Land Titling and Indigenous Peoples

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FOREWORD

In recent years, the Inter-American Development Bank has been increasingly confronted with the need to address the demands of indigenous peoples, who comprise approximately 10 percent of the total and about 40 percent of the rural population of Latin America. Foremost among these demands is the legal recognition of the lands they have traditionally inhabited, not only because of the value of land as the basis for economic sustenance, but also because indigenous culture, identity and spirituality are closely associated with the land and natural resources. Indigenous peoples throughout the hemisphere demand that these lands be recognized and titled to the community and not its individual members, insisting that only communal title and management of the lands will guarantee their *cultural survival* and their long-term sustainable *development with identity*.

While this principle has been recognized by international legal frameworks, such as the ILO Convention 169 on the Rights of Indigenous and Tribal Peoples, and by many of the new constitutions recently adopted in the region, there is a lack of consensus within the IDB and in many other development institutions as to how to ensure compatibility of indigenous land rights with improved efficiency in land markets and rural development.

The Bank has provisions in place that date to 1990, to ensure that indigenous land rights are respected in the context of environmental and social mitigation measures associated with infrastructure projects that affect indigenous areas. The mandates that resulted from the Eighth Capital Replenishment in 1994 require the IDB to adopt a much more proactive approach to addressing indigenous issues in its poverty reduction and social equity initiatives. In addition, a new emphasis on rural development has compounded the need to review Bank experience in the different types of operations that have directly or indirectly dealt with indigenous lands. The aim is to develop a more consistent policy and operational approach on these highly complex and sensitive issues.

Anne Deruyttere, Chief
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CONTENTS

EXECUTIVE SUMMARY 1

I. INTRODUCTION 8

II. APPROACHES TO INDIGENOUS LAND TENURE AND TITLING: HISTORICAL OVERVIEW 12

III. INDIGENOUS PEOPLES AND LAND TENURE SYSTEMS: CONCEPTS AND CATEGORIES 18

IV. LAW AND POLICY FRAMEWORK FOR INDIGENOUS LAND TITLING: TRENDS IN THE 1990s 32

V. SECURING INDIGENOUS LAND AND RESOURCE RIGHTS: PRACTICAL EXPERIENCE IN THE 1990s 41

VI. SUPPORT FOR INDIGENOUS PEOPLES IN LAND POLICY AND TITLING INTERVENTIONS: COMPARATIVE REVIEW OF THE IDB AND OTHER INTERNATIONAL ACTORS 53

VII. LAND TITLING AND INDIGENOUS PEOPLES: ELEMENTS OF A NEW STRATEGY 68

BIBLIOGRAPHY 76

ABBREVIATIONS AND ACRONYMS

ACIA	*Asociación Campesina Integral del Atrato*
CIDOB	*Consejo Indígena del Oriente Boliviano*
COMPLADEIN	National Council of Indigenous and Afro-Ecuadorian Development
CONAMAQ	*Consejo Nacional de Ayllus y Markas de Qullasuyu*
CONFENIAE	Confederation of Indigenous Nationalities of the Ecuadorian Amazon
DANIDA	Danish International Development Agency
FEPP	*Fondo Ecuatoriano Populorum Progressio*
FONAPAZ	National Peace Foundation
GIS	Geographic Information System
IERAC	Ecuadorian Institute for Land Reform and Colonization
IFAD	International Fund for Agriculture Development
ILO	International Legal Organization
INCORA	Colombian Agrarian Reform Institute
INDA	National Institute of Agriculture Development
INEFAN	Ecuadorian Institute for Forests and Natural and Wildlife Institute
INRA	Natural Agrarian Reform Agency
INRENA	National Natural Resources Authority
NGO	Nongovernmental Organization
OPIP	Organization of Indigenous Peoples of Pastaza Province
PAI	Program of Attention of Indigenous Peoples
PCN	*Proceso de Comunidades Negras*
PEPP	*Proyecto Especial Pichis Palcazo*
PETT	Special Program for Land Titling
PROMUDEH	*Ministerio de Promoción de la Mujer y del Desarrollo Humano*
SITT	System Inventory and Land Titling
TCA	*Tratado de Cooperación Amazónica*
TCO	*Tierras Comunitarias de Origen*
UNDP	United Nations Development Program
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

Nature of the Challenges

Addressing the economic and cultural needs of indigenous peoples within the framework of its agricultural development and poverty alleviation programs is a major challenge for the Bank. Over the past decade the Bank has devoted increasing attention to the rights and identity of indigenous and other local communities. It has also highlighted agricultural development policies and programs, including land titling and registration, as part of its market-oriented approach to generating income and alleviating poverty.

Are there inherent contradictions between the protection of indigenous values and institutions, and the promotion of market-oriented agrarian strategies? What experiences have previous Bank projects in these areas had, and what lessons can be learned? What more can be done to ensure that land titling and regularization programs respond to indigenous demands and are designed and implemented with their participation? What are the implications for the Bank of new Latin American law and policy approaches to indigenous rights and multiculturalism with respect to land tenure, territorial organization, decentralization, and natural resource management? How can the Bank's strategy on indigenous peoples and community development best respond to these broad challenges?

Scope of the Report and Methodology

Two consultants—each with over twenty years experience in agrarian policy and indigenous land issues in Latin America—were asked to prepare a discussion paper with recommendations for the Bank. Its major objectives were: to review the actual or potential impact of land titling and cadastre programs on indigenous populations; to recommend actions that would minimize risk and ensure that land projects are tailored to the aspirations and needs of indigenous peoples; to outline a typology of indigenous landholding systems and to identify any areas requiring further research. They were asked to make country and site visits, review Bank projects as well as those of other international agencies, and meet with government authorities, representatives of indigenous organizations and other relevant actors. The countries visited were Colombia, Ecuador, Panama and Peru. In each, the consultants focused on both law and policy concerns and made extensive site visits to highland areas and tropical regions, including the Amazon basin. Though the study reflects this field experience, it is written as a policy paper aiming to have the widest possible relevance for Latin America as a whole. The consultants thus draw on their previous experience in other Latin American countries, particularly Bolivia, Guatemala and Mexico.

Conceptual Issues and Typologies

An adequate conceptual framework is essential for addressing indigenous land claims in titling and regularization programs. A broad distinction can be drawn between protective, rights-based and environmental approaches. The first approach aims to protect indigenous peoples from market forces, placing restrictions on their capacity to transfer their lands. The second approach is concerned with the indigenous peoples' special rights to their lands and territories, either as peoples who predate the nation-state or as the victims of historical discrimination. The third approach is concerned mainly with the indigenous contribution to environmentally sustainable resource management.

Issues of indigenous identity, as related to land tenure concerns, are highly complex. In the past, some states have aimed to break down any sense of a separate indigenous identity among their peasant populations of indigenous extraction,

particularly within the framework of nation-building and integrationist land reforms. There is now a resurgent sense of indigenous identity throughout Latin America, often linked to land and territorial claims. A contributory factor has been the renewed tendency to recognize special or collective land and resource rights for indigenous populations as well as for rural black communities in the Pacific and other such population groups.

Many indigenous claims are rooted far back in history. Policy concerns cannot be presented through an evolutionary theory of property rights, supposing an evolution from more collective to more individual forms of land tenure over time. Instead, there have been continuing fluctuations in approaches to indigenous land tenure over the ages. The late nineteenth century saw attempts to eliminate communal tenure throughout Latin America, though the trend was reversed in the early twentieth century. Land reforms of the mid-twentieth century often aimed to consolidate collective forms of ownership.

Indigenous land tenure systems display great diversity. A basic distinction is made between the *horizontal* economies of the Amazon and adjacent lowlands, and the more *vertical* economies of the Andean and Central American highlands. Another distinction is that most Amazon Indians still have access to extensive territorial areas, though their land base is increasingly under threat from cattle ranching, resource extraction and other infrastructure. Indigenous peasant economies, by contrast, have suffered loss of their lands over time and are now facing the fragmentation and parceling of their lands into tiny plots, resulting in landlessness and out-migration.

Indigenous peasant communities, where they survive as legally recognized entities, are often misrepresented as collective land tenure systems. They should more correctly be seen as alternative systems of private land tenure. Ownership by individual families is recognized within the indigenous community, families often possess separate parcels in different ecological areas. The complexity of these land tenure systems and their implications for land titling and registration programs is insufficiently understood by policymakers. A consequence is that recent policy reforms in some countries now aim to liberalize indigenous forms of land ownership, promoting individual tenure and terminating the earlier restrictions on indigenous land transfers.

Indigenous peoples refer to their rights to territory as well as land. This may be most relevant in the Amazon, where they now have rights over vast territorial areas. Current areas of debate are the extent of these territorial rights and the degree of indigenous control over hydro-energy development, timber extraction and other resource, including national parks and environmentally protected areas. The resurgence of interest in the political dimensions of territorial ordering extends to the highlands where indigenous lands are far more fragmented. This has implications for fiscal management as part of decentralization programs.

New Legislative and Policy Approaches: Dilemmas of the 1990s

A review of legal and political developments in Latin America during the past decade illustrates new approaches to the titling and registration of indigenous lands.

On the one hand, a *new Latin American constitutionalism*, firmly recognizes an increasing number of Latin American republics as multiethnic and multicultural societies and often provides special protection for indigenous lands and resources. One can detect the influence of the ILO's Indigenous and Tribal Peoples Convention, No. 169 of 1989, and its land provisions. This convention has now been ratified by ten Latin American states, meaning that they are obliged to bring national legislation into line with its provisions. The convention has provisions requiring ratifying states to identify indigenous lands and guarantee the effective protection of rights of ownership and possession; to safeguard indigenous rights to participate in the management and conservation of resources; to consult with indigenous peoples over mineral or sub-surface

resource development; and generally to consult with indigenous peoples regarding all policy measures that affect them.

Among the new constitutions, Colombia's (1991) is of particular interest in that it extends these rights to rural black communities in the Pacific region and elsewhere. Most recently, Ecuador's 1998 constitution deals with the collective rights of black or Afro-Ecuadorians as well as those of indigenous communities. Both constitutions recognize the concept of indigenous territorial areas, linking concepts of indigenous land rights to broader issues of political and fiscal administration. Other Latin American constitutions of the 1990s also contain ample requirements for the demarcation and titling of indigenous lands. Peru's 1993 constitution is somewhat exceptional in that it removes earlier restrictions on the alienation of peasant and native community lands.

Similarly, recent agrarian legislation promotes individual titling within indigenous and other rural communities. Reflecting the current economic orthodoxy, these agrarian law reforms appear to be motivated by the need to increase agricultural productivity and eradicate ambiguities over land ownership deriving from earlier land reforms. There is evidence that the Bank itself has been influential in promoting new agrarian laws of this nature.

Some law and policy reforms address the indigenous resource management and indigenous participation in the profits derived from the development of energy sources. This is evident *inter alia* in Colombia and Panama as well as in Ecuador's new constitution. But national laws are only beginning to address this area, which is likely to receive far more attention over the next decade.

Indigenous Land Titling in Practice

There have been few major and well-funded state programs specifically geared to the demarcation and titling of indigenous lands in either tropical or highland areas. Colombia has embarked on some important programs in the Amazon and began the collective titling of black lands in the Pacific. Yet, programs to augment the lands of indigenous *resguardos* in the highlands and to resolve conflicts with nonindigenous land occupants have been beset by a lack of funds for land purchases. In Bolivia and Ecuador, though vast land areas have been vested with title by decree, the organization and rationalization of that land has been lacking. Conflicts between indigenous and nonindigenous land claimants are becoming potentially acute throughout the Amazon region. The same problem is apparent in Panama, where there have been important measures to create new indigenous *comarcas*, but the regularization of the land has not been adequate. Despite major programs to title communal and *ejido* lands in Mexico and Peru, there is no strong evidence that these have been adapted to the needs of indigenous communities and organizations.

During the past decade, indigenous peoples have shown a growing capacity to carry out their own land demarcation and titling programs. Indigenous organizations have developed considerable technical expertise in mapping, computerization, geodesic surveys and topography to back up their obvious knowledge of local terrain and boundaries. Acting sometimes through agreements with national governments, at other times with the support of national and international NGOs, they have played a major role in the initial delimitation of their claimed areas. In the Peruvian Amazon indigenous organizations were able to carry out their titling programs at a time of widespread violence and insurgency, contributing to the eventual stabilization and democratic development of the region. In Ecuador, indigenous organizations have succeeded in demarcating and mapping substantial land areas and negotiating with the state forestry agency its acceptance of the territory as a joint management area. In Colombia, black community organizations were initially instrumental in pressing for special legislation for ethnic minority land rights in the Pacific and have continued to develop strategies for the collective titling and territorial organization for black communities in the Pacific. Panama's indigenous organizations have also mapped their

own territory, acting in coordination with the government's National Boundaries Commission.

Addressing the Impact of Land Titling on Indigenous Peoples: The Experience of the Inter-American Development Bank

Though Bank policy papers generally refer to indigenous peoples, their land claims have not received detailed consideration. Policy documents on rural poverty or rural land markets do not address indigenous land tenure concerns. A policy paper on involuntary resettlement requires some safeguards for indigenous customary rights. A policy document on indigenous issues sees the strengthening of indigenous communal land tenure systems as a key challenge ahead.

At the operational level, the Bank has paid only limited attention to indigenous peoples in its land administration and land titling projects. However, there are other types of projects, especially in recent years, which address indigenous land issues. These projects have to be divided into two major categories. First, there are larger infrastructure or sustainable development projects that can have components for the demarcation and regularization of indigenous lands. Second, there are the land programs of more general application, in which the concerns of indigenous peoples can be addressed.

To the best of the consultants' knowledge, few projects in the first category have been approved. Some have been identified in Argentina, Belize, Bolivia, Panama and Paraguay, among other countries. Of these only the Panama project, for sustainable development in Darien, was visited by the consultants. The design and preparation of this project showed the Bank's commitment to addressing the land claims of indigenous peoples and other ethnic minority groups, reviewing legislation in detail, consulting with indigenous organizations, and including program components for consultation with indigenous organizations and conflict resolution. Yet, neither in Panama nor in the other projects is there evidence of a longer-term strategic vision, building on the titling components *per se* to support longer-term objectives of sustainable development.

The issues surrounding general land titling programs that can have an impact on indigenous peoples are far more complex.[1] There have been incipient programs such as in Colombia, where the main policy decision has been to *exclude* indigenous peoples from the coverage of land titling programs, thus ensuring that individual titling does not have a negative impact on recognized indigenous communal land areas. The programs in Ecuador and Peru are expected to have an impact on communal forms of land tenure, including the promotion of individual land titling with the consent of the communities concerned. The programs were not designed on the basis of careful baseline studies in those communities, nor does the available project documentation point to detailed knowledge of communal land tenure systems or their degree of market interaction. The programs in these two countries are clearly designed to promote more efficient land markets as part of broader agricultural policy reforms. The Bank itself has played a role in promoting market-based legal and administrative reforms, which have implications for indigenous communal land tenure systems.

Elements of a New Strategic Vision

If indigenous rights and cultural identity are to be respected in land titling programs, it is essential to understand how indigenous agrarian systems and land markets currently function, and what are indigenous aspirations in this regard. Indigenous views themselves may not be uniform and tensions may exist between lowland and highland areas.

There are obvious conflicts between most notions of indigenous land rights and tenure, and the

[1] These issues were addressed in detail by the consultants in their fieldwork in Colombia, Ecuador, Peru and to some extent Panama, and in their working sessions with both policy and operational divisions of the Bank.

views of economic planners promoting market-based land and agricultural policy reforms. These tensions are also being played out in the multilateral development banks. The strategic challenge is an obvious one—to enable indigenous peoples to benefit from modernization without sacrificing their cultural identity. Indigenous peoples recognize the need to participate in the market economy. Difficulties that they have experienced in securing credit and financial services can be due to the bias of the private financial sector, which insists on individual land titles as a collateral for loans.

Policies that call for the reduction of state institutions and support can lead to further bias and discrimination against indigenous communities. The current scenario and future outlook in the indigenous highlands appears particularly bleak. Pressures for individual land titling seem to result from apparent state withdrawal from these areas. During the transitional adjustment era, the Bank's main contribution was compensatory financing with some community participation, the so-called "social investment funds." Yet anecdotal evidence suggests that private creditors are, for the most part, not lending to indigenous peasants, even those who have obtained individual land titles. At the same time, strong social arguments for reinforcing these communities imply that improvements in the provision of financial services to indigenous communities are an essential area of future policy research and intervention.

Innovative experiments and new trends in legal and administrative practice concerning indigenous land rights and territorial organization are now evident. Some reforms are keen to consolidate indigenous forms of local governance as part of decentralization programs and fiscal reforms. In this context, land-titling programs can have a significant impact on the democratization process, notably in areas where there are conflicts. Indigenous land titling and territorial organization have proved to be effective means for political stabilization in those areas. New approaches to territorial ordering should be seen as an important part of the land policy agenda. Land policies must consider the political and social, as well as economic, aspects of land ordering. A review of customary practices and forms of governance, as they affect land allocation, must be an important part of any baseline study.

Recommendations

Policy Concerns

- A fundamental challenge is to work towards a consistent policy and a coherent vision, one wherein indigenous claims are considered in all land titling and regularization programs. This will require the Bank to commit resources both at its Washington D.C. headquarters and in the country offices.

- New working methods need to be established in order for this issue to be addressed in a serious manner. This study argues that indigenous land and resource systems are a form of private tenure that, under certain conditions, can be adapted to market opportunities.

- In the new spirit of Latin American multiculturalism, indigenous concerns must be mainstreamed into all policy analysis; indigenous peoples can no longer be treated as a vulnerable group for whom special arrangements should be made. Land tenure policies may once again be at the crossroads in Latin America, as governments experiment with new forms of territorial organization. These issues cannot be addressed only from the perspective of agricultural productivity, nor can the experience of remote countries, such as Thailand, be used as the basis for introducing similar models in Latin America.

- Conditionality requirements on IDB operations in Ecuador and Peru show that organizations like the IDB and the World Bank can have a strong influence on Latin American law and policy in this area. But the conceptual basis for addressing these concerns has been far too narrow. A major interdisciplinary effort is now required, involving *inter alia* planners, topographers and other land

specialists, lawyers, economists, anthropologists, ecologists and, in some cases, historians. The key question is how these policy concerns should now be addressed, with the greatest possible technical competence.

- Ideas from other parts of the world are important. In Africa, where there have been similar pressures for land privatization, more research has been done concerning the links between communal agrarian systems and productive efficiency. More research of this kind is urgently needed in Latin America.

- Far more empirical research is needed on indigenous and peasant communal systems to study productive arrangements as well as governance, including the provision of social services. Despite some scattered initiatives, available Bank documentation shows that very little is actually known about the functioning of communal agrarian systems in countries such as Ecuador and Peru. The country profiles undertaken by the World Bank and the IDB's own indigenous poverty studies did not focus on this area sufficiently. A series of policy-oriented and multidisciplinary studies could be a useful area of future collaboration between the IDB and the World Bank.

- It is now clear that communal agrarian systems cannot be studied only from an indigenous perspective. Definitional problems aside, there is a need to spread the net more widely. Now is the time, for example, to undertake a technical study of the potential for special systems of land and resource management by black and other ethnic minority communities. This refocusing has already begun throughout the continent and, in some countries, has already led to legal and policy reforms. But the implications of ethnically or racially based approaches to land use and resource management need to be assessed critically from an interdisciplinary perspective. Will black communities accept the existing international normative framework for indigenous land rights? Or will they pursue their own path? This is a crucial policy concern for several Latin American governments. The international financial institutions, beyond their specific projects in certain countries, would do well to join the wider policy debates.

- In the Amazon countries there is some crucial normative work to be done concerning indigenous management of renewable and non-renewable resources in the context of land titling programs. Greater consensus between governments, indigenous organizations, environmentalists and private sector companies is required. This can be a vital area of future technical assistance, perhaps using Multilateral Investment Fund (MIF) resources to bring together the different actors from the public and private sectors.

Project Design

- Consultation must take place at various different levels in the process of preparing land-titling programs of general application. For example, legal and policy reforms should be discussed in advance with the national indigenous and peasant organizations that are likely to be affected. This is a legal obligation for governments, under the ILO's Convention No. 169. It is also common sense and a prerequisite for eventual project success.

- It is also important to carry out baseline studies (with community participation) in those areas to be included in land titling programs. These were altogether absent from earlier land titling programs. Although there is evidence of local consultation in more recent programs, detailed baseline studies are still lacking. The desires of local communities with regard to land tenure must be a key element of such studies. At a minimum, consultation mechanisms and procedures should fulfil the requirements of the ILO's Convention No. 169. Lacking these preliminary steps, legislative reform proposals will meet with justified opposition.

Project Implementation

- Bank project with specific land titling components should give priority to the demarcation and titling of indigenous areas before dealing with properties owned by nonindigenous individuals.

- If land titling programs are to be part of an integrated package of agricultural reforms and development, they should include components that provide support to local institutions. A first and necessary phase is the broadcasting of information about the implications of land titling laws and programs. Broader institutional support for communities and organizations could also be included.

- An implementation structure should favor the participation and establishment of indigenous and peasant organizations at the local, regional and national levels. There seems to be ample provision for this in some recent projects, such as the Darien project in Panama. There is a notable absence of such provisions in some earlier land titling programs.

Mechanisms for Indigenous Participation and Support for Indigenous Organizations in Land Titling Programs

- The Bank should support the development of an advanced registry and cadastre system using GIS and remote sensing possibilities in technical cooperation with indigenous organizations.

- Where possible, indigenous organization, should be equipped with the technical capacity for cadastre and mapping to create a qualified technical partnership with government institutions and an improved guarantee of continuity in the accumulation of experience.

- Indigenous personnel and delegates from representative indigenous organizations should be included in technical team such as visual inspection teams, land survey teams, topographical teams, land classification, boundary demarcation, cadastre work, GIS lab work, or legal teams.

- A special training program for indigenous leaders and negotiators on the technical, economic and legal aspects of the exploitation of renewable and nonrenewable resources (including minerals and hydrocarbons) could be developed in collaboration with indigenous organizations and environmental NGOs.

- A general program of integrated management plans and joint management of protected areas and natural resources could be offered to both indigenous organizations and the responsible government ministries.

- The Bank could demonstrate its commitment to indigenous land security by setting up a trust fund for the purchase of land for indigenous communities in conflict areas and areas of land recuperation. This could conceivably be done under the aegis of the existing Indigenous Fund.

A separate study—or studies—is recommended to address these issues in countries not covered by the present report. Brazil should be a high priority, as should certain Southern Cone and Caribbean countries.

I. INTRODUCTION

This study covers the broad issue of land titling and regularization policies and programs, as they affect the indigenous peoples of Latin America.[2] This vitally important subject is arousing some controversy in development circles. On the one hand, there are increasing concerns regarding the adaptation of development policy interventions to the cultural, social and economic needs of indigenous peoples, often with particular reference to their traditional land and natural resource rights. On the other hand, there have been renewed concerns about the issues of land titling and registration, and the development of modern cadastral systems to promote the more efficient operation of market forces in agriculture.

Is there a necessary contradiction between these approaches? Can market-oriented agricultural reforms, of which land titling and registration programs tend to be key components, be made consistent with the preservation of indigenous lifestyles and with adequate respect for their cultural values and institutions? What guidance can be given in project preparation to ensure that land titling programs take account of indigenous demands and promote rather than prejudice their interests?

While much has been written in recent years about indigenous land rights and development—and there is a growing policy literature on land titling and registration as mechanisms for improving land markets and agricultural productivity—the two issues have rarely, if at all, been considered together. The indigenous literature has tended to focus on the *special* land regularization and titling programs in the Amazon and other tropical regions, where sizeable land areas have now been legally recognized for the indigenous peoples of some Latin American countries. And the literature on land markets and titling, insofar as there is any reference to indigenous peoples, tends to see them as vulnerable groups for whom exceptions might be made.

Particular challenges are now arising in the mountainous areas of Mexico, Central America and the Andes where the vast majority of Latin America's indigenous peoples reside. In the tropics, at least in the more isolated parts, indigenous peoples have been more removed from the market economy. In the highlands, indigenous peoples have been an integral part of the market economy since the colonial period, working as serfs, agricultural laborers, miners, migrant workers, or peasant producers of food staples. For almost two centuries, since Latin American independence, there have been intense political debates about whether or not their lands should be governed by special protective regulations. Policies have vacillated over time between those restricting indigenous participation in land markets and those aimed at promoting individual and freely transferable forms of land tenure.

In historical terms, Latin America has been faced with a dilemma. Periods of open land markets have seen greater inequality and indigenous peoples have invariably been the losers. But periods of restricted markets have been associated with low productivity and perceived agricultural inefficiency. The more recent advocates of market-oriented land policies point to the chaos and low productivity as a legacy of the earlier land reform period. Though much land was distributed, often to indigenous communities, in many cases it was inadequately registered and titled. There were problems of overlapping land titles, and some beneficiaries simply received no titles at all.

[2] The use of the terms *land titling* and *regularization* is discussed in Chapter IV.

Some policy analysts tend to see communal agrarian systems in Latin America as a root cause of poor agricultural performance. It has been argued, moreover, that free market forces will lead to greater productivity and efficiency and, at the same time, serve to alleviate rural poverty. Despite the fact that this can lead to some land concentration, it can be offset through increased job creation and income generation.

Some indigenous organizations have expressed vocal opposition to Latin America's latest round of market-oriented agricultural reforms. In Ecuador, Mexico and Peru, there was outspoken indigenous criticism of key agrarian legislation that facilitated procedures for the dissolution of indigenous or peasant communities and promoted individual land titling. Their stated fears are that contemporary free market approaches will have the same effect as in the past, leading to further land concentration, undermining indigenous institutions and accentuating indigenous poverty, which has already reached unacceptable levels throughout Latin America.

Yet, present-day attempts to reform indigenous communities, unlike some earlier ones, are for the most part voluntary. New international norms on indigenous rights, as well as the national laws adopted in many countries over the past decade, emphasize a radically new approach to State relations with indigenous peoples. Important policy decisions that will affect indigenous peoples are to be taken in full consultation with them, and every attempt should be made to seek their consent of proposed policies and programs. This tends to be the case for land titling and registration programs. Recent land laws tend to place the final decision as to whether or not to change the tenure status of communal land areas in the hands of indigenous assemblies. Moreover, indigenous organizations are increasingly demanding mechanisms for meaningful consultation regarding mineral or other large-scale development projects within their traditional land areas.

All of this poses a challenge for indigenous peoples and their supporters, as well as for governments and other development actors. How can indigenous societies maintain their cultures and traditions, without being locked into technically backward, low productivity systems that fail to provide for their needs? How can governments and nonindigenous groups promote economic development and modernization without dismembering these communities? And which, exactly, are the indigenous groups or communities that require special treatment in land titling or other rural development programs? How and by what criteria should they be identified? Can other minority groups, such as black populations, be candidates for special treatment?

The aim of this study is to provoke a discussion rather than to provide definitive answers on these highly complex issues. It was undertaken for the Inter-American Development Bank by two international consultants, both of who have over twenty years experience working with indigenous peoples and land issues in Latin America. One of them, a political scientist and institutional expert, has more experience with the indigenous peasant economies of Mexico, Central America and the Andes. The other, an ecologist and social anthropologist, has extensive experience working with the indigenous peoples of Latin America's tropical lowlands. Four country consultants, who prepared background papers on Colombia, Ecuador, Panama and Peru, assisted the international consultants.

A Note on Terms of Reference and Methodology

The objectives of the study were to:

- conduct an extensive review of the impact and/or potential impact of land titling and cadaster programs on indigenous populations;
- recommend actions that would minimize any social or environmental risks and ensure that the land titling and cadaster projects are tailored to the aspirations and long-term

needs of the indigenous peoples they are expected to benefit; and

- outline a typology of landholding systems that would facilitate the comparison of the land titling programs in the Bank's regional member countries and identify any specific areas that require further research.

The consultants were requested to identify and review the land titling projects in the Bank's portfolio as well as that of other key international agencies. On this basis they were to identify key issues that needed to be addressed in select country studies. They were requested to visit Mexico, at least one Central American country, Peru and one other Andean country. In addition to reviewing available studies on land titling and reform, and meeting with Bank staff, government officials and other interested parties, the consultants were asked to make site visits and visit indigenous communities in the areas where Bank projects are currently in execution or have been completed. The governments of Colombia, Ecuador, Panama and Peru welcomed the consultants' visits; however, the government of Mexico considered that such a visit would be inopportune.

During 1999, country visits were made to Panama (24 January-2 February), Colombia (2-12 February), Peru (7-20 March), and Ecuador (20-28 March). A largely similar methodology was used in each of the four countries. First, the consultants met with Bank staff to discuss and review ongoing Bank projects or projects in the pipeline that were considered of relevance to the report. Second, meetings were held with government agencies and officials as appropriate. Third, extensive meetings were held with representative organizations of indigenous peoples and of other ethnic minority groups (the organizations of black peoples of Colombia and Ecuador). Meetings were also held with academic, policy and nongovernmental institutions with relevant expertise. Fourth, as much time as possible was spent in field visits in each country. In Panama and Peru, the field research paid particular attention to ongoing or pipeline projects with a direct impact on indigenous lands.

Both consultants visited the Darien region in Panama, holding extensive interviews with the indigenous communities that will be affected by the Bank's loan for sustainable development in the Darien region. Separately, they visited the indigenous *comarcas* of San Blas (Kuna Yala) and Ngöbe-Buglé.

In Colombia, the consultants paid particular attention to the issue of the communal lands of Afro-Colombian (black) communities on the Pacific Coast, also referring as relevant to the Bank-financed *Plan Pacífico* project. Meetings were held with black and indigenous organizations in Buenaventura, Tumaco and Quibdo. Communities were also visited in up-river regions of Tumaco, where communal Afro-Colombian lands are currently under threat from agroindustrial development. Visits were also made to several indigenous *resguardos* in the province of Cauca.

In Peru, visits were made to those parts of the *sierra* and Amazon regions where problems over land titling are becoming apparent. In the *sierra*, the emphasis was on the provinces of Cuzco and Puno, where the government has been implementing a Bank-financed land-titling program (*Programa Especial para la Titulación de Tierras,* PETT). Visits were made to several communities in the presence of PETT officials. In the Amazon, visits were made to Pucallpa, Atalaya and Satipo, where interviews were held with both government officials and the representatives of indigenous organizations. Much progress in the titling of indigenous lands has been made in the first two of those regions by means of contractual agreements (*convenios*) between the government and indigenous organizations (with the indigenous organizations providing much of the technical and financial input). In Satipo, there have been serious conflicts between indigenous peoples and the nonindigenous settlers.

Visits to Ecuador's *sierra* and Amazon regions were also made. In the *sierra*, the emphasis was on towns where indigenous peoples have been elected to public office and are devising integrated plans for indigenous development. Meetings were also held with the provincial indigenous organizations of Cotopaxi and Chimborazo provinces and with the recently constituted indigenous parliament in Guamote. In the Amazon, lengthy meetings were held with leaders and technicians of the most representative organizations of Amazonian indians, the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE) and the Organization of Indigenous Peoples of Pastaza Province (OPIP). Discussions centered on the current status of land titles, the implications of the new 1998 Constitution, negotiations with petroleum companies, and the role of indigenous organizations in promoting cross-border cooperation.

Following the country visits, an initial presentation of findings was made to each of the Bank's operational departments in Washington, D.C. Bank officials from both operational and policy departments were invited to contribute to the study and to identify areas that require particular focus in the final report. An initial version of the study was presented at a workshop at IDB headquarters in December 1999. Comments and recommendations made at the workshop have been taken into account in this final version.

While the study is largely based on the four country visits, it is written as a thematic discussion paper that aims to be relevant for Bank policy in the region as a whole. Thus, when relevant, the consultants draw on their recent experience in other countries. In 1998, for example, both consultants were involved in an assessment of a government program to title indigenous lands in eastern Bolivia that was carried out by the Danish International Development Agency (DANIDA). The consultants have also been individually involved in Guatemala, Mexico and Nicaragua, and gained important practical experience that is applicable to the issues at hand. It was still impossible to cover all the countries of the continent. Brazil and the Southern Cone and Caribbean countries present a variety of different challenges that would usefully be addressed in future studies.

This study is organized as follows: Chapter II provides the historical background, setting out the complexity of some contemporary indigenous land claims and explaining the main issues that need to be taken into account in the titling and registration of indigenous lands today. Chapter III discusses conceptual issues and illustrates some of the different indigenous land tenure and resource management systems in Latin America. Chapter IV summarizes the new law and policy framework of the 1990s, a period that has seen some radical new approaches to the recognition and promotion of indigenous land and resource rights. Chapter V examines the practical experience with indigenous land titling over the past decade, covering both official and nongovernmental approaches including those undertaken by indigenous peoples themselves. Chapter VI contains a critical review of the approach and initiatives taken by the major international institutions, with a particular emphasis on those of the Inter-American Development Bank. A final chapter contains conclusions and recommendations and identifies some issues that are in need of further research and analysis.

II. APPROACHES TO INDIGENOUS LAND TENURE AND TITLING: HISTORICAL OVERVIEW

Latin America's indigenous peoples have different kinds of claim to the land. Many claims are grounded in ancient or historical title, in the form of collective land titles issued perhaps several centuries ago. This tends to be the case of the indigenous peasant communities who are still located in or near their areas of traditional occupation. A second kind of claim is based on immemorial possession and a special relationship with the land and environmental resources, whether or not any form of written title has ever been issued. This tends to be the case of the lowland and forest-dwelling indian communities, few of whom possessed or demanded land titles until a few decades ago. The main criterion for addressing the demand of these groups is prior possession, capacity to manage environmentally fragile lands and resources in an ecologically sound manner, and the need to protect these vulnerable groups from external influences and interests. A third kind of claim can be for compensation for past injustices and discrimination, to benefit indigenous communities that have lost their lands over time. In the light of now overwhelming evidence that indigenous peoples are disproportionately represented among the extremely poor throughout Latin America, there are compelling grounds for targeting land distribution and access programs specifically at indigenous peoples. Indigenous landlessness, land hunger and extreme poverty are most evident in nontropical regions.

Some historical perspective is required in order to review present-day law and policy approaches. As will be argued, there is no *evolutionary theory of indigenous land rights* in Latin America. There have been attempts to promote individual forms of land tenure for indigenous peoples almost two centuries ago as well as at the present time. Indigenous communities have been abolished by law (though not effectively in practice) whereas subsequent law has again declared their validity. Some land reforms have aimed to restore or reconstitute indigenous communal lands; others have aimed to promote individual forms of tenure. And while the promotion of indigenous territorial autonomy may appear to be a recent trend, there are precedents from the early twentieth century.

To prepare the ground for a critical review of present-day approaches, this chapter captures the main policy trends over time, illustrating them as necessary with country-specific examples.

The Colonial Period

Many countries recognize the validity of land titles issued to indigenous communities during the Spanish colonial period. Colombia draws a distinction between the colonial or historical *resguardos*, and the *resguardos* created through later land reform programs. In Bolivia and Mexico, proof of ancient title could be grounds for land restitution under agrarian reform programs. And in Guatemala, as the country begins to implement the land claims provisions of its peace accords, new interest is being displayed in researching colonial land titles.

Throughout Latin America, both fiscal and labor policies favored ethnic differentiation in land tenure regimes. Indian communities had to provide tribute and to furnish forced labor in mining and agricultural enterprises through a succession of coercive regimes. The policies required that indigenous communities reside in the same geographical area, often under Church supervision,

and that they possess sufficient land and resources to produce a taxable surplus. After the Conquest, the Spanish Crown assumed patrimony over all native lands, entrusting Spanish colonists to administer indigenous lands and labor through the *encomienda* system, while the new colonists also received massive land grants. Yet, some pre-colonial structures such as the Inca *ayllus* were able to receive legal status through the system of *reducciones* set up to facilitate tribute collection. In some cases, in the latter part of the colonial period, indigenous authorities and their extended families were also able to purchase land areas from the Crown. This is essentially the origin of the *comunidad indígena* concept that has survived until modern times.

Given their inhospitable climate and the absence of rich mineral deposits and a substantial labor reserve, tropical lowland areas attracted little interest from the colonial regime. As a result, the indigenous populations living in those areas received no special protective measures or specific rights. Care of the more isolated indigenous groups was entrusted to missionaries, who tried to replicate highland models by concentrating lowland indians into *reducciones* or reserves.

