰ See Agreement for Subregional Integration, May 26, 1969, Bol.—Colom.—Chile—Ecuador—Peru [hereinafter Cartagena Agreement]; GALO PICO MANTILLA, DERECHO ANDINO 21 (1989); see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁸¹ Decree Law No. 18900 (1971) (Peru).

¹⁸² See Cartagena Agreement, *supra* note 180; PICO, *supra* note 180, at 21; see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁸³ See Cartagena Agreement, *supra* note 180; PICO, *supra* note 180, at 21; see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁸⁴ See Cartagena Agreement, *supra* note 180; PICO, *supra* note 180, at 21; see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁸⁵ See Cartagena Agreement, *supra* note 180; PICO, *supra* note 180, at 21; see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

foreign investment must be registered at the National Commission of Foreign Investments and Technology (CONITE).¹⁸⁶

While prior law had prohibited rental of land, the new law permits rental on terms agreed upon by the parties.¹⁸⁷ This liberalization is important for several reasons. First, it provides access to land that might otherwise not be available for cultivation.¹⁸⁸ Second, it eliminates a barrier to the land market economy because land rental is an important element of this market.¹⁸⁹ Third, it allows for the exploitation of the land so that it is not removed under provisions for "abandoned" land.¹⁹⁰

Liberalization of rental controls, however, is incomplete. The decree states that rental is allowed only in cases specified by law.¹⁹¹ Plots under three hectares cannot be rented.¹⁹² The original law required judicial police action to evict a tenant, although the procedures subsequently have been relaxed.¹⁹³ Because of drafting ambiguities in the original law, it was uncertain whether the rental term could be less than six years. It is now clear, however, that the term of rental can be as long as the parties desire.¹⁹⁴

3. The Environment

The new Peruvian land law potentially could have unintended and unfortunate environmental effects. This law repeals Article 71 of the Environment and Natural Resources Code,¹⁹⁵ which prohibited development activities from taking advantage of nonrenewable energy and natural resources. The new law also opens these lands to construction of oil and gas pipelines, and mining and petroleum installations.¹⁹⁶

¹⁸⁶ See Cartagena Agreement, *supra* note 180; PICO, *supra* note 180, at 21; see also Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁸⁷ See del Castillo, *supra* note 135, at 49-53.

¹⁸⁸ Eyzaguirre Letter Opinion, *supra* note 152, at 3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Decree Law No. 18900 (1971) (Peru); see also PICO, *supra* note 180, at 21; Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁹² See Decree Law No. 18900 (1971) (Peru); see also PICO, *supra* note 180, at 21; Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁹³ See Decree Law No. 18900 (1971) (Peru); see also PICO, *supra* note 180, at 21; Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁹⁴ See Eyzaguirre Letter Opinion, *supra* note 152, at 4.

¹⁹⁵ See Ley de Reforma Agraria, Decreto No. 613 (1991) (Peru).

¹⁹⁶ See *id.*

Article 20 of Law 653, which allows the executive to reclassify land use, potentially threatens the environment.¹⁹⁷ Under prior law, a legislative act was required to convert parks and reserves to commercial use.¹⁹⁸ Conversion now may be accomplished by executive order, without public debate or input.¹⁹⁹

III. MEXICO: ARTICLE 27 OF THE CONSTITUTION, *LEY AGRARIA* AND *LEY ORGÁNICA DE LOS TRIBUNALES* (1991)

A. Background

In the late 1800s, the *hacienda* system in Mexico allowed large estate holders to displace *campesinos* by formally purchasing land.²⁰⁰ As a result, communities were forced from their traditional lands onto marginal and less productive properties.²⁰¹ Following the 1910 Mexican Revolution, the Mexican government instituted agrarian reforms.²⁰² These reforms, which were codified in Article 27 of the 1917 Mexican Constitution, allowed *campesinos* to recover their former lands.²⁰³ The agrarian reform was extended not only to the formerly dispossessed communities, but also to *peones* who had worked on the large *haciendas*.²⁰⁴ This policy allowed peasants access to land under the *ejido* system, even if they could not prove that they personally had been dispossessed.²⁰⁵

¹⁹⁷ *Id.* art. 20.