Nineteenth Century Liberalism

The nineteenth century, in particular the second half of the century, which was the classic period of Latin American liberalism, saw the gradual repeal of colonial laws to protect indigenous lands. Bolivar's vision of the prosperous indian small farmer was exemplified in his 1824 decree promoting open land markets. Following a conservative reaction, in which segregationist policies prevailed for a few decades in many countries, the years after 1850 saw almost uniform policies to terminate special status for indigenous lands. The new civil codes, based largely on the Napoleonic model, recognized only individual forms of tenure. Indigenous communities had the theoretical right to register their holdings as private property. Few had the resources or knowledge to do so and almost every country with a significant indigenous peasant population underwent similar trends. Land registration programs led to a significant concentration of land in which indigenous communities were the losers. The large and unproductive Latin American *hacienda* was consolidated during this period. As the *haciendas* expanded, encroaching on the indigenous communities, increasingly large numbers of indigenous workers were employed through nonwage labor systems whereby they were given access to subsistence parcels within the *hacienda* in exchange for cheap labor.

Colombia provides some exception to the general trend. Though communal land ownership had been abolished by law in 1850, resistance by *comuneros* in some regions led to special measures of protection for their *resguardo* lands. First, in the province of Cauca, largely occupied by Paez and Guambiano indians, an 1859 provincial law recognized communal landholdings as the permanent and natural state of the Cauca *resguardos*. An 1890 law provided for the restitution of the *resguardos* where these had disintegrated, prohibited further sales of *resguardo* lands and recognized that the *resguardos* should have their own form of political and social organization. The law remains in force and has since formed much of the basis of indigenous demands for land restitution in Colombia.

Early Twentieth Century: Protection and Integration

The first decades of the twentieth brought policy shifts based on the principles of protection and, eventually, integration of indigenous communities. Indigenous communities were again recognized under law as specific and differentiated agrarian entities, usually with prohibitions on the sale, rental, mortgaging, division or prescription of communal lands.

The 1910-1920 revolution in Mexico marked a watershed; the decades before the revolution had seen the particularly marked dispossession of indigenous lands. Land restitution had been one of the banners of the Mexican revolutionaries,

many of whom were landless indigenous peasants. The post-revolutionary Mexican constitution and land reforms gave priority to communal and collective land ownership under two nominally distinct forms. First, the *comuneros* who could prove valid title to the land illegally taken from them during the previous government were to have the land restored to them, in the form of indigenous communities. Second, ceilings were placed on the size of all farms and expropriated lands were to be distributed to both indigenous and nonindigenous peasants in the form of *ejidos* as inalienable and nontransferable common lands. After the land reform had reached its height some decades later, the inalienable *ejido* became the predominant form of land tenure in Mexico until the market-oriented constitutional reforms of the 1990s.

At approximately the same period, other Latin American countries began to grant legal ownership to indigenous communities or to encourage the establishment of new ones. A Peruvian 1916 law ordered that all land illegally taken from the *comunidades* be restored to them upon payment; and the 1920 Constitution explicitly recognized the indigenous communities' existence. So did Bolivia's 1938 Constitution. And in 1937 Ecuador enacted its Statute on Communities, urging that they be transformed into producer cooperatives. Policies continued to fluctuate however, making the situation insecure for the community members. In Colombia, for example, despite the early safeguards, a number of decrees enacted after the 1920s aimed to promote the partition of the *resguardos*.

At this early period the policies were generally protectionist, with no hint of autonomy or territorial control. The land areas were likely to be small, recognized at the community level rather than for a specific ethnic group, and possibly not contiguous.

An interesting exception is Panama, where indigenous territorial rights have been constitutionally recognized since the founding of the republic in 1904. The first constitution recognized the collective property rights of indigenous populations; though (following protectionist trends of the time) the control of such *tribes* in circumscribed areas was ceded to Christian missions and other nonindigenous patrons. The Kuna indians on the Caribbean coast, however, managed to secure control over a large and contiguous territorial area as a largely self-governing entity. This may be considered a historical accident, in that an armed insurrection of the Kunas in 1925 led to a declaration of the independent Tule Republic during a period of U.S. armed intervention. But the Kuna model has provided an important precedent of political autonomy based on the recognition of territorial rights. The Kuna reserve was created in 1930 and converted into the *comarca* of San Blas in 1938. In 1953, the *comarca* received its internal ordinance, which the Kunas have been able to build upon and improve up to the present day.

By the mid-twentieth century, concerns were being expressed about the backwardness and marginalization of the traditional indigenous communities and at the servile conditions of the indigenous labor force on the large estates. Under the banner of *indigenismo*, governments began to develop more coherent integrationist policies. An important event was the Patzcuaro meeting of 1940, held on the initiative of Mexican President Lázaro Cárdenas, which led to the creation of the Inter-American Indigenist Institute under the auspices of the Organization of American States. Countries pledged themselves to comprehensive programs to tackle indigenous poverty, including its agrarian dimensions. And Latin American governments were largely instrumental in promoting the first ever international instrument on indigenous issues, the ILO's convention concerning the Protection and Integration of Indigenous and Tribal Populations (Convention No. 107 of 1957). Fourteen Latin American countries eventually ratified this convention (meaning that it had force of domestic law in those countries) until it was superseded by a revised version in 1989.

An important section of Convention No. 107 was concerned with indigenous lands. It stated that the right of collective or individual

ownership of indigenous and tribal populations over the lands that they traditionally occupy was to be recognized. In addition, there were to be safeguards against removals from habitual territories, save in exceptional circumstances, and respect for customary procedures for the transmission of ownership rights. Finally, indigenous populations were to receive equal treatment in national agrarian programs, including the provision of more land as necessary.

Land Reform and National Integration: 1950s-1970s

Between the early 1950s and mid-1970s, most of the countries of Latin America were affected by a wave of land reforms that sought to expropriate idle and unproductive lands (generally upon the payment of some compensation) and to modernize agriculture by eradicating servile tenure systems and labor arrangements.

The reforms were potentially important for indigenous communities, which could receive a sizeable adjudication of land, as was the case in Mexico, Bolivia and Peru and, to a lesser extent, in Colombia and Ecuador. But the reform rarely aimed to consolidate traditional indigenous forms of land tenure and resource management. In Bolivia and Ecuador, for example, indigenous agrarian reform beneficiaries tended to receive the land in individual lots. In Peru, where the reformed land was distributed on a collective basis, the government introduced new models of collective or cooperative production rather than build on established indigenous practices. In Colombia, where the broadening of indigenous *resguardos* was an official aspect of land reform policy after 1961, the actual redistribution of land was fairly limited. In Mexico, historic indigenous communities received additional land but, at the same time, an ever-growing backlog of unattended land reform claims started to be created.

As exercises in equitable nation building, the land reforms were often concerned with downplaying ethnic differences. An example was the Peruvian Statute of 1969, which adopted the term *peasant* communities instead of the previously used *indigenous* communities. A work by a Peruvian intellectual, describing the transition as one from the *ayllu* to *socialist cooperativism*, may reflect the spirit of Peruvian land reforms of the period (Castro Pozo, 1973). It was a centralized model, inspired by Marxist and socialist principles, aiming to achieve high productivity through modernized cooperatives. In the Peruvian case, moreover, an effective titling program did not accompany the land distribution. Of the total number of almost 5,000 peasant communities registered under the agrarian reform program, only 1,565 received title to their land. Rather, many communities found themselves involved in cooperative ventures, which turned into economic failures and caused much resentment.

The mid-century period also saw the first concerted efforts to demarcate or title indigenous lands in the tropical lowlands. Hitherto, the tendency had been to provide for special reserved areas for indigenous tribes in forest regions under the administration of state or private agencies, often run by churches, with no legal recognition of land rights as such. Laws were often highly paternalistic, seeing these indians as primitive peoples in need of tutelage. In Brazil, for example, the constitution of 1967, recognized that forest indians enjoyed permanent possession over their lands and natural resources, but accorded them the legal status of minors until their "emancipation" from tutelage. Indigenous lands were thus held in trust by the State.

Growing colonization of the tropical lowlands, by both small farmers from the highlands and larger commercial enterprises, heightened the need for land regularization. Brazil's 1973 Indian Statute required the demarcation of all native lands within a five-year period. And the following year, Peru became the first country to recognize full rights of collective ownership for its Amazonian indians. Under the 1974 Native Communities Act, indigenous communities could petition for communal and inalienable land titles. Third parties could be removed from

recognized native community areas, upon payment of compensation for land improvements. While the lands were to be inalienable and could not be mortgaged, free access was nevertheless permitted for oil and mineral extraction in forest regions.

In Peru, the initial impact of the 1974 act was slow. Some 315 native communities were titled during the first five years, but the titled areas were small islands in the midst of colonist enterprises. It appears that the initial titling was conducted as a purely administrative measure, changing the legal status of former reserve lands to that of native communities. The effects were far more significant after the late 1970s when, in the face of growing pressure from colonists, new indigenous organizations in the Peruvian Amazon began to undertake their own demarcation and titling initiatives with the support of non-governmental organizations (NGOs).

In the other Amazon countries, large scale titling of indigenous lands did not take place until later. In Colombia major titling initiatives took place as of the 1980s, and in Bolivia and Ecuador only after the 1990s (see following chapters).

Aftermath of the Land Reform Era: Agrarian Issues and Indigenous Poverty

Before examining present-day trends, it is important to reflect on some implications of the agrarian reform period and its aftermath for indigenous land tenure and livelihood.

The main redistribute phase of land reforms ended by the mid-1970s. Though some land distribution took place after then, there was relatively more emphasis on colonization. In a country like Bolivia for example, the main agricultural investment and expansion took place in the eastern lowlands, an area sparsely inhabited before then except by indigenous groups. In Mexico, land distribution had effectively ceased by the 1980s, but there remained a huge backlog of over 200,000 agrarian reform cases, many of them claims by indigenous communities who were contesting the border land claims of large neighboring landowners.

Regression analyses in certain countries with large indigenous populations point to a significant rise in poverty and extreme poverty for indigenous peoples in the 1980s; this was particularly the case for indigenous peasants in non-tropical regions (Psacharopoulos and Patrinos, 1994). In these and other countries, disaggregated data on the extent to which indigenous peoples benefited from land reform programs are not generally available. But it is fair to ask whether indigenous peoples were largely bypassed by land reform; whether they received inferior lands, rather than those of high agricultural potential; whether, having received the land, they had unequal access to credit and other necessary inputs; whether the agrarian reform models were inadequate and, perhaps, created a disincentive to investment and greater agricultural productivity; or whether other factors, including demographic trends, explain the higher incidence of indigenous poverty.

In many cases, indigenous peoples did receive inferior lands under the reform programs. This is the case of Ecuador, where small indigenous farm plots are to be found at the higher altitudes with the more eroded soils, while the larger commercial enterprises are in the fertile valleys. Similarly, most indigenous plots in Bolivia are at high altitudes (in the *sierra*), while the poles of agricultural growth are in the more fertile valleys.

Moreover, there are reasons to believe that certain reform programs, rather than alleviating landlessness among indigenous peoples, actually contributed to increasing it. In principle, some tenure reforms aimed to convert tenants and sharecroppers on traditional estates into small farmers. Yet, landowners were often able to expel farm workers before they could benefit from the tenure reforms.

The rise of indigenous landlessness and near-landlessness can also be attributed to factors independent of the tenure reforms, including new

patterns of agricultural production introduced after the 1960s. Many countries found markets for new agricultural exports (cotton, sugar, soya, fruits and vegetables), and landowners began to bring more of their acreage under export crop production. Most commercial crops require a seasonal labor supply, peaking during the harvest season. Indigenous peoples tended to be the main participants in these seasonal labor markets, with their insalubrious living and transport conditions. Moreover, as landowners brought more acreage under commercial crop production, they often evicted the indigenous workers who had previously resided on their estates, enjoying the right to cultivate subsistence crops in exchange for the provision of their labor below market rates. An example is Guatemala, which saw a particularly marked rise in export farming at this time and where the expulsion of indigenous *colonos* from private farms and contested lands took place in an atmosphere of considerable violence. Livestock production also increased considerably in tropical regions, often leading to land disputes between traditional indigenous occupants and outsiders.

Indeed rural violence was a feature of many Latin American countries during the 1980s, often having a particular impact on indigenous populations. Rural and indigenous areas were, to a certain extent, bypassed by Latin America's democratic transition during this period. Human rights organizations have documented substantial abuses against indigenous peoples during throughout Mesoamerica and the Andes, most notably in the countries with significant indigenous peasant populations. There are similar accounts from different countries. In cases of armed insurgency indigenous peoples could be caught up in the conflict between insurgent groups and security forces. In other cases, violence against indigenous farmers has been attributed to gunmen acting on behalf of local landowners.

Indigenous peoples had become more mobilized during the reform period, sometimes forming their own ethnic organizations and at other times participating in wider peasant and rural worker movements. Frustrated at their inability to obtain or recover lands through legal means, some promoted invasions of private or disputed lands. The feeling of insecurity and loss of faith in law enforcement mechanisms, the deepening patterns of rural poverty and the inability to place land distribution back on national agendas may help to explain the rise of a more specifically indigenous consciousness in Latin America over the past decade.

III. INDIGENOUS PEOPLES AND LAND TENURE SYSTEMS: CONCEPTS AND CATEGORIES

This chapter aims to do four basic things to prepare the ground for the subsequent analysis of specific land titling approaches and programs. First, it discusses the conceptual premises by which indigenous peoples can demand special treatment in land titling programs. This also requires some discussion of indigenous and other ethnic identities in Latin America, as related to land claims. Some conceptual clarity is obviously needed, before either a State can devise appropriate mechanisms, or an organization like the Bank can determine how to approach such a complex issue. Second, it places indigenous land titling concerns within the context of broader current debates on land policies and markets. This calls for a more general review of present-day approaches to land titling and registration, land rentals, the role of common property systems and other issues that are arousing some controversy in contemporary debates. Third, it examines some of the conceptual categories for dealing with indigenous land and territorial claims. The use of the terms *lands* and *territories* in themselves requires some discussion, in view of the importance that indigenous peoples attach to the concept of territory and the resistance that this has met from some (though by no means all) Latin American governments and legislatures. Also, the use of the terms *titling* and *regularization* also merit some discussion. Fourth, an attempt is made to formulate a typology of indigenous land tenure systems and their recognition in national laws. The chapter does not aim to portray in detail the diversity of indigenous systems of land use and management, in the different ecological zones of Latin America. Such a task would be beyond the scope of the present study. Rather, its main interest is to see how law and policy instruments have responded to this diversity until now and what response they could provide in the future.

Indigenous Land Claims: Conceptual Issues

The previous chapter examined some of the historical complexities of indigenous land claims. In Latin America one tradition of property rights has not given way to another, in an evolutionary manner. There have been tensions and conflicts between different legal philosophies, with tensions between civil and agrarian codes or tensions between individual and collective concepts of land rights. At the heart of these tensions has been the concept of the *social function of property*, which places limitations on the exercise of land rights by any individual or community and empowers the State to redistribute land in accordance with either economic or social need. It is the perceived need to strengthen property rights and clarify the competing claims to the land that has fuelled market-based approaches to land titling and reform in Latin America over the past two decades.

There are three main conceptual premises behind current approaches to indigenous lands. One is the protective approach, which insists that indigenous peoples need special protection from outside elements and market forces. Another is the rights-based approach, which insists that indigenous peoples have special rights to land and resources within the parameters of a multicultural and multiethnic state. A third is the environmentally or ecologically determined approach, which argues that indigenous peoples have the greatest capacity to manage natural resources in ecologically fragile areas. In some cases, the three approaches may overlap; however, they provide a useful starting point for analysis.

Until recently, the protective approach was clearly predominant in forest regions and, to a certain extent, in the highlands. It can be

associated with a reservation mentality and aims to isolate indigenous peoples from potentially damaging external interventions. Thus, the majority of indigenous land tenure regimes recognized by the state have, at least until recently, placed restrictions on the capacity of indigenous community members to sell or transfer their lands to outsiders. One finds a wealth of similar concepts in the average Latin American legislation on indigenous issues, affirming that their lands are *inalienable* (inalienable), *imprescriptible* (not subject to prescriptive claims), *inembargable* (cannot be mortgaged), among others. While indigenous peoples and their supporters often see such restrictions as necessary to the preservation of their land and territorial integrity, it is also argued that they can constitute a *legal fiction*. Many analyses have found an active land market within indigenous communities, including land rentals to external agents. The need to adapt agrarian law to the reality of such informal land markets is one argument put forward in several Latin American countries for recent land law reforms that aim to terminate or at least reduce earlier restrictions on the transfer of indigenous communal lands.

A rights-based approach is one that analyses land tenure and titling issues from the perspective of indigenous rights, as recognized in national or international standards. It first became important in Latin America in the 1950s and 1960s with the ratification and entry into force of the ILO Convention No. 107. However, as will be seen in the following chapter, there have been very significant developments over the past decade. Latin America has been at the forefront of the indigenous rights movement worldwide, accepting that indigenous peoples have the basic right to manage their lives, development and resources in a distinct manner within the framework of a multicultural state. This is a *special rights* approach, which links the recognition and enjoyment of these rights to a particular ethnic or cultural identity. Moreover, there are different ways in which such *special rights* can be approached conceptually. One way is to argue that indigenous peoples have *original* or *immemorial* rights to their lands and resources, and that they never sacrificed these rights after conquest and colonization. These concepts of original and native title to land are now driving the indigenous rights movement in such places as Australia and Canada. A second approach is to place the emphasis on the historical land rights of indigenous communities, namely the ancient land titles that were issued during the colonial period or after independence. This approach has been important in countries including Colombia, Guatemala and Mexico, where ancient land titles can be jealously guarded.

A third approach to *special rights* is to place the emphasis on discrimination and the need to combat the injustices of the past by adopting special measures to favor indigenous access to the land. This approach focuses not so much on the concept of special historically derived rights, as on the need to promote genuine equality of opportunity for indigenous peoples in the realm of economic and social development. Thus, indigenous peoples should be favored in land access, distribution and purchase programs. It is already common wisdom, in the design of market-assisted land reform programs, that there should be some special interventions on behalf of underprivileged groups. Yet, if the entry point for special agrarian programs on behalf of indigenous peoples is to be their condition as underprivileged and disproportionately poor members of society, there can be complex issues regarding their cultural identity and the status of their lands. These are key issues, which will be discussed further below.

The environmental approach takes as its starting point the protection of the environment as a whole, rather than the human rights of any groups. There are areas where environmental and rights-based approaches are now coalescing, on the grounds that some environmentalists see indigenous peoples as the best keepers or protectors of rainforests and other natural resources. But the alliance is not an automatic or necessary one. Environmental approaches can easily prejudice indigenous peoples, by ignoring their claims in biosphere reserves and other environmentally protected areas. This has raised serious problems for indigenous peoples throughout Latin America and

some practical examples will be given in later chapters. At the same time, environmental arguments have also been put forward for recognizing special land and resource rights for ethnic minority groups. An interesting example, which will be examined further in the next chapter, is the recognition of special land rights for rural black communities in the Colombian Pacific. These rights are now recognized, not so much because of the ancestral origins of these communities, as because of cultural characteristics and their special relationship within such fragile environmental resources as mangrove swamps.

Indigenous Land Rights: Issues of Identity and Definition

The definition of indigenous peoples is an immensely complex issue. This report can only touch briefly upon the subject, inasmuch as it is relevant to the land policy issues being discussed (Plant, 1998).

Clearly, if a special status is to be provided under law for any population group or category, the greatest possible clarity is needed in identifying the peoples or communities concerned. Yet, a precise identification of indigenous peoples has always been beset by problems, in Latin America as elsewhere, because of the diverse criteria used. Some national statistics refer to objective criteria such as dress and language. Others, including new international standards, place more emphasis on the retention of traditional cultural institutions and practices, as well as on the important issues of *self-perception* and *self-definition*. Others have also referred to certain functional criteria for identifying indigenous peoples, including a close attachment to ancestral territories and natural resources, or primarily subsistence oriented production.[3]

Various efforts have been made to classify indigenous peoples by the type of economic or agrarian activity in which they engage. Most people tend to draw a broad distinction between the mostly peasant farmers of Mexico, Central America and the Andes, who have a lengthy history of contact with the national societies within which they live, and the indians of lowland South America, who have traditionally remained more isolated and tend to combine agriculture with other subsistence activities. It has been argued, for example, that the latter need special protection and specific supporting strategies because, unlike the peasant indigenous peoples who need mostly land and agricultural support, they need territories conceived in an ecologically integrated way (Gnerre, 1990). Yet, it is also clear that indigenous groups can display very different characteristics within the same country. Colombia's National Department of Planning distinguishes between four major categories of indigenous population: tribal populations with sporadic contacts, indigenous tribal populations with stable contacts; indigenous tribal populations with a peasant economy; and the indigenous peasant populations (Roldán Ortega, 1997).

Yet a key question remains to be faced. Is a particular kind of land tenure system or a particular relationship with the land and the environment, at the heart of being defined or identified as indigenous? Urban-based intellectuals often lead today's indigenous movements in Latin America. And an important feature of Latin America's recent socio-economic development has been the increasing urbanization of people who, by the criterion of ethnic origin, could define themselves as indigenous.

In rural areas the corporate territorial community can be an important aspect of indigenous identity, but this is not necessarily so. The Spanish colonial authorities originally promoted indigenous communities in the physical sense, with restrictions on relations between indigenous peoples and outsiders, mainly to extract tribute and forced labor from them. Retaining these communities may have been an important aspect of indigenous struggles after independence, in order to prevent further fragmentation of their

[3] These are two of the six functional criteria identified by the World Bank, for example, in its Operational Directive 4.20 on indigenous peoples.

lands and social structure. But some twentieth century governments have actually promoted communal farming systems among peasant farmers of largely indigenous origin, while at the same time deliberately and successfully breaking down their sense of a separate indigenous identity. This can be seen clearly in Bolivia and Peru, where natives of the tropical lowlands tend to define themselves as indigenous, while Aymara- and Quechua-speaking peasant farmers tend to reject this identification. This is likely to be a consequence of the nation-building land reforms of the mid-twentieth century, which downplayed ethnic differences and promoted a peasant rather than indigenous identity.

Indeed some of the complexities of *indigenous* definitions as related to land use and claims are well illustrated by comparing Peru to Bolivia and Ecuador. In Bolivia, indigenous peoples of mainly Aymara and Quechua extraction are generally considered to constitute the majority of the population. In Peru and Ecuador estimates vary from less than 20 percent to more than 40 percent, depending on the criteria utilized. In Peru, the fact that some three-quarters of the population live in an urban environment implies that a large proportion of the indigenous population must also live in towns. As only cultural definitions are applicable, there are no clear objective criteria as to who is or is not indigenous. In most of the Peruvian Andes the rural population do not identify themselves as *indígenas* or see themselves as part of an indigenous movement, even when they speak Quechua or Aymara and meet many of the functional criteria of *indigenous*. For the most part they identify themselves as *campesinos*, a term which refers more correctly to an occupational category. Widespread ethnic/racist prejudice against the indigenous Aymara and Quechua cultures led Peru's reformist government in the 1960s to replace the terms *indio* and *indígena* with *campesino* in legal and administrative terminology. Pejorative connotations still apply to the term *indígena* in Peru (as in highland Bolivia) and are one of the main reasons that peasants of Quechua and Aymara cultural extraction tend not to identify themselves as such.

In Peru, the term *cholo* is widely used for persons who, while perhaps appearing to an outsider as *indian*, themselves reject an indigenous identity. Past discrimination against indigenous cultures, together with official efforts to stamp out indigenous identities, persuaded them to adopt the new *cholo* identity. This population group does not claim communal land titles and does not, as yet, identify itself as an ethnically based political or social movement. The *cholo* category is interesting in that up to now it has represented a basic negation of indigenous identity, its members adhering to more individualist notions of national identity. Yet the political implications would be significant, if these population groups were to shift their allegiances and identify themselves more openly with the indigenous movement. Certain new tendencies among Peruvian peasant organizations in both Andean and coastal regions point towards a possible resurgence of indigenous identity, which may eventually require a response in future approaches to land and territorial ordering. Current developments in neighboring Bolivia and Ecuador point to similar challenges for policymakers. Especially in Ecuador, the recent resurgence of an indigenous movement in the Andes has created new options for *cholos* to identify themselves more openly as indians, and for a whole group of *cholo* colonists in the montage forests to achieve an official ethnic classification as *montubios* with matching territorial rights. As will be seen later, there have been similar trends with black communities in the Colombian Pacific.

In the eastern Andean slopes leading into the Amazon lowlands, and in the Amazon basin itself, ethnic identification is generally less ambiguous. In Peru, the official term applied to the indigenous populations of the humid tropical forests is native (*nativo*). The designation was first used during the agrarian reform period of the 1970s, which aimed at securing community land rights for the Amazonian indigenous populations. The term *nativo* was generally accepted by these groups, who have a strong sense of ethnic identity without the ambiguities so prevalent in the rural Andes, though the term *indígena* has

now been reintroduced as a result of the political work of Amazonian organizations and allied NGOs.

A distinct category of the rural population in the Peruvian Amazon is the so-called *ribereños* (river-dwellers), an Amazon equivalent of the Andean *cholo*. These are Spanish-speaking communities along the major rivers on the lower Amazon flood plain, living in a mixed economy of agricultural market production, extractive activities and fishing. Due to intensive maltreatment of the native labor force, who for centuries were exploited by labor contractors and slave raiders, they tried to avoid being classified as indians. Yet, the recent success of the Amazonian indigenous movement has now persuaded the *ribereños* to reconsider their ethnic identity. One such group on the lower Huallaga river redefined themselves as indigenous Cocamilla in the 1970s, and had their community territory titled. Neighboring *ribereños* groups soon followed suit. And in the largest protected area of Peru (the Pacaya-Samiria National Reserve inhabited by more than 35,000 *ribereños*) more than twenty new native communities have now been recognized by law as indigenous and have been claiming their rights to communal territories. This illustrates the indigenous and ethnic revitalization that is now affecting Peru and that has recently begun to have some resonance in the Peruvian Andes.

There can also be a strong sense of indigenous identity in countries where there is almost no communal agriculture today. This is particularly the case in Guatemala, where the indigenous communities as territorial entities were broken up by liberal land tenure reforms. There is now a resurgent sense of Mayan consciousness. Mayan ethnic groups tend to have a triple sense of identity, first as a Quiche or Pokomchi or Cakchiquel, second as a Mayan, and third as a Guatemalan national. Yet, the majority of Guatemalan indians are farming small private plots, some with registered title, others under more customary forms of ownership.

Very little is actually known, concerning the present-day aspirations of indigenous peoples on land tenure arrangements. There is evidence that, today as in the past, indigenous peoples are determined to oppose arbitrary state efforts to dismantle communal tenure regimes. Yet, it is far from certain that, in the event of a land redistribution program, landless rural workers or small farmers of indigenous extraction would prefer that land be allocated on a communal basis. These will remain as unknowns until more systematic surveys of indigenous aspirations in this regard are carried out.

Official definitions of the term *indigenous* have changed with time, as indeed have the perceptions of the people who define themselves as indigenous. However, the indigenous movement is gaining momentum throughout Latin America. The greatest question regarding future directions entails the ethnic rural communities of the highlands, which have, until now, accepted a *peasant* identity. The growing indigenous consciousness can be seen easily enough in countries like Ecuador and Guatemala. And some countries are now experimenting with the idea of indigenous territorial units of governance, even when the lands have been effectively fragmented overtime. The long-term implications of such a concept remain unclear.

Concepts of Land and Territory

The concept of *territorial rights* in the broader sense, rather than *land rights* in the narrower sense, is of importance for the claims and resource management strategies of indigenous peoples. Indigenous claims, and the real or potential conflicts surrounding them, can go way beyond the land as an agricultural or productive category. The issues and challenges in Latin America today relate to renewable and nonrenewable resources, water rights and environmental management and control. There are also innovative approaches to the political aspects of territorial ordering involving both indigenous and black populations. For indigenous peoples, territory refers to the space under their control,

which enables them to develop and reproduce the social and cultural aspects of their livelihood.

The use of the term *territory* is sometimes seen as recent, emerging from Latin America's new constitutionalism and new approaches to decentralization and territorial ordering. In fact, the ILO's 1957 Convention on indigenous and tribal peoples used both terms: lands and territories. Yet, it was the ILO's 1989 Convention on indigenous issues, No. 169, which gave the issue more political importance in Latin America (see following chapter). The ILO Convention clarified that the use of the term *lands* should include the concept of *territories*, covering the total environment of the areas which indigenous peoples occupy or otherwise use. It also reflected the collective aspects of the relationship between indigenous peoples and their lands. Other international instruments on indigenous rights, such as those of the United Nations and the Organization of American States, have placed similar emphasis on the concept of indigenous territory, reinforcing indigenous claims for participation in, and also a degree of control over, resource management and extractive activities within their traditional habitat. These concepts have been of immense importance in places like Australia and Canada, where recent judgments and decisions on the concept of native title have vested considerable powers in indigenous authorities over resource management within their ancestral domain.

Although both terms are used in Latin America, there is an increasing tendency to recognize indigenous land and resource claims from a perspective of *territory*. (Later chapters will discuss the new legal figures of indigenous territorial entities or circumscriptions that have now been recognized in the constitutions of countries including Colombia and Ecuador.) The issues and the use of these terms are still keenly debated. There may be a greater willingness to recognize and apply the territorial concept in the Amazon and tropical lowlands, where the contiguous land areas vested in indigenous groups can cover several million hectares, allowing for more genuinely integrated approaches to resource management and territorial ordering. Yet, in some countries, the territorial concept has also been applied to Andean and mountainous areas, where indigenous lands are far more fragmented. The implications of these new approaches have yet to be seen.

Concepts of Land Titling and Regularization

Throughout this study, the terms *titling* and *regularization* are used interchangeably. Latin American legislation tends to refer to *land titling*, as part of the process of achieving security over land for indigenous peoples or any other population member or group. But the issuance of a title is no guarantee in itself of land security. Titles may not be registered, and there may not be a functioning cadastre. There can be overlapping titles, deriving as seen in the previous chapter from different historical and legal traditions. Moreover, as will be seen in later chapters, in some cases a title can be no more than a piece of paper. There are cases where (usually after indigenous mobilization) a title has been issued by decree over vast territorial areas, but competing claims to the same lands have never been clarified. This is why the process of demarcation, or *saneamiento*, is absolutely crucial for achieving real security for indigenous peoples over the land areas legally titled in their names. There can also be problems when a title is issued, before there is full legal clarity as to the legal entity in which the title is vested.

And in some countries, the very concept of *title* is associated with individual forms of ownership. This is likely to be the result of liberalizing land policies, which tend to promote individual ownership. In Panama, for example, indigenous persons interviewed for this study were universally opposed to the concept of title for this reason. The same tendencies can be found in some Bank documents, though it is clear that the concept of communal or collective land titles is well entrenched in most Latin American legislation.

Perhaps for these reasons, there is a growing tendency in Bank (and also World Bank) discourse to refer to the concept of *regularization* for land programs that aim to achieve greater security of tenure for indigenous or any other rural populations. This report will use the terminology of *land titling* because the purpose of this project was to examine the impact of land titling programs on indigenous peoples.

Basic Systems of Indigenous Land Use and Resource Management

Indigenous systems of land use and resource management in Latin America are extremely diverse, so much so that any typology risks oversimplification. Even the conventional distinctions between *temperate highland* and *tropical lowland* agrarian systems can be artificial in some countries because they overlap. The Mexican state of Chiapas, for example, has different climactic areas, ranging from cold mountains to temperate coffee growing areas and the Lacandon *selva.* Similarly, in Guatemala, a few hours travel can take someone from the temperate highlands, where most Mayan indians are concentrated, to the tropical lowlands of the Pacific or the tropical forests of the Peten. Although the distances in the Andes are greater, there can be similar gradual transitions.

For policy purposes, some basic differences can still be identified quite easily. One is between the more *vertical economies* of the highlands, where for centuries indigenous peoples have adapted their land use to different ecological zones, and the *horizontal economies* of the Amazon, where itinerant indigenous communities can embrace vast areas of riverine and other terrain. A fairly obvious distinction is between cases where indigenous peoples currently have enough land to meet their subsistence needs, and those where they do not. This is perhaps the most basic distinction between the population-rich and land-poor indigenous peasants of Mexico, Central America and the Andes, and the numerically smaller tropical indigenous populations with their sizeable land reserves. In most highland areas, safeguarding the existing indigenous land base is clearly not enough. The issue also has to be addressed from the perspective of distributional equity, the expansion of land areas and, in some cases, the recovery of lost indigenous lands.

Another category is the land use patterns of black and other ethnic minority groups who, strictly speaking, are not indigenous because they are not descendants of aboriginal populations. Blacks, as well as Garifuna and other indigenous populations, reside in many of coastal areas of Central and South America. These once-remote areas include riverine regions, mangrove swamps and other fragile natural ecosystems that are now recognized as an important part of the Caribbean or Pacific biospheres. Such areas, and their traditional occupants, are increasingly becoming candidates for special titling programs.

Land Use in the Amazon and Adjacent Lowlands

The great Amazonian watershed encompasses a variety of ecological types that range from permanent flooded areas, swamps and lakes, riverine areas with seasonal flooding, and interfluvial areas with no flooding; to the high lying savannas and rugged montane rain forest. Given the great variety of these local ecological formations, only a brief overview of the diversity of habitats can be given here, to illustrate the importance of the specific land use patterns adapted to these ecological systems.

A distinction can be drawn between three major formations. These are the montane rain forest (*montaña*), the riverine flood plains (*varzea*) and the interfluvial firm lands (*tierra firme*). The *montaña* refers to the vast areas of mountain forest, forming the transition from the Andes to the Amazon basin. It runs from Bolivia in the south, through Peru and Ecuador, and into Colombia in the North. This is an area with varied but relatively good soils and latent problems of access because of the rugged topography. It is in the *montaña* region that the greatest

concentration and variety of Amazonian indigenous peoples live, but it is also an area with extensive colonization pressure from the ever-expanding agricultural frontier that is encroaching from the Andean highlands.

The other important distinction is between the flood plains of the Amazon and its major tributaries, and the interfluvial firm land areas. The flood plains, with the nutrients deriving from the rise and fall in the water level which creates rich alluvial soils, have been able to support quite large indigenous populations in the past (Gnerre, 1990). Most contemporary human settlements, both indigenous and nonindigenous, are found in the flood plains. The firm lands, with their poor quality soil, cover the vast majority of the broad Amazon region. These lands have a very low agricultural potential and are unsuited for colonization and most agro-economic development. This is also reflected in a low indigenous population density. Deviating from this general pattern are certain interfluvial areas in Brazil and eastern Bolivia whose different geological formation has yielded a somewhat better productive potential. Cattle ranching by colonists is widespread in this area, causing latent problems of deforestation and territorial conflicts with the indigenous populations.

In Peru, for example, the Amazon region is generally divided into two geographical zones, namely the upper Amazonian *montaña* and the lower flood plains. Thus, the *selva alta* encompasses the rugged eastern slopes of the Andes, stretching into the Amazon basin. The *selva baja* comprises the river basins of the Amazon river and its tributaries, including the Ucayali river. These two different geographical formations have been crucial in determining patterns of colonization. The *selva alta*, closely connected with Andean markets and labor supplies, has been targeted mainly for its agricultural and cattle-ranching potential. The *selva baja*, despite rich alluvial soils along the main rivers, has not experienced agricultural expansion because of unpredictable seasonal flooding and the distance to markets. All transportation is by river, traditionally oriented towards Brazilian markets. A similar pattern can be seen in the Ecuadorian *oriente*, the difference being that most rivers run through Peru before reaching the lower Brazilian Amazon.

Similar patterns can be detected in Bolivia, Ecuador and parts of Colombia. The agricultural frontier expanding from the Andes, and the rise in commercial timber extraction, have penetrated sizeable areas of tropical rain forest in their eastern borders. Features of these frontier regions are massive deforestation and spontaneous colonization by thousands of individual settlers from the Andes, mainly *mestizos* and indigenous *cholos*, placing enormous pressure on both the ecology of the zone and indigenous territories and populations. The process has also seen extensive exploitation of indigenous labor. Quite recent reports by human rights organizations have referred to continuing patterns of debt-bondage and indigenous slave labor in cattle and logging enterprises in these regions.

Some indigenous peoples have themselves turned to commercial activities. An example is Ecuador's Shuar Federation, whose modern economy, based on raising cattle, has led to a constant search for new lands to clear for pasture. The Bank has contributed to this process by providing credit for individual Shuar producers to purchase cattle. In a tropical forest environment, the wisdom of such endeavors has been questioned because of the unsustainable nature of cattle raising in this environment and for the problems such expansion can cause with neighboring indigenous groups.

Since the 1980s and 1990s when large-scale titling of indigenous lands in the Amazon got under way, the challenge has been to regularize the lands in such a way that these peoples can pursue their traditional lifestyles. The Amazon panorama is constantly changing. Most recently, oil and gas development has threatened a new wave of disruption. But, in most parts of the Amazon, it is commonplace to find a mixture of large cattle ranches, logging enterprises and other commercial ventures, and smaller settlements of Andean colonists. In some cases,

indigenous peoples have been able to coexist peacefully with the new occupants. In others, there are signs of growing conflict. Thus, when governments vest title over large areas in indigenous communities, the next important step is to clarify or *sanear* the lands in question. What happens when colonists have a long-standing presence, with or without legal title, in the areas over which an indigenous group is awarded a collective title? Andean governments are only now beginning to grapple with these problems.

Land Use in Indigenous Peasant Communities: Individual or Collective Agrarian Systems?

There have been intensive policy debates as to whether indigenous land tenure and land use systems are—or should be—seen as individual or collective. Among policy planners there are widespread perceptions that indigenous communities base their economy on collective forms of production, and that this is organized through communal work institutions rooted in archaic traditions. The inference is that contemporary indigenous communities are akin to cooperatives based on *primitive socialist* models of production and tenure. And because agrarian cooperatives have generally performed poorly in Latin America, it is argued that communal indigenous agrarian systems are anachronistic and in urgent need of reform in the interest of greater productive efficiency and better livelihoods for their members.

These perceptions and the policy implications derived from them are gradually being dispelled as more is known about the reality of indigenous agrarian systems. In the mid 1970s, for example, World Bank land reform policy recommended that communal tenure systems be abandoned in favor of freehold titles and the subdivision of the commons. However, a recent paper by the World Bank's leading land tenure specialists questions these earlier assumptions, now recognizing that communal tenure systems can be more cost-effective than formal title. Recent proposals are to award property rights to communities, which then decide on the most suitable tenure arrangements (Deininger and Binswanger, 1999).

Similarly, the head of the UN Food and Agriculture Organization's land tenure service has argued that, in fragile environments, common resource management systems often prove to be the most sustainable. There is growing evidence that privatizing common property and communally held land and resource rights does not automatically lead to sustainable investment or development. Moreover, the majority of the members of communities having common property resource management systems are very willing to enter into market relations with the rest of the world (Riddell, 1998).

In practice, virtually no indigenous societies in Latin America base their production on communal labor. Whether in peasant-based indigenous societies adapted to the highland environment, or in lowland horticulturist and extractive communities, production tends to be planned and executed by individual family units. Each family owns its produce on an individual basis, and may manage its own marketing. In the Andean and Central American highlands, indigenous communities have subdivided their lands into individually owned plots that are registered and affirmed by the community councils. This trend becomes most extreme in the Central Andes, where families may own up to 40 or 50 different plots in different ecological zones and types of soil. This system was devised to spread economic risk and exploit ecological variety as effectively as possible.

Soils in tropical forest lowlands are generally much less productive and production is vulnerable to unpredictable seasonal variations. As a result, other factors affect land use patterns in these areas. Producers need to adjust very quickly to changing conditions, meaning that the produce itself may vary widely from one year to another. For example, dry season rice growers using alluvial silt banks in river beds may be faced with unusually high waters due to even small variations in rainfall patters, and thus need to shift to alternative production such as fishing or other cultigens. Only small production units can adjust

rapidly to such variations and apply economically viable strategies in response to market fluctuations. The nuclear family is best equipped for such flexibility.

The general ecological fragility of tropical lowland soils demands long fallow periods, particularly in interfluvial areas. This is necessary to maintain an environmentally sustainable production and an acceptable relationship between crop returns and labor input. These factors mean that the individual producer must have access to a vast territorial area in order to engage in flexible production strategies. This is a strong argument against individual titling of indigenous lands in the tropical lowlands, which would invariably freeze the individual producer in one location and reduce the flexibility of the individual production unit to the detriment of productivity. Communal titling in tropical forest environments, apart from the social arguments, also proves to be the most viable approach for enhancing the productivity and full economic potential of the individual producer.

There are some exceptions to this general pattern of individual production in indigenous communities. One is the high altitude commons used for grazing, which are often communally owned, managed and used. However, individuals or associations of individuals usually own the animals grazed. Other associations of individual producers are also common, particularly to reduce costs of transportation and marketing of the produce. The only decidedly communal labor organization tends to be for specific purposes like the construction and maintenance of schools and other public buildings, cleaning of community roads and airstrips, maintaining a collective field to pay for medical and other essential supplies, and for larger religious festivals and community celebrations. Such communal work is also frequent in contemporary local communities in industrialized Europe and the United States and is by no means limited to indigenous societies.

Thus, the traditional indigenous communities of Latin America might best be depicted as alternative forms of private ownership. Much has been written about the *legal fiction* of the land use arrangements within these communities, for example, the existence of an active land rental or transfer market despite legal restrictions. This reflects a misunderstanding of the land tenure realities of these communities. A better understanding could have major policy implications.

In some cases, members of indigenous communities may have sought individual titles in order to sell their lands. Nevertheless, when families within an indigenous community seek some type of ownership document, it can often be for purposes of protection within the community. Indigenous families need security to bequeath their land parcels to their heirs or to retain land use rights when they migrate outside the community. As in any society, dangers of capricious use of power by traditional authorities may exist, thus calling for internal rules to safeguard the land use rights of individual family members.

For these reasons it is most useful to conceive indigenous land tenure systems as alternative forms of private ownership, under decentralized mechanisms which permit the allocation of land use rights under the internal norms of each community. In some ways, indigenous systems can be compared with such modern enterprises as joint-stock companies or other forms of corporate ownership. Promoting indigenous community systems as a type of private enterprise, which permits individual titling and registration within the jurisdiction of a community, can guarantee the integrity of the community as a civil association. Rather than abuse long-established systems of social control, it can actually improve the operation of financial markets and facilitate land rental agreements, all under the control and by-laws of the community itself. It can also reduce the costs of land titling and regularization compared with the individual titling approaches that are reviewed in later chapters. There can be immense costs, for example, in demarcating and titling the lots of several hundred families within a community, when each family can have dozens of different individual parcels. The mere costs of topographical

measurements, mapping and titling might easily exceed the value of the land itself.

Indigenous Production Systems: Subsistence or Market-Oriented?

As already seen, indigenous livelihoods have displayed tremendous diversity in Latin America's different ecological regions. Nevertheless, there is still a tendency to perceive indigenous lifestyles as essentially subsistence-oriented, rather than integrated within national markets.

Subsistence production (that is, production for immediate household consumption) certainly plays a prominent part in most indigenous economies. At the same time, however, indigenous peoples can be keenly interested in competitive markets. Indigenous peoples and communities in both the *sierra* and *selva* regions of the Andes and Central America were involved in extensive market relations and trading networks long before the European conquest. Overcoming the bottlenecks to effective market participation, often a legacy of deep-rooted discrimination, can be one of the principal demands of indigenous organizations.

This requires that the complex relations between subsistence and market-oriented activities be well understood.[4] Most indigenous economic systems tend to be comprised of a traditional economy, including an indigenous internal market, supported by a degree of market-oriented production. The indigenous internal market or *subsistence* production has tended to serve as a buffer against the whims of the market and changing agrarian policies. Ideally, this should provide for the community's immediate needs, enabling its social reproduction. However, with the growing land hunger among indigenous peasant communities, it has proved increasingly difficult for indigenous families to meet their requirements for household consumption. Severe problems persist in the traditional peasant economies that have not been able to identify alternative products and markets. These groups compete with each other for markets for the same agricultural staples. Earnings from migrant labor and remittances have thus proved an increasingly important component of indigenous incomes. More favorable market outlets, together with access to finance and credit, will be essential for improving indigenous livelihoods.

The symbiosis between the different components of indigenous production can be seen clearly in the tropical lowlands. Here, indigenous producers have had the opportunity to produce export crops, including coffee and cocoa beans, niche products like herbal medicine, and other specialized items for the export market. Moreover, provided that they have a fairly stable and varied subsistence production, they have also been able to compete in the market with nonindigenous producers from the same area. This production guarantees a varied and sound diet, together with other products for daily livelihood. Furthermore, indigenous export producers are less vulnerable to market fluctuations, as the cash income generated can be spent on items beyond subsistence needs. Indigenous lowland communities have been able to afford the risk of experimenting with alternative crops and extractive produce, and several new indigenous export enterprises have emerged in recent years. The lesson is that communally titled territory, with a combined subsistence and export production, can spur immediate economic improvements for the individual family without state subsidies.

Indigenous Communities and Land Rental Markets

A common criticism of past land use policies in Latin America is that they have underplayed the importance of land rental as a mechanism for improving land productivity and incomes. In particular, redistribute land reforms that sought

[4] For a detailed examination of these issues in the Colombian context see: Carlos César Perafán, *Impacto de cultivos ilícitos en pueblos indígenas*: *El caso de Colombia*, Inter-American Development Bank, January 1999.

to give access to land to poor rural households have been criticized for failing to distinguish between access and ownership (see IDB, 1998, and de Janvry and Sadoulet, 1999). Many of the reforms, particularly those that are aimed at strengthening communal or collective land tenure, actually prohibited land rentals. Mexico's *ejido* system, and the land reform and rural labor laws of other Latin American countries, also involved prohibitions or restrictions on tenancy and sharecropping arrangements, which were seen as an undesirable legacy of earlier feudal agrarian systems. Thus the incidence of land rentals as a share of the land is lower in Latin America than other regions (particularly Asia), and appears also to have been declining.

Much influential policy analysis is now calling for more open and flexible land markets in the interests of equity and poverty alleviation as well as greater agricultural efficiency. The IDB has been associated with this trend. Its most recent strategy paper on rural poverty reduction urges that the effectiveness of land markets can be increased by, *inter alia*, eliminating regulations that limit the selling or leasing of land (IDB, 1998).

A key issue of policy debate concerning indigenous lands in Latin America today is the extent to which restrictions on land use (whether sales, transfers, rentals, mortgages or other encumbrances) should be retained. The majority of Latin American countries, despite some recent trends to the contrary, still provide that indigenous lands should be inalienable, indivisible, imprescriptible and nonmortgageable.

Several studies have found evidence of an active land rental market within indigenous communities. Informal land rentals to nonindigenous interests have long been a feature of many indigenous agrarian systems. Indeed, the growth of such lands rentals or transfers has been one of the arguments put forward for liberalizing indigenous land tenure arrangements (see following chapter). At the same time, there are also indications that indigenous communities can be reluctant to lease even unutilized or underutilized land for fear of losing it. In Ecuador, for example, it has been estimated that as much as half of irrigated indigenous lands may be currently unused.[5]

Thus, the challenge is to strengthen the capacity of indigenous community members to transfer rights of land use, without undermining their overall land security. Under most national land legislation, as well as Bank-supported programs, the options appear to be unduly limited—between collective ownership with severe transfer restrictions on the one hand, and fully transferable forms of individual land ownership on the other. Yet neither seems to suit the present-day reality of indigenous communities, particularly in regions where outsiders actively covet their traditional lands. Where recent policy reforms have enabled indigenous community members to opt for individual land titling, as in Mexico, they have generally rejected this option.

Where indigenous communities rely on traditional norms for the allocation of land use rights, the rental markets that develop tend to be informal and short term. The need is now to seek appropriate longer-term options, enabling them to have access to capital markets. Where indigenous communities opt for communal titling as a defense, one option would be to develop long-term negotiable leases. These could help strengthen individual rights over cropland holdings, while also allowing the community or its individuals to lease out part of their lands without compromising the integrity of the communal land title. Moreover, by retaining the right to resume the lease upon its expiry, the issuing authority (whether an indigenous or State authority) could eventually redress any undue concentration of land use rights or prevent a significant amount of communal lands from being controlled by outsiders.[6]

[5] Data taken from Carlos Perafán, Adecuación de servicios financieros a las economías tradicionales indígenas, unpublished paper, Inter-American Development Bank, May 2000.

[6] We are grateful to Francisco Proenza of the FAO-Bank Cooperative Program for bringing these concerns,

On this point, the exact modalities need to be negotiated between the State and its legislative institutions, and representative indigenous authorities in each country. The important issue is that indigenous authorities should determine their own patterns of land use, rather than have these externally imposed by state agencies which may not be fully familiar with customary indigenous forms of land use and allocation, and which may not appreciate the social and economic as well as cultural benefits that indigenous people can derive from them.

Indigenous Communities and Natural Resource Management

While not all of Latin America's rural communities are indigenous, by the same token, far from all the indigenous population resides in formally constituted communities. The historical reasons for this are apparent in countries like Ecuador and Guatemala.

Even when land is owned individually, with a registered title or other form of locally recognized document, there can be important community systems of natural resource management. In Guatemala for example, where the majority of indigenous land is held on an individual basis, a 1995 World Bank study identified over 100 communal forests in seven departments of the indigenous highlands (World Bank, 1995). These played a key role in biodiversity conservation and provided poor indigenous communities with firewood and other essential products. Yet, most communities lack norms and sanctions to guide forest use and communal lands were threatened by disputes with neighboring land owners, ambiguity in the definition of property boundaries, and lack of land title registration.

Communal forests, duly recognized by law, can be an important source of income for indigenous communities. This is most easily achieved where they fall within the boundaries of registered communal lands. Examples will be provided later of innovative indigenous development programs in Mexico, built around communal forestry. But it should be remembered that, even in areas where indigenous agriculture takes place on a largely individual basis, identification and protection of community resources can be a vital contribution to indigenous livelihoods.

Equity Concerns: Indigenous Land Tenure and Social Differentiation

Much policy literature has focussed on the relationship between land tenure systems and agricultural efficiency or productivity, and less emphasis has been placed on equity. Indigenous systems are generally considered equitable, at least to the extent that traditional systems provide a safety net for aged and vulnerable members. This does not mean that indigenous systems are in any way egalitarian. There can be considerable land and resource accumulation and some indigenous families will be more entrepreneurial than others will. But a key policy concern is whether intercommunity equity is likely to be greater where indigenous communal tenure systems are formally recognized.

There are *prima facie* reasons to believe that the breakdown of communal agrarian systems has led to greater social differentiation. This has been quite extensively documented in the case of the Ecuadorian *sierra*, where the land reform programs after the 1960s emphasized individual titles. Almost invariably, it has been seen that communal indigenous lands in the Latin American highlands are now fragmented and usually small land entities, interspersed with nonindigenous settlements and enterprises. The policy question today is whether the reconstitution of indigenous territorial entities is likely to promote more equity in cases where a degree of social differentiation has already occurred. A test case for this may be found in Panama and its new *comarcas* (see following chapter).

The Panamanian *comarca* system, in that it embraces both indigenous peasant and tropical

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to our attention and making specific proposals.

lowland areas, is somewhat unique. Originally devised in response to the demands of Kuna indians for autonomy during Panama's independence period, the *comarca* has gradually become the accepted form of land tenure and administration for the major indigenous groups. The *comarca* authorities develop their own organic charters in consultation with the government and can have considerable discretion for determining their own land tenure arrangements. With recent additions, the *comarcas* now cover some one fifth of the national territory.

As illustrated by the case of the Ngöbe-Buglé *comarca*, recently legalized in 1997, the system has to accommodate considerable diversity. The Ngöbe are the largest indigenous group in Panama, numbering close to 200,000, and are also the poorest members of society. Together with the Buglé a small group of some 5,000 living inside the Ngöbe territory and some poor *mestizo* peasants, they inhabit an immense area of the western provinces of Chiriquí, Veraguas and Bocas del Toro. The central cordillera divides their territory into two climatically and ecologically distinct zones, affecting settlement pattern, production and the local economy. On the Pacific side, which is drier and has marked seasons, indigenous families tend to live in dispersed communities. On the Atlantic side, where the heavy rainfall causes lush vegetation, the indigenous population is settled mainly in riverine communities and along the coast. Also located on the coast are the black communities of Antilles descent with their own culture and language, accepted by their indigenous neighbors. Following the general indigenous norm in Latin America, there are no collective institutions of production apart from communal works.

In the past, the Ngöbe have earned much of their income outside the community, as either seasonal or permanent migrant workers in cattle ranches or banana plantations. Land tenure varies within the community, ranging from fairly large areas to small farms, while there are also some landless families. Thus, while much production takes place at the subsistence level, some families have been more successful in marketing their produce and there is internal differentiation. Individual renting agreements between Ngöbe families have been quite common, though a source of some conflict when the plots have to be returned to the owners. Some of the more entrepreneurial Ngöbe have entered into commercial cattle farming (although competing with neighboring *mestizo* ranchers has been difficult).

What effect might the creation of the Ngöbe-Buglé *comarca* have on land use and productive strategies of this territorial area? In fact, only part of the area traditionally used and inhabited by the Ngöbe has been covered by the designated *comarca*. There was growing evidence of social differentiation between indigenous families, despite a strong sense of ethnic identity reflected in the struggle for the creation of the *comarca*. Productive land in the *comarca* is now scarce and there is an apparent need to identify economic alternatives. Without new economic strategies, perhaps based on the reallocation of internal land rights, it is difficult to see how the Ngöbe's long-standing poverty can be addressed in a positive manner.

Finally, it should be emphasized that current trends of indigenous poverty are disturbingly similar throughout Latin America. These issues have been covered in an earlier Bank study on indigenous poverty, and need no be addressed in depth here. Suffice it to say that the incidence of rural landlessness among indigenous communities has been growing persistently, that an increasing proportion of incomes is earned outside the agricultural sector, and that there is increasing out-migration on both a seasonal and permanent basis.

IV. LAW AND POLICY FRAMEWORK FOR INDIGENOUS LAND TITLING: TRENDS IN THE 1990s

The past decade has seen an extraordinary amount of normative activity in Latin America concerning indigenous rights, including rights over traditional lands and natural resources. Several countries have adopted new constitutions or amended existing ones in order to recognize special rights for indigenous peoples and other ethnic minorities. Special laws concerning the titling of indigenous lands have also been adopted in some countries. Some of the new legislation addresses more than surface land. Attention is being paid for the first time to the degree of control that indigenous peoples may exercise over renewable, and occasionally non-renewable, resources within their land and territorial areas. Several countries are examining new legislation to regulate indigenous control over mining and petroleum activities, and participation in the profits. A revised ILO Convention on Indigenous Issues (No. 169, now ratified by the Latin American countries with the largest indigenous populations) has been of importance in this respect. So have the emerging policies of international actors, including donor governments and the international financial institutions.

Despite these changes, tensions remain over how agrarian and land titling policies should address certain categories of indigenous lands. As ethnic consciousness grows, indigenous organizations are increasingly able to influence national laws and policies. In some countries, negotiated agreements have taken place between indigenous organizations and the State. But while some countries continue to promote a special status for indigenous lands, others appear concerned to break down the differences, in particular the restrictions on indigenous land use and sales. In tropical lowland areas policies are more uniform, seeking the titling of large indigenous areas as inalienable units. In the indigenous peasant and mountainous areas, policies vary more from country to country. Some governments are again aiming to activate a land market among indigenous communities. Any fragmentation of communal land areas now takes place on a voluntary basis, following a majority vote of community members.

There is a potential lack of correspondence between the political aspects of recent reforms and economic policies, especially agrarian policies. At the political level, there is an increasing tendency to recognize the multi-ethnic and multicultural nature of Latin American societies. While the practical implications of this new approach are far from clear, it is a shift away from the integration and assimilation policies of the past. The conceptual underpinning is one of differentiated forms of citizenship, creating political space for indigenous peoples and allowing for new forms of political representation in accordance with indigenous customs and traditions. This is evident, for example, in the new normative framework of Bolivia, Colombia and Ecuador. New norms promote some form of indigenous autonomy and control over their own development, which is necessarily linked to concepts of territorial space.

However, economic policies place their emphasis elsewhere. Several governments and multilateral financial institutions have continued to base their policies on the premise of free and open land markets, the promotion of individual tenure and a reduced role for State institutions.

Indigenous and Tribal Peoples Convention No. 169 of 1989: Land Provisions

This convention entered into force in 1990. It is important because nine of the thirteen countries that have ratified it to date are from Latin

America.[7] The aim of the convention is to reinforce the land provisions of the earlier 1957 instrument. The section on land contains seven separate articles. The use of the term *lands* is to include the concept of territories, covering the total environment of the areas which indigenous peoples occupy or otherwise use (Article No. 13). The rights of ownership and possession of indigenous peoples over the lands that they traditionally occupy shall be recognized; governments shall take steps to identify these lands, and to guarantee effective protection of the rights of ownership and possession (Article No. 14). The rights of indigenous peoples to the natural resources pertaining to their lands shall be specially safeguarded; and indigenous peoples shall wherever possible participate in the benefits of resource exploitation pertaining to their lands (Article No. 15). Indigenous peoples shall not be removed from the lands that they occupy, save in exceptional circumstances (Article No. 16). Indigenous procedures for the transmission of land rights among their members shall be respected (Article No. 17). Governments shall prevent and punish unauthorized intrusion on indigenous lands (Article No. 18).

Latin America's New Constitutionalism: Implications for Land Titling

Brazil adopted a new constitution in 1988 that significantly amended earlier provisions on indigenous land and resource rights. Guatemala's 1985 constitution provided that the lands of indigenous communities would receive special protection from the State. During the 1990s, indigenous issues were addressed in new or amended constitutions in Argentina, Bolivia, Colombia, Ecuador, Mexico, Paraguay and Peru. The constitutions all tend to refer to special collective land rights. Several refer to special rights regarding surface natural resources on these lands; at times according indigenous peoples some control over mining or other extractive activities. Two of the constitutions formulate the concept of indigenous *territorial entities*, thus linking a special land regime to wider notions of territorial autonomy. An emerging feature of Latin American constitutionalism is to recognize a special collective land tenure regime for black populations in ecologically fragile areas. This novel trend extends collective land rights to other ethnic minority groups.

Colombia's 1991 constitution addressed the political and financial aspects of indigenous autonomy. Building on extensive titling experience in the Amazon during the previous decade, and on historically established experience regarding the *resguardos*, it aimed to consolidate the new territorial entities in the Amazon. The legal figure in which inalienable and collective land rights were vested in indigenous peoples was now the *resguardo* in all parts of the country. But indigenous areas were recognized as *territorial entities* on an equal footing with departments, districts and municipal areas. Thus, indigenous authorities could exercise jurisdictional functions within these territories, governed by indigenous councils constituted according to traditional customs and uses. Natural resource exploitation is to be carried out with due respect to the cultural and economic integrity of indigenous communities and the government should promote indigenous participation in decisions on any undertakings. The decentralization of public investment requires the State to transfer revenues to the indigenous territorial entities.

An original feature of the Colombian constitution is its transitory Article No. 55, requiring congress to legislate collective property rights for black communities occupying *baldío* lands in rural riverine basins of the Pacific in accordance with their traditional practices of production. Until then, there had been no legal norms covering the black or Afro-Colombian population. In the late 1950s, the entire Pacific region had been declared a massive forestry reserve with the legal status of *tierras baldías* (unoccupied lands). Law No. 70 of 1993 extended the

[7] At the time of writing the ILO's Convention No. 169 had been ratified by Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru.

provisions to Afro-Colombian black communities with similar characteristics in other rural areas and paved the way for a substantial collective titling program in the late 1990s.

Ecuador's 1998 constitution has some similarities to Colombia's. Enacted after intense negotiations, it gives prominence to the concept of indigenous territoriality and introduced the concept of *indigenous territorial circumscriptions.* Potentially, this prepares the ground for recognizing new territorial areas in accordance with the identity of each ethnic group. Since the adoption of the constitution, a draft Law of Nationalities has been discussed in congressional commissions, examining *inter alia* how to give effect to this territorial concept. There are concerns that it is based on the Amazon context where territorial affiliation is related to ethnic and cultural identity, rather than to the *sierra* region where indigenous lands are more fragmented and ethnic affiliations are less precise.

Ecuador's new constitution restricts the alienation or division of ancestral communal lands. It also addresses resource rights within indigenous areas. Indigenous peoples are to participate at all decision-making levels on the use and conservation of their natural resources. They should be fully involved in the planning and implementation of any project within their territories. They should be consulted regarding the exploitation of nonrenewable resources and, where possible, share in the benefits and receive compensation for environmental damages.

Bolivia's reformed 1994 constitution recognizes a new concept of original community lands, *tierras comunitarias de origen (TCO)*, in existing legal entities of indigenous and peasant communities. This concept has been applied to the indigenous areas of eastern Bolivia's tropical lowlands, where a significant land-titling program has begun. The constitutions of Argentina and Paraguay have recently recognized indigenous communal lands. Argentina's 1994 constitution recognizes, for the first time, the existence of an indigenous population as well as the legal status of their communities and the rights of communal possession and property of the lands they traditionally occupy, which are not subject to transfer, sale, mortgage or taxation. Paraguay's 1992 constitution recognizes that communal lands should be provided to indigenous peoples free of charge, with prohibitions on transfer and rental, and not liable to taxation.

Peru's 1993 constitution moves in a different direction. The previous constitution had provided that communal lands were inalienable, nonmortgageable and nonprescriptible. The 1993 text removes the first two of these restrictions, stating that communities are free to dispose of their lands. Their lands are not subject to prescription except in the case of abandonment. The provisions, which will be regulated by law, apply to Amazon as well as highland and coastal areas, making Peru the only country to allow, in principle, the parceling of titled indigenous lands in the Amazon into individual lots.

Earlier constitutional restrictions on the alienation of common lands, including those of indigenous communities, were similarly rescinded in Mexico. Article No. 27 of the constitution (amended in 1992) effectively eliminated land redistribution and authorized transactions in *ejido* lands for the first time in over 70 years. *Ejidos* can decide whether to distribute land to its members under full private ownership or to continue with the present system of communal land tenure. Article No. 4 of the constitution was also amended to recognize that Mexico is a multicultural nation. The article also stipulates that the law shall specifically promote and protect indigenous forms of social organization, that their members shall be guaranteed effective access to State jurisdiction, and that indigenous practices and customs shall be duly regarded in agrarian suits and procedures. The article requires the adoption of a special regulatory law.

Recent Agrarian and Indigenous Laws: Individual and Collective Titling

Consistent with the constitutional trends, most national secondary legislation continues to

promote collective land titling for indigenous peoples. In some countries, governments have dealt with specific geographical areas or specific ethnic groups. This was the case in Bolivia, Ecuador, Panama and Peru. In Bolivia and Ecuador, presidential or other decrees of the early 1990s stipulated the titling of specific indigenous lands. In Panama, the rights of indigenous groups continue to be dealt with under separate legislation. In Peru, while some agrarian legislation has had national coverage, one land titling law was adopted specifically for coastal regions where commercial agriculture is most prevalent. Bolivia's 1996 Land Reform Law established different land tenure regimes for different parts of the country, differentiating by type of agriculture and by the ethnicity of farmers.

The main instrument of agrarian law and policy in Colombia is Law No. 160 of 1994. This legislation has been mainly an instrument of market-oriented land transfers that attempts to promote voluntary sales of land to peasant farmers. However, it also addresses the situation of indigenous *resguardos*, emphasizing the need to broaden existing *resguardos*, including those of colonial origin, in accordance with need. The responsible institution is the Land Reform Agency (INCORA), which is to purchase new land as necessary and to clarify indigenous rights by, among other things, buying out the improvements of nonindigenous occupants of *resguardo* lands. As previously noted, Law No. 70 of 1993 has played a key role in the case of black populations. This lengthy piece of legislation covers the procedural aspects of land titling as well as substantive issues, including mineral rights, within the black collective areas. For example, black communities covered by the law enjoy preferential treatment in the issuance of licenses for exploiting nonrenewable minerals within their collective areas. However, there has been no specific new legislation regarding indigenous land rights and titling. No regulations have been written to codify *indigenous territorial entities*.

Ecuador's basic agrarian legislation is the 1994 Law for Agrarian Development, an initial version of which was amended by congress following large protests by indigenous and peasant organizations. The final version, while respecting indigenous forms of ownership, permits the *comunas* to change their form of land use through parceling or conversion into cooperatives or other legal entities. Article No. 36 provides that State land that had been the ancestral possession of indigenous, Afro-Ecuadorian and/or *montubios* (coastal peasants) peoples be awarded (free of charge) back to them on condition that the beneficiaries respect traditional forms of cultural life and social organization as well as the environment. Other lands can also be allocated to indigenous peoples, but not free of charge. The law rules out further land expropriation, and is part of overall policies to strengthen the security of private land ownership. The legislation also replaces the Ecuadorian Institute for Land Reform and Colonization (IERAC) with the National Institute for Agriculture Development (INDA), whose functions include land titling. Although the law has been criticized for, among other things, its ambiguities, it appears to have prepared the ground for collective titling programs because it was undertaken with the support of international agencies.

In the Ecuadorian Amazon, titles have been issued by decree without any specific legal framework. Considerable legal uncertainty exists concerning the competence of INDA and the Ecuadorian Institute for Forests and Natural Wildlife (INEFAN) for titling forested lands in the tropics. Adoption of the 1998 Constitution is likely to give rise to new legislation on indigenous land issues. Proposals have already been formulated by indigenous organizations.

Bolivia's main instrument for agrarian policy is the 1996 Law of the National Agrarian Reform Service No. 1715, which distinguishes between six separate kinds of agrarian property, with different restrictions and obligations for each of the categories. The *tierras comunitarias de origen* (original communal land or TCO) are the

traditional habitat of indigenous peoples who live, mainly, in the Amazon lowlands. These lands are inalienable, indivisible, nonmortgageable, collective, and tax-exempt. The law also identifies communal properties (*propiedades comunarias*), which have been titled to peasant communities or former estate workers. These have the same restrictions on sale and transfer as the TCO and are likewise tax exempt. Small properties (which include the small farms of indigenous land reform beneficiaries in the highlands) are also indivisible and tax exempt, but can be sold. Only medium-sized farms and large agricultural enterprises are subject to taxation and operate in a free land market.

This was the first legislation to provide for indigenous property rights in Bolivia's eastern lowlands. Before then, four presidential decrees had been issued (in 1990) that generally recognized those rights but did not establish the procedures to render them effective. In contrast, the 1996 Law and its accompanying regulations set forth procedures for clarifying these rights and resolving land claims between indigenous peoples and others. The law also provides that sixteen territorial areas, over which claims have been made by indigenous organizations, should be declared *immobilized* until the claims have been addressed by the Natural Agrarian Reform Agency (INRA). This means that no additional nonindigenous persons will be permitted to settle there. Finally, the law provides that the State agency responsible for indigenous affairs, in collaboration with indigenous organizations, carry out technical studies to determine the special needs of current and future generations. This is an important criterion for determining the size of the *original community areas* to be titled.

Finally, mention should be made of Bolivia's popular participation laws enacted after 1994. These laws have attempted to create new participatory structures at local and municipal levels, ensuring that national resources are channeled effectively to rural communities and that local organizations, including those of indigenous peoples, can participate in development planning. The laws have also created a new legal entity, the indigenous municipal district, as part of the program of municipal reform. The present government has considered proposals for territorial restructuring, based on over 300 potential indigenous municipal districts throughout the country. Thus, as in Colombia and Ecuador, territorial ordering for indigenous peoples is linked to broader issues of municipal reform and national income distribution.

Interesting moves in the same direction have taken place in Panama. Historically, only the Kuna indigenous peoples had a recognized territory: the *comarca.* Following a period of land reforms and colonization programs (in the 1960s) that favored individual titling, the 1972 constitution required the establishment of *comarcas* for all indigenous ethnic groups. Law No. 22 of 1983 established a *comarca* for Embera-Wounaan indians in Darien province; Law No. 24 of 1996 established the Mandungandi *comarca* for Kuna communities that had been forcibly relocated as a result of the construction of the Bayano dam and hydroelectric plant. After more than two decades of intense struggle, Law No. 10 of 1997 established a *comarca* for the Ngöbe and Buglé indigenous peoples, which includes the Ngöbe peasants, Panama's largest indigenous ethnic group.

A feature of the Panamanian situation is the absence of any national legislation covering the land or other rights of indigenous peoples. Indigenous peoples in recognized *comarcas* can now enjoy a high degree of autonomy, establishing their own organic charters for internal governance and administration. Yet, there is no jurisprudence to cover the claims of indigenous groups outside the *comarcas.* Indigenous organizations are proposing special legislation to recognize the collective rights of these indigenous groups over the lands they occupied.

In Peru, the overall instrument of recent agrarian policy is Law No. 26505 of July 1995, commonly known as the *Ley de Tierras* or Lands Law. Its objective is reflected in its full title, *Law of Private Investment in the Development of Economic Activities in the Lands of the National*

Territory and of the Peasant and Native Communities. Thus, much of the law is concerned with the conditions under which various land categories can be opened up to the market, or sold by the State to private investors. As regards communal land areas, a distinction is drawn between *sierra* and *selva* areas on the one hand, and coastal areas on the other. In the former, any rental, sale or mortgaging of communal lands requires the approval of two thirds of the members of the community's general assembly; in the latter, only half of the community members need approve. The law also directs the government to auction off uncultivated (*eriaza*) state land. The provision has aroused concern among indigenous peoples and their supporters, who argue that it can cover substantial land areas claimed by indigenous communities, but not as yet titled.

In June 1997, the Peruvian Congress adopted Law No. 26845, which deals with land titling for coastal peasant communities. The lands involved cover an area that has undergone significant growth in commercial agriculture and investment, easing the conditions for privatizing communal land tenure regimes in this region. Only a one third vote of the communal assembly is required to privatize these lands in the case of third parties that have been in occupation of communal lands for a period of less than two years.

Indigenous organizations and NGOs, who argue that the collective rights of indigenous groups are being sacrificed to the interests of private investors, criticized Peru's recent agrarian legislation. Indigenous groups have lobbied congress to adopt specific indigenous legislation.

New agrarian legislation was enacted in Mexico in early 1992, soon after the reforms to Article No. 27 of the Mexican Constitution governing land provisions. The law codifies the new constitution, setting out the procedures under which the tenure status of *ejidos* or indigenous communities can be altered. Chapter V of the law covers the specific issue of communities, providing *inter alia* that *ejido* members can elect to change their status to that of a community and vice versa. One article deals specifically with indigenous groups, stating that their lands should be protected within the framework of the law regulating Article No. 4 of the Constitution (on indigenous rights). However, by 1999 this regulating law had still not been adopted.

The new legislation has been criticized by indigenous organizations and supporters because it appears to promote individual rather than communal tenure. In theory, however, it could permit indigenous peoples to identify themselves more closely with one kind of tenure regime. It has been estimated that, of a total of some 5,776 indigenous agrarian nuclear units, only 2,226 were registered as *communities* at the time of the reforms. In addition, over 3,500 *ejidos* were comprised mainly of indigenous peoples, while a small number of agrarian communities were comprised of nonindigenous *mestizos*.[8]

Negotiating Indigenous Land Rights

During the past decade, governments have been willing to enter into direct negotiations with indigenous peoples' organizations concerning land and territorial rights. Some of the major titling initiatives in the tropical lowlands have come in response to demonstrations and protests by indigenous organizations, as in the case of Bolivia and Ecuador in the early 1990s. More recently, indigenous land rights have been part of the agenda of peace processes in countries that have been affected by armed conflict.

An example is Guatemala where, after a lengthy period of civil conflict, indigenous identity and rights were included in the agenda of the peace accords negotiated between the government and armed insurgents. In a 1995 sector accord on the identity and rights of indigenous peoples, the government undertook a series of commitments

[8] Figures taken from José Carlos Pérez, México: de comunidades agrarias a pueblos indígenas in Carlos Iván Degregori, ed., *Comunidades: tierra, instituciones, identidad*, CEPES, Lima, Peru, 1998.

to regularize indigenous land tenure, to guarantee the right of indigenous communities to participate in national resource management, and to improve the legal protection of the rights of indigenous communities. An important feature was the creation of a joint commission of government and indigenous representatives, to propose legal and administrative reforms relating to indigenous land rights. This mechanism has since allowed for indigenous participation in law and policy reforms as well as the preparation of land projects financed by the international community. There has been more limited experience in Mexico where, in the aftermath of the 1994 uprising in Chiapas, negotiations led to the San Andrés accords on indigenous issues. In the Mexican case, the negotiations were beset by differences over concepts of indigenous autonomy and territoriality. Most recently, land and indigenous concerns have been placed on the agenda of the peace negotiations in Colombia.