¹⁹⁸ See Decree Law No. 18900 (1971) (Peru); see also PICO, *supra* note 180, at 21; Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

¹⁹⁹ See Decree Law No. 18900 (1971) (Peru); see also PICO, *supra* note 180, at 21; Eyzaguirre Letter Opinion, *supra* note 152; Ravettino F., *supra* note 158.

²⁰⁰ See generally CELSO FURTADO, *ECONOMIC DEVELOPMENT OF LATIN AMERICA* 254-64 (1985); Gerardo Otero, *Agrarian Reform in Mexico: Capitalism and the State*, in *SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA*, 276-304 (William C. Thiesenhusen ed., 1989); Merilee S. Grindle, *Agrarian Reform in Mexico: A Cautionary Tale*, in *AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT: TEN CASE STUDIES*, 179-204 (Roy L. Prosterman et al. eds., 1990).

²⁰¹ See generally FURTADO, *supra* note 200, at 254-64; Otero, *supra* note 200, at 276-304; Grindle, *supra* note 200, at 179-204.

²⁰² See generally FURTADO, *supra* note 200, at 254-64; Otero, *supra* note 200, at 276-304; Grindle, *supra* note 200, at 179-204.

²⁰³ See generally FURTADO, *supra* note 200, at 254-64; Otero, *supra* note 200, at 276-304; Grindle, *supra* note 200, at 179-204.

²⁰⁴ See generally FURTADO, *supra* note 200, at 254-64; Otero, *supra* note 200, at 276-304; Grindle, *supra* note 200, at 179-204.

²⁰⁵ See Ignacio Ovalle Fernandez, *El Ejido y Sus Perspectivas: Un Enfoque Jurídico*, 40 *COMERCIO EXTERIOR* 845, 845-48 (Sept. 1990); *Resultados de la Encuesta Nacional Agropecuaria Ejidal 1988*, 15 *EL MERCADO DE VALORES* 7, 7-12 (Aug. 1990). See generally Rogelio Ramos Oranday,

Pursuant to the *ejido* system, all peasants claiming land had to be connected with a "population nucleus."²⁰⁶ Each population nucleus was recognized by the state and given a grant of land, or *ejido*, for its members.²⁰⁷ This land could not be transferred, sold, mortgaged, or rented.²⁰⁸ Inheritance was allowed if the property passed to the widow, children, or dependents of the *ejidatario*.²⁰⁹ *Ejididos* could be worked individually in small private farms or by groups, according to the government's determination.²¹⁰ Since 1930, most common or village lands have been distributed through the agrarian reform process.²¹¹

Presently, there are approximately 29,000 *ejidos* and agrarian communities in Mexico.²¹² These include 3.5 million *ejidatarios* and *comuneros*, or collective owners, holding 4.6 million parcels and 4.3 million houses or urban plots.²¹³ In total, the *ejidal* lands represent fifty percent of all national territory and roughly twenty-five percent of the national population.²¹⁴ Since 1930, only about 600 of the 29,000 *ejidos* have received any type of legal certificate of possession.²¹⁵ The overwhelming majority of *ejidatarios*, therefore, do not possess documentation of ownership interests.²¹⁶

As early as 1961, academics debated whether Mexico needed a "reform of the reform" of the *ejido* structure in order to benefit the private sector.²¹⁷ Recent constitutional changes allow *ejidos* to be bought and sold on the private market and also remove restrictions on commercial ownership of rural property.²¹⁸ According to former President Carlos Salinas de Gortari, the purposes of these new re-

Elementos para la Discusión Sobre el Ejido en México, 40 COMERCIO EXTERIOR 838, 838-44 (Sept. 1990).

²⁰⁶ A population nucleus is the group of individuals living together on a single piece of land, the *ejido*. See Ovalle, *supra* note 205, at 845-48. See generally Ramos, *supra* note 205, at 838-44.

²⁰⁷ See Ovalle, *supra* note 205, at 845-48. See generally Ramos, *supra* note 205, at 838-44.

²⁰⁸ See Ovalle, *supra* note 205, at 845-48. See generally Ramos, *supra* note 205, at 838-44.

²⁰⁹ See Ovalle, *supra* note 205, at 845-48. See generally Ramos, *supra* note 205, at 838-44.