Land Titling in its Broader Environmental Dimensions: Energy Development and Natural Resource Management

The recognition of indigenous ownership of sometimes vast territorial areas has raised complex issues of control over, and management of, strategic natural resources. Many Latin American governments had awarded large timber concessions in areas of traditional indigenous habitation. Moreover, the past decade has seen a huge increase in energy development, particularly hydrocarbons, in tropical Latin America. There has been substantial international investment in the oil and gas potential of Brazil, Bolivia, Colombia, Ecuador and Peru. The marked increase in petroleum or mineral development in remote areas has led to prolonged negotiations between indigenous peoples and governments concerning control over resource and energy development, including profit-sharing arrangements.

Environmental concerns have caused governments to establish ministries or other agencies for the environment, sometimes assuming responsibilities for the titling and management of forests. National parks, protected areas and biosphere reserves, at times created with the assistance of the multilateral development banks, often overlap the areas of indigenous habitation. In some cases, these areas were created within the territories already titled to indigenous communities, creating overlapping land claims and potential conflict. Indigenous peoples can invoke the Rio Declaration of the 1992 United Nations Conference on Environment and Development, containing specific commitments by states to facilitate indigenous participation in sustainable development. The Biodiversity Convention has since added other dimensions including the intellectual property rights of indigenous peoples in regard to conservation and traditional knowledge.

The ILO's 1989 Indigenous and Tribal Peoples Convention took significant steps in this area, preparing the ground for Latin America's constitutional and other law reforms of the 1990s. In Latin America, as in most other parts of the world, the laws distinguish between surface and subsurface rights, vesting subsoil and subsurface rights in the State. But Article No. 15 of the ILO's Convention No. 169—a precedent in international law—stressed that the rights of indigenous peoples to the natural resources pertaining to their lands should be especially safeguarded. This includes the right to participate in the use, management and conservation of these resources. In cases where the State retained the ownership of mineral or subsurface resources or the right to other resources, it was required to establish procedures for consulting with indigenous peoples before undertaking or permitting any programs for the exploration or exploitation of these resources. When possible, indigenous peoples should participate in the benefits of such activities and receive fair compensation for any damages sustained.

Such principles have affected the approaches of other international agencies. For instance, the World Bank's proposed revision to its operational directives on indigenous peoples denies

support for any commercial exploitation of minerals and hydrocarbons in indigenous areas unless indigenous peoples participate in the benefits of such activities and receive fair compensation for any harm or damages.

This has posed normative challenges for Latin American states, particularly the nine countries that already ratified the ILO's Convention No. 169. There have been grounds for amending environmental, forestry, mining and petroleum legislation (among others) to provide the special safeguards now required by law for indigenous peoples. An adequate review of this issue would require a separate study, but a few illustrations of the new trends are provided below.

Colombia's 1991 constitution provides that natural resource exploitation in indigenous lands should not prejudice indigenous cultural integrity. Colombia's Constitutional Court has since ruled that indigenous peoples own the renewable natural resources as well as the lands within their communities. Colombia's 1988 mineral code and its regulations also gave indigenous peoples preferential rights over certain minerals, with the exception of certain *strategic* minerals including coal and oil. Some of Panama's *comarca* legislation contains strong safeguards. For example, the 1983 law creating the Embera *comarca* in Darien provides that the exploitation of subsoil, underground water, mineral resources and timber within the limits of the *comarca* can only take place with the permission of its authorities. The community is to be guaranteed participation in the benefits and the percentage of incomes to be received by the *comarca* is to be specified in each contract.[9] Ecuador's new 1998 constitution now recognizes the right of indigenous and black communities to be consulted over the prospecting of nonrenewable resources within their lands, to participate in benefits and, insofar as possible, to receive compensation for damages.

While other countries (such as Peru) still vest rights over resources on the State, including timber and minerals, these issues are now the subjects of intense negotiation. Peru's Organic Hydrocarbons Law contains no reference to indigenous communities, stipulating only in general terms that it is the responsibility of petroleum enterprises to preserve the environment. During their visit to the Peruvian Amazon, the consultants attended a meeting of indigenous leaders, discussing proposals to ensure indigenous participation in hydrocarbon activities within their territories. A new draft decree was prepared in 1999, providing *inter alia* for consultation, a community relations plan, participation rights, and sociocultural impact studies. Similar discussions were being held in Ecuador where, pursuant to the 1998 constitution, indigenous leaders were pressing for similar legislation in the context of negotiations with multinational petroleum companies. Draft regulations (issued in October 1999) cover consultation and participation mechanisms, participation in environmental impact studies, institutional relations for sustainable community development, compensation and benefits, and conflict resolution.

Few countries appear to have adopted specific regulation to ensure that policies and programs that deal with environmental conservation and resource management are consistent with indigenous land rights. Bolivia's 1992 Environment Law provides for indigenous participation in the administration of protected areas. A 1994 Ministerial Resolution sets out different options for the management of these areas, for which agreements can be concluded with indigenous peoples among others. Moreover, the 1996 Forestry Law permits exclusive indigenous use of forestry resources within their original community lands. There are outstanding legal ambiguities, however, dealing with forestry concessions that were awarded to commercial companies before the adoption of the recent laws.

Panama's General Environmental Law (Law No. 41 of 1998) is an interesting model. A separate chapter is devoted to issues of indigenous participation and consent in matters related to

[9] Law No. 22, November 1983.

natural resources within their lands and territories. Resource exploitation projects presented by indigenous peoples are to receive preferential treatment. Yet the law does not address the fact that so many indigenous areas are located in national parks under the jurisdiction of Panama's environmental agency (INRENARE).

Legal ambiguities over resource use abound. Ecuador is a case in point. Indigenous communities in the Ecuadorian *selva* were awarded land titles by decree in the early 1990s, but there was no accompanying legislation on indigenous rights. The Forestry Law vests ownership of the forests and protected areas in the INEFAN. Real property rights in national parks and ecological and biological reserves cannot be awarded. As a result, all natural resources reverted to the state when these areas were created and no title can now be given to indigenous communities. A proposal to amend the Forestry Law is under consideration to recognize indigenous rights within these areas. However, arrangements have been made on a largely *ad-hoc* basis. Early in 1999, for example, the government declared an area of some 435,000 hectares within the Cuyabeno reserve and 700,000 hectares of the Yasuni Park as *zonas intangibles*, a concept that prohibits all extractive activities (including oil exploration) while guaranteeing the right of the indigenous peoples who live in the area to undertake subsistence economic activities. Ecuador's 1998 constitution recognizes the right of indigenous peoples to the usufruct, administration and conservation of the renewable natural resources within their lands. This will call for further legislative reforms, as well as a major demarcation effort, to resolve the problems of overlaps between indigenous lands and the protected areas. The recent draft petroleum regulations referred to above, if finally approved, will go some way towards clarifying these issues.

Recent trends towards the decentralization of forest management in Mexico hold out significant prospects for indigenous communities. The 1942 Forestry Law gave some control to communities and *ejidos* over their forest resources. The 1986 Forestry Law increased government control and supervision. The 1992 Forestry Law and its 1994 regulations have reversed this trend, granting more responsibility for forest management and conservation to forest landowners and producers. Indigenous communities and *ejidos*, within whose lands much of Mexico's forest resources are located, appear to have benefited from the marketing forest produce.

V. SECURING INDIGENOUS LAND AND RESOURCE RIGHTS: PRACTICAL EXPERIENCE IN THE 1990s

On paper at least, indigenous land rights are now receiving significant attention in national law and policy instruments. But what is the experience in practice? Where and by what mechanisms has the most progress been made? What problems are now arising in implementing the law and policy framework? How, if at all, are conflicts being resolved between indigenous and nonindigenous interests? What role is being played by indigenous organizations in the titling and demarcation of their claimed lands? Where have there been constructive partnerships between the state and indigenous organizations or NGOs?

The analysis in this chapter builds mainly on the countries visited by the consultants, but at times covers other countries where the experience is deemed to be of particular relevance. A first section examines the experience with official land titling programs undertaken by the government and directed specifically at indigenous peoples. A second section deals with special programs also covering other ethnic groups, such as black communities. A third section looks at the way in which indigenous issues and claims have been dealt with in general land-titling programs over the past decade. The analysis then turns to the important issue of the demarcation and titling programs undertaken by indigenous peoples themselves, often with the support of national or international NGOs and, in some cases, in cooperation with state entities. A final section covers issues of natural resource management and use, reviewing some of the mechanisms for enhancing indigenous participation and also some problem areas that are now apparent in this area of fundamental importance for indigenous livelihoods.

Official Programs to Title Indigenous Lands

Despite the legislative measures, there have been few major and well-funded state programs to title and demarcate the lands claimed by indigenous peoples, and to render this ownership effective. The ILO's Convention No. 169, as seen earlier, has several requirements in this regard. In particular, it states that governments shall take the necessary steps not only to identify the lands which indigenous peoples traditionally occupy, but also to guarantee effective protection of their rights of ownership and possession. Moreover, governments are to take measures to prevent the unauthorized intrusion upon, or use of, the lands of indigenous peoples.

A serious problem, common to all the countries visited, is the presence of nonindigenous settlers in the lands adjudicated to indigenous peoples. In cases where title had been issued to indigenous peoples over large and contiguous territorial areas, a major challenge was to sort out the competing claims to the land and to determine the priorities for granting compensation to either indigenous or nonindigenous land occupants.

These issues have been of particular importance in Bolivia, where the emphasis over the past decade has been on the initial titling of indigenous lands in the eastern lowlands. No ownership titles had been issued to indigenous communities before that time, though a number of colonists had received land titles under the agrarian reform program. Some colonists had received title over extensive areas, others were small farmers, and a number of colonists were also occupying land without legal title.

Presidential decrees to recognize indigenous territorial areas had been issued since 1989, mainly after protest marches from the lowlands to La Paz. Decrees enacted between 1989-1990 provided for the titling of 2.8 million hectares of indigenous lands in the departments of Beni, Cochabamba and La Paz. After an indigenous march in 1991, president Paz Zamora recognized the principle of indigenous ownership over some 2.3 million hectares, in nine separate lots. When the 1994 Constitution recognized the concept of *tierras comunitarias de origen (TCO)* in the eastern lowlands, a presidential decree to title 16 additional TCO in the oriente, Chaco and Amazonía regions was issued after a second protest march in 1996.

The various decrees, however, have been no guarantee of effective ownership and occupation. The titles have been issued on a provisional basis. Moreover, given the extensive colonist presence in many indigenous areas, together with timber concessions, a process of *saneamiento* (or clarification) of title was needed in order to deal with overlapping land claims, and to provide for compensation in the case of relocation if necessary. The stage for this was set by enactment of the new Agrarian Reform Law in 1996 and its accompanying regulations. INRA was to carry out the technical aspects of titling and clarification; a role was also reserved for the government agency responsible for indigenous affairs (VAIPO). VAIPO was to determine the socioeconomic and spatial needs of indigenous peoples in the lowlands, ensuring that they be vested with sufficient lands to provide for themselves and for future generations. With support from the Government of Denmark, INRA and VAIPO have been able to embark on their respective tasks.

However, only slow progress has been made. A 1999 NGO publication[10] finds that, two years after the enactment of the agrarian reform law, the process of clarification and titling of the TCO had barely commenced in the majority of cases. Where the process was under way, the results to date suggested that the rights of third-party occupants of the TCO were being consolidated. As much as 80 or 90 percent of some TCO lands were found to be in the hands of colonists. This NGO was also critical of the Forestry Superintendent's Office, alleging that it had approved new forestry concessions within the TCO areas claimed by indigenous peoples.

The Bolivian experience, while still at a relatively early stage, demonstrates the difficulties of carrying out the effective titling of indigenous lands in a region where there is a substantial, and also highly influential, presence of external colonists and commercial enterprise. The legal framework is in place and the government has embarked on a program of land clarification and titling. Yet, the law gives considerable discretion to the government as to whether to give priority to indigenous peoples or the colonists in the event of overlapping land claims. And the criteria for determining the spatial needs of the indigenous peoples, required for this and future generations to continue their traditional lifestyles, can also be open to fairly arbitrary interpretation. When under pressure from agricultural, cattle and forestry interests, the government is faced with a political choice. Should it give preferential treatment to the original indigenous occupants, providing compensation for colonists as necessary?

By early 2000, there were signs of progress. The land reform agency (INRA) had carried out much of the necessary field investigations, and was expecting to issue titles to several of the lowland TCO in the course of that year. After consultations between the Government of Bolivia and the indigenous umbrella organization (Center of International Relations and International Cooperation, CIDOB), a provisional timetable was agreed for the titling of six TCO by April 2000. And yet certain disagreements remained between the government and indigenous organizations concerning the criteria for determining the land needs of indigenous

[10] Titulación de territorios indígenas: un balance a dos años de la promulgación de la Ley "INRA", *Revista de Debate Social y Jurídico*, January-April 1999, No. 6, Centro de Estudios Jurídicos e Investigación Social, Santa Cruz, Bolivia.

peoples and for resolving conflicts between indigenous peoples and nonindigenous settlers within the claimed TCO areas. Some indigenous leaders have been highly critical of the methodology applied by VAIPO for determining the spatial needs of indigenous peoples, in that it has underplayed the importance of such traditional activities as hunting and fishing, and has used somewhat abstract formulas for determining future economic needs. Moreover, INRA titling activities have been hampered by the absence of an adequate regulatory framework for implementing the 1996 Land Law. One point at issue is the interpretation of the concept of the *economic and social function of property* (a requirement that nonindigenous land occupants within the TCO have to fulfil, if they are to retain rights over the lands currently occupied by them). INRA application of this concept has been subject to criticism from indigenous organizations and NGOs, who allege that this may serve to consolidate the land rights of substantial numbers of nonindigenous settlers within the TCO. This points to the importance of titling indigenous land areas before issuing individual land titles to nonindigenous settlers, in particular in cases where conflicts are likely to arise.

It is likely that the indigenous peoples of eastern Bolivia would seek a *modus vivendi* with existing colonists, particularly the small-scale farmers, rather than engage in protracted disputes. Indeed some of the indigenous TCO land claims allow for a continued colonist presence, seeking lands in virgin forests rather than those already settled. But the main concerns are that the commercial penetration of this region will continue unless the clarification and titling process is concluded swiftly.

Since the adoption of the 1996 INRA law in Bolivia, a limited number of TCO demands have also been made by Aymara and Quechua indigenous organizations in the highlands. The largest of these claims is for as much as 2.5 million hectares in Potosi department, covering a remote area where an international mining company has now established a presence. Overall, indigenous TCO demands in nontropical areas are being made by such new organizations as the *Consejo Nacional de Ayllus y Markas de Qullasuyu (CONAMAQ)*, which seeks the reconstruction of Aymara indigenous identity. These territorial claims appear also to be motivated by the indigenous conviction that the TCO status will give their communities greater leverage over mineral activities and also water resources, together with enhanced rights to participate in the profits of these activities.

In Colombia, the main emphasis during the 1990s was on indigenous land titling in the Amazon. Despite legal provisions to this effect, less headway has been made in consolidating indigenous peasant *resguardos* outside the tropical areas. According to figures provided by the National Planning Department in 1999, only 18 percent of the population have had its land situation regularized. Of a total indigenous population of over 700,000 persons, 83.88 percent inhabited 534 *resguardos* covering 29.8 million hectares.[11] The vast majority of these are new *resguardos* located in forested regions of the Amazon. An official study indicates that the *new resguardos*, created under the agrarian reform process since 1961, account for over 400 of the *resguardos* and over 97 percent of their acreage. At the same time the *historical resguardos*, while accounting for only 1.84 percent of the acreage, are inhabited by over 240,000 indigenous persons or over 34 percent of their numbers. As a result, it is widely considered that the indigenous peasants of the Andean and Caribbean regions, with their numerous populations, have insufficient lands. The indigenous communities of the piedmont areas of the eastern plains and the Amazon are also considered to suffer from land shortage. By contrast the indigenous peoples in tropical zones, with the exception of some parts of the Pacific, are considered to have ample territory duly recognized and titled (Arango and Sánchez, 1997).

[11] Plan Nacional de Desarrollo (draft), citing post-census study carried out by the National Department of Statistics, DANE, 1997.

The regularization of indigenous lands has been the responsibility of the Program of Attention to Indigenous Peoples (PAI), within the land reform agency INCORA. PAI's main activities have been land acquisition for indigenous communities who have lost their land or have insufficient land, or for restructuring *minifundista* colonial *resguardos*. PAI is also responsible for land ordering within the *resguardos* by purchasing the improvements of colonists presently located within them. INCORA figures by mid-1997 were that some one thousand of the approximately 3,500 colonists within the *resguardos* had been bought out. Yet INCORA's activities in this area have been beset by lack of funds, with its budget reduced sharply over the past year.

A visit to a number of *resguardos* occupied by Paez and Guambiano indians in Cauca province, where most of the country's *historical resguardos* are located, illustrated the problems faced by indigenous peoples at the present time. Almost all of the indigenous leaders interviewed pointed to the need for land ordering and clarification, but lamented the lack of INCORA funds to buy out the colonists. Similarly, while many had ongoing claims for extension of their land areas, INCORA's program had virtually ground to a halt for lack of funds. Problems also arose when claims to historical title had been rejected by INCORA for lack of proof.

Colombia's recent climate, characterized by civil conflict, cannot be considered a normal one for carrying out a land-titling program, particularly a large-scale program for collective land titling in remote areas. Concern has nevertheless been expressed at the lack of headway made in giving effect to the concept of indigenous territorial entities recognized in the 1991 Constitution. The aim appears to be to move beyond scattered or small-scale areas of indigenous landholding, towards entities that can carry out a meaningful financial and political autonomy. By 1999, regulations had not been enacted to implement these articles of the constitution. The incoming government's development plan stresses that priority will now be given to this matter, enabling indigenous communities to formulate their own development plans.

It is difficult to assess the titling process in different regions of Ecuador because of a lack of reliable statistics. The last national agrarian census was taken in 1974. In the absence of a legal cadaster, it is estimated that approximately half of all landowners do not have proper titles. As a rough figure, the World Bank has estimated that some 2.5 million hectares of the lands occupied by indigenous and Afro-Ecuadorian communities remain to be titled (World Bank, 1997).

Significant land titling has taken place in the Amazon over the past decade. Some 25 percent of the Amazon, or over three million hectares altogether, have now been adjudicated to different indigenous groups, and a further 25 percent is covered by areas of nature conservation. Yet there is an evident overlap between indigenous territorial areas, protected areas, and also certain mining and petroleum concessions. Overall, Ecuador has suffered from the absence of specific legislation for titling indigenous lands, from the duplication of titling roles between various State agencies, and from a failure to carry out effective land ordering in the areas where indigenous peoples have received title on paper. In addition, policy shifts and political uncertainty over the past decade mean that much of the titling has taken place on an *ad hoc* basis, sometimes as a rapid response to the pressures exercised by indigenous organizations. A further problem, particularly acute over the past few years, has been the lack of funds enabling State agencies to carry out their titling responsibilities. The main actors have thus been NGOs or international agencies.

Problems in the Amazon stem from the legacy of the earlier land reform period. The IERAC, which is responsible for implementing the 1964 and 1979 land reform laws, carried out some titling in the 1980s, but IERAC tended to favor individual land titling and to seek evidence of economic exploitation as one criterion for the issuance of titles. Titles could be issued to colonists from the *sierra*, as well as to the

indigenous communities of the Amazon region. In 1990, the director of IERAC reported that the then government had legalized 552,000 hectares in the name of 14,843 families, 78.4 percent from indigenous communities and 21.6 percent peasant colonists.[12] Moreover, in accordance with national law, there were no restrictions on the sale of the lands adjudicated.

In the early 1990s, as the pressures from Amazonian indians escalated into protest marches (among other things, against growing petroleum exploitation in the region), the government shifted its policy, and began to issue group titles over substantial and contiguous areas. The Huaorani Indians, comprising some 1,200 inhabitants, received title over more than 600,000 hectares in 1990. The Quichua, Shiwiar and Achuar indians of Pastaza province also demanded similar treatment, conducting a celebrated protest march to Quito, in March 1992. Largely as a result of this, over 1.3 million hectares of Pastaza province have now been adjudicated with title to indigenous organizations.

Yet the problems of this *ad hoc* approach to issuing substantial collective land title without an adequate legal and institutional framework have become evident in Ecuador. Because of the legal ambiguities and the lack of any specifically indigenous legislation, there was never much clarity as to the nature of the indigenous authority in which the title could be vested. While IERAC tended to favor collective title, there was an abundance of individual titles. And there were no clear regulations regarding the key issues of natural resource and subsoil rights, or the relative weight of the claims of colonists and indigenous peoples in the areas covered by collective indigenous titles.

By the end of the decade, titling programs were still being carried out in an *ad hoc* fashion. The 1994 Agrarian Development Law had gone some way towards clarifying titling responsibilities. The INDA had the principal responsibility, but in the Amazon the respective roles and competence of INDA and INEFAN had still not been fully articulated. The World Bank and other international agencies now involved in indigenous land titling have promoted agreements between the two State agencies to facilitate further work in the Amazon region. In the areas presently classified as State forest lands, a 1996 Resolution calls for the demarcation by INEFAN and the titling by INDA of indigenous communal lands.[13] But an overriding problem appeared to be the lack of State funds, meaning that neither INDA nor INEFAN could undertake meaningful initiatives without entering into an agreement with a nongovernmental or international funding agency. INDA officials were unambiguous in this respect, informing the Bank consultants that the State had no resources for land titling.

In Panama, the past decade has seen the creation of new indigenous *comarcas*, and also some important initiatives to safeguard and regularize indigenous lands in the context of infrastructure development projects in Darien province. Yet none of the four indigenous *comarcas* currently recognized under law has been adequately demarcated. In consequence, there are continuing conflicts between indigenous peoples and non-indigenous colonists within the *comarcas*. Moreover, there have been ongoing problems for indigenous groups outside the *comarcas*, who have been unable to secure legal protection for their collective land areas. In part, as was seen earlier, this is due to the lack of an appropriate legal entity for recognizing indigenous lands outside the *comarcas*. But there has also been some administrative uncertainty regarding which State agency should have the primary responsibility for the demarcation and titling of indigenous lands.

[12] Cited in Wilson Navarro et al., *Tierra para la vida*, Fondo Ecuatoriano *Populorum Progression* (FEPP), Quito, Ecuador, 1996.

[13] Resolution No. 001, Registro Oficial No. 27, June 1996.

As previously mentioned, an important event has been the creation of the Ngöbe-Buglé *comarca*. The size of the new *comarca* (624,000 hectares), though significant, is only half of what was originally demanded by indigenous organizations, and has left some 58 Ngöbe or Buglé communities outside the new territory. Thus indigenous organizations are now striving to have the lands of these communities demarcated as annexes to the main *comarca*. A further concern of the Ngöbe-Buglé indians has been the degree of control over mineral development within the new *comarca* because the mineral deposits in Ngöbe territory are extremely rich. In particular, there have been drawn-out disputes over the planned development of the Cerro Colorado mine.[14]

Major challenges for the titling and regularization of indigenous lands stem from the development of Darien province, in particular the road construction project linking Panama and Colombia. The province had been occupied traditionally by indigenous peoples, many of them from the Embera and Wounaan ethnic groups, by black Afro-Darienite communities and also a limited number of colonists. In recent decades, several indigenous communities moved away from their original habitat near the Colombian border to new settlement areas. The colonist influx then increased considerably after the construction of a new road in 1978. The IDB estimates that some 45 percent of the population of Darien are now colonists, 30 percent indigenous, and 25 percent Afro-Darienites.

While Law No.22 legally recognized the Embera and Wounaan comarca in 1983, it has suffered like the rest from the absence of physical demarcation. A demarcation program was finally initiated in 1994, covering over half the *comarca* in its least conflictive areas, though not officially validated by the government. In other areas colonists have resisted demarcation, calling for amendments to Law No. 22. Commissions have since been established in attempts to achieve a negotiated settlement. Furthermore, some sixty Embera, Wounaan and Kuna communities in Darien remained outside the *comarca*. Residing in separate land units, which vary considerably in size, they are still seeking legal recognition for collective forms of land ownership.

In Peru, there has been no concerted government program, aimed specifically at the titling of indigenous peasant and native communities, since the agrarian reform era of the early 1970s. As seen earlier, the current titling programs place their main emphasis on individual tenure. In the *sierra* region titling has been sporadic and has responded to a series of new claims or petitions for extensions and land regularization. Figures provided by the Ministry of Agriculture indicate that, of 5,680 *comunidades campesinas* registered by early 1999, 3,887 had in fact been titled. By contrast, data given to the consultants by the government's indigenous peoples office (PROMUDEH) indicate that, out of a total of over 18 million hectares of *comunidad campesina* lands, only 4,236,598 hectares (or less than one quarter) had been titled. Of the native community lands on the other hand, over half the acreage is estimated by PROMUDEH to have been duly titled by 1999.

In the Peruvian Amazon, one of the first multilateral programs to address collective land titling

[14] Since its discovery in 1932, Cerro Colorado has been known as one of the world's largest copper deposits. Most of the planned mining project together with a proposed highway and hydroelectric project, have been located in Ngöbe territory. Concerns have been expressed about the adverse impact of an open-pit strip mine in the heart of Ngöbe territory, that could affect a substantial part of the claimed land. Government efforts to develop the project in the early 1990s met with local and also international opposition. The Canadian company Tiomin Resources, through its subsidiary Pana Cobre, reportedly received a concession to exploit Cerro Colorado in 1996. Only trial exploration has been carried out, and in a context of low world copper prices no mining activity has taken place to date. Ngöbe authorities nevertheless expressed to the consultants their concern that planned construction could lead to widespread displacement and environ-mental damage, while they have not been involved in the decision-taking process.

was the *Proyecto Especial Pichis Palcazu* (PEPP), undertaken in the 1980s with the support of the Bank, the World Bank and the United States Agency for International Development (USAID). An ambitious scheme for integrated development in the *selva alta* of the Andean foothills, the PEPP essentially promoted Andean settler colonization through infrastructure development, and only included components for the demarcation and titling of native community lands after pressure from indigenous organizations. Overall, the PEPP is now widely seen as an ill-judged project, contributing to the escalation of violence and insurgency in the region. Yet, its titling component, originally developed on an *ad hoc* basis, became a pioneering experience for the titling of indigenous lands. Over sixty communities had their lands demarcated and titled through a process that gave rise to an innovative model of community participation through topographical surveys and other technical work. The model and its methodology were subsequently incorporated in other programs to title indigenous lands in the Peruvian Amazon.

Special Land Titling Programs for other Ethnic Groups

The concept of special land rights for nonindigenous ethnic groups was pioneered in Colombia, where since the mid-1990s, there has been an active INCORA program to title Afro-Colombian lands in the Pacific. The program has its origins in the demands of the Afro-Colombian communities from the Atrato river of Choco department, who protested against plans for a large timber concession within their traditional habitat. Their organization *Asociación Campesina Integral del Atrato* (ACIA) pressed successfully for an 800,000 hectare Area of Special Management, with black participation in natural resource management including control and surveillance of the zone. This can be seen as the first step towards general recognition of collective territorial rights. After the enactment of Law No. 70 of 1993—which recognized the right to collective land titles for black communities in select environmental regions including the Pacific—INCORA undertook a significant collective titling program.

The first community titles were issued in December 1996, when six black communities in Choco department received title to over 60,000 hectares but were subsequently forced to flee because of armed conflict. In 1997, the Grand Council of ACIA obtained collective title over a far larger area of almost 700,000 hectares for almost 8,000 families. After surveying the Pacific region in 1996, the aim was to title approximately half of its 10 million hectares in the hands of black communities by the end of the year 2000, covering seven separate departments. Twenty-three titles had been issued by January 1999, covering 1,200,000 hectares and benefiting some 13,000 families. The objective was to title a further 1,700,000 hectares in the course of 1999 and the remainder in the year 2000.

Colombia's initiatives for collective titling on the Pacific Coast can be considered novel in Latin America, and deserve to be watched with interest. The approach was initially spurred by a new black ethnic movement, which combines environmental and ethno-political concerns. The Pacific region of Colombia represents a unique area of biodiversity, where the interests of ethnic territoriality and biological diversity can coalesce. As a result, it has already attracted the attention of the multilateral financial institutions. The World Bank is financing a natural resource management program in the region, which has components both for the collective land titling of black communities, and for the titling and demarcation of indigenous *resguardos*. Although the IDB is not providing direct support for land titling, it has financed the government's *Plan Pacífico* program of sustainable development for the Pacific Coastal region. The IDB program is concerned broadly with governance, territorial ordering, and the sustainable utilization of renewable natural resources.

The process has since been followed up by the *Proceso de Comunidades Negras* (PCN), an umbrella grouping that comprises several black regional organizations and also community

organizations (*palenques*) organized on a territorial basis. The PCN, aiming to influence both national and international policy development concerning the ethnic rights of black populations, has placed a particular emphasis on territorial themes, land tenure and sustainable land use planning. It is currently developing a pilot project on community strategies for land titling and territorial organization in the southern Pacific. Private donors initially sponsored this project, but additional support for territorial development strategies has been sought from other sources, including the European Union.

The Pacific titling program has encountered a range of difficulties since its inception. First and foremost, it has been an area of growing conflict with an increasing presence of both paramilitary groups and guerrilla forces. As in much of Colombia, drug-traffickers have also been present, perhaps linked with the introduction of new commercial crops. There can be potential problems between indigenous and black communities. Moreover, there can be different perceptions among the black villages and communities themselves, as to the preferred form of titling their lands. Many black community members had obtained individual titles in the past, and can be under pressure to sell the land to new commercial investors. Among those who favor collective titling, there have been disagreements as to the preferred way to carry this out. Politically and environmentally conscious black leaders have insisted that the collective titling should be carried out by river basin (*cuenca*) in order to preserve the region's ecology and allow for collective management of mangrove swamps. Yet the law also allows for an alternative titling mechanism on the basis of villages. A 1998 evaluation of the program criticized its lack of a real strategic vision, in the absence of which territorial conflicts were more likely to arise among the communities concerned (Villa and Sánchez, 1998).

The issue of special land demarcation and titling programs for black minorities has also arisen in other Latin American countries, including Ecuador and Panama. In Ecuador, the new approach can be attributed in part to an initiative by the World Bank, which in 1997 prepared an indigenous and Afro-Ecuadorian development project with a component for the titling of the lands of black communities. And in Panama, the IDB's Darien development project gave rise to concerns for the land rights of black communities.

It has yet to be seen how far the movement for black land and resource rights will spread throughout Latin America. The Colombian initiative was originally restricted to black communities on the Pacific Coast, who were seen as having a unique relationship with environmentally fragile resources in this region. But there has been a growing tendency for other ethnic minorities to present their claims alongside indigenous peoples, whether or not such a *unique relationship* can be identified. An example is Guatemala's Indigenous Accord, where the Garifuna peoples of the Caribbean coast are considered together with the indigenous peoples of Mayan descent. Some parallels can also be found in the Caribbean coastal regions of Honduras and Nicaragua. Where black consciousness movements have existed, they have tended to see their problems as deriving from discrimination and social exclusion, rather than seeking a special or separate status in economic and agrarian issues. Despite the marked trend towards indigenous urbanization in certain countries, black communities are far more likely than indigenous peoples to live in urban areas.

Impact of Overall Land Titling Programs on Indigenous Peoples

Land titling, we have seen, has become an important issue in the post-agrarian reform era. In recent years governments have commenced important land titling and registration programs, of either national or regional coverage, in order to clarify land rights, resolve disputes, and generally improve security of tenure. Notably in countries with an important agricultural sector, this has been a key feature of market-oriented structural adjustment programs. How, if at all,

have such titling programs accommodated indigenous forms of land use, resource management and cultural practices?

Approaches have varied considerably, depending among other things on the size and proportion of the indigenous population, and on whether or not communal and customary land rights for indigenous peoples have hitherto been recognized and secured. In some cases, the programs focus only on individual titling, though instructions may be given that no titling should take place on indigenous lands. This was the case, for example, in a Colombian land-titling program from which the indigenous *resguardos* were specifically excluded.

Mexico and Peru are two countries where recent titling programs have given most emphasis to individual title. In Mexico, the instrument for official titling programs has been the Program to Certify Ejido Rights and to Title House Plots (PROCEDE). First created in 1992 to implement the new agrarian laws, PROCEDE has the powers to issue titles for individual land parcels and household plots, as well as certificates for the use of common lands. The program is free and voluntary. Originally covering only the *ejidos*, PROCEDE was extended in 1996 to indigenous communities. Over its first five years, the PROCEDE program clearly had a major impact on the *ejidos*. Nationwide, almost 80 percent of *ejidos* were officially participating in PROCEDE by December 1997, while 59 percent had received certificates and house titles. The impact on predominantly indigenous *ejidos* and communities has so far been difficult to assess. A World Bank study (1998) observes that indigenous *ejidatarios* are less likely to participate, particularly in the southern states. It finds that indigenous peoples are less likely than other *ejidatarios* to choose the option of *dominio pleno* (full ownership), giving the right to sell land parcels to non-*ejidatarios* without the permission of the *ejido* assembly. Where indigenous peoples did opt for full ownership, the main reason was their desire that children inherit the land. An academic study of Chiapas similarly finds that several indigenous *ejidos* have turned to PROCEDE in order to clarify once and for all the rights of each individual *ejidatario*, though the *ejido* reform has not yet had the desired effect in terms of promoting private investment (Harvey, 1994).

Altogether, there are no indications that titling programs in Mexico have been adapted to any specific needs or demands of indigenous communities and organizations. Some have participated in PROCEDE, though the underpinnings of PROCEDE have also been widely criticized by indigenous organizations. Although the *ejidos* are empowered by law to convert their status to that of indigenous communities, none had legally done so by early 1999. Moreover, no regulations had been adopted concerning indigenous transactions of their *ejidal* and communal lands. The status of indigenous lands, as linked to issues of autonomy and indigenous customary law, has become part of the agenda for political negotiations between indigenous peoples and the State, as reflected in the 1996 San Andrés Agreements.

In Peru, the government has undertaken an extensive land-titling program through the PETT of the Ministry of Agriculture. This is a comprehensive program to establish a flexible rural land market through the regularization of all holdings created under the agrarian reform. Though the program also involves collective titling of native and peasant community lands, if so desired by the communities concerned, the main emphasis has been on individual land titling. The PETT project is examined in more detail in the next chapter because it has received extensive support from the Bank.

Indigenous and Black Participation in Land Demarcation and Titling

An important feature of the past decade has been the growing capacity of indigenous peoples to carry out their own land demarcation and titling programs. Backed by extensive international funding and technical support from foreign aid agencies in Europe and the United States, much

of this mediated through international NGOs and advocacy groups organizations, they have developed considerable technical expertise in mapping, computerization, geodesic surveying and topography, to back up their obvious knowledge of terrain and boundaries. And this indigenous involvement has had an impact beyond the titling process itself, often leading to greater participation in the local political process. As a result of these efforts, indigenous and black peoples' organizations have now developed their own proposals for local development. Such organizations have also drafted proposals for local indigenous enterprises, mainly in extractive industries. Others have begun to negotiate directly with multinational companies, proposing environmental and social criteria for the exploitation of nonrenewable resources within the demarcated areas.

An example of such successful titling programs, carried out in close collaboration with indigenous organizations, can be seen in the Amazon region of Peru. Official titling programs had virtually ceased by the late 1980s, as violence generated by armed insurgency and drug trafficking spread throughout the region. The problems were particularly severe in the central Peruvian Amazon, where thousands of the indigenous Asháninka were forced to abandon their communities. Some land titling endeavors were undertaken with the support of multilateral financial institutions including the Bank, within the framework of large-scale development projects. Several Peruvian NGOs with a technical land titling capacity then entered the area, backed by international support. One of the most successful initiatives was the titling of the Gran Pajonal region, carried out in coordination with the local Asháninka organization. This created an exemplary model of indigenous participation, setting a technical precedent soon to be followed in neighboring areas. However most outside organizations left the area, as the violence escalated.

Faced with this violence, and also increasing abuses from local patrons and encroaching settlers, indigenous organizations then sought international funding for a large-scale demarcation and titling project in the Ucayali region. With Danish assistance, the project was launched under a contract with the Ministry of Agriculture in 1989, carried out essentially by indigenous organizations themselves. By 1995 the result was the granting or extension of titles to 162 native communities, covering over 1.5 million hectares in contiguous territorial areas, and benefiting over 20,000 indigenous inhabitants. This was followed by the creation of seven indigenous reserves, some of them for uncontacted groups,[15] others as *communal reserves*.[16] Four such communal reserves are currently at different stages of legal recognition. The total land area secured by this project is approximately 4.4 million hectares.

Key features of this Ucayali project are its success in pacifying a once violent area and the political mobilization of the indigenous population. Through the land titling process thousands of indigenous Asháninka freed themselves from their debt bondage to patrons and reestablished themselves in native communities. Indigenous candidates