²¹⁰ See ALAN RIDING, *DISTANT NEIGHBORS* 260 (1986).

²¹¹ Memorandum from Joseph R. Thome, Professor of Law, University of Wisconsin Law School, to John Bruce, Director, University of Wisconsin (Madison) Land Tenure Center (Aug. 24, 1992) (on file with author) [hereinafter Thome Memorandum].

²¹² *Id.*

²¹³ Parcels are commonly divided into two or more smaller plots. *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Thome Memorandum, *supra* note 211.

²¹⁷ See, e.g., Thomas F. Carroll, *The Land Reform Issue in Latin America*, in *LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS*, 161, 175 (Albert O. Hirschman ed., 1961).

²¹⁸ See Claudia Luengas, *Restoring Constitutional and Legal Orders for Empowerment and Participation: A View from Mexico*, in 2 *BEYOND LAW* 11, 14 (1992).

forms include: effective social justice in employment, production, and training; an equal sharing among beneficiaries; and, the right to decide property uses.²¹⁹

The new reforms to Mexico's *ejido* system include: (1) a new agrarian law which establishes market principles for agricultural land; (2) a constitutional amendment to Article 27; (3) a law which regulates the newly created agrarian courts; and, (4) the creation of a special Attorney General for Agriculture.²²⁰

B. Coverage

In general, neither foreigners nor churches may own land in Mexico unless specifically authorized by the government.²²¹ Businesses, nonprofit organizations, and banks are permitted to own property, but only to the extent permitted by law.²²² The new agrarian law in Mexico clearly recognizes the legal status of indigenous communities and *ejidal* populations.²²³ For the first time, these groups are constitutionally protected.²²⁴

In addition, the *ejidos* themselves are governed by a group assembly,²²⁵ an *ejidal* board,²²⁶ and an enforcement advisory group.²²⁷ Rent-

²¹⁹ See President Carlos Salinas de Gortari, Diez Puntos para Libertad y Justicia al Campo Mexicano, Address at the Official Residence in Los Pinos, Mexico (Nov. 14, 1991) (on file with author) [hereinafter Salinas Address]; see also Salvador Martínez García, *Transformación Integral al Ejido sin Privatizarlo: CSG*, EXCELSIOR, Jan. 7, 1990, at 1; *En Marcha, La Reforma que Necesita el Campo Mexicano*, EXCELSIOR, Nov. 10, 1991, at 1.

²²⁰ The new agrarian law provides that: (1) the government is no longer obligated to provide land to peasants; (2) the risk of expropriation to large estate holders is eliminated, thereby allowing these owners to increase investment in their land; (3) agrarian tribunals will settle land disputes between *ejidatarios* or between *ejidatarios* and private land holders; (4) *ejidatarios* may legally sell, rent, sharecrop, or mortgage their land. In most instances, if the transaction involves individuals from outside the *ejido*, a two-thirds majority of the *ejidal* general assembly must approve the transaction; (5) *ejidatarios* no longer must personally work their land. Rental and sharecropping of land is now permissible; (6) maximum property limits will still be enforced to prevent a return to *latifundios*; (7) joint ventures and associations with *ejidatarios* are now possible; (8) foreigners may own up to 49% of equity capital in production associations with *ejidatarios*. See Wayne A. Cornelius, *The Politics and Economics of Reforming the Ejido Sector in Mexico: An Overview and Research Agenda*, 23 LASA FORUM 3 (Fall 1992); see also Wesley R. Smith, *Salinas Prepares Mexican Agriculture for Free Trade*, HERITAGE FOUND. REP., Oct. 1, 1992, available in LEXIS, News Library, Hfrpts File.

²²¹ See MEX. CONST. art. 27.

²²² *Id.*

²²³ See *id.*; see also Ley Agraria, art. 9 D.O. 920811 (1991) (Mex.).

²²⁴ See Salinas Address, *supra* note 219.

²²⁵ See MEX. CONST. art. 27; Ley Agraria, arts. 21-42 D.O. 920811 (1991) (Mex.).

²²⁶ The *ejidal* board includes a president, treasurer, and secretary, each with certain administrative duties. See Ley Agraria, arts. 32-42 D.O. 920811 (1991) (Mex.).

²²⁷ *Id.* arts. 35-42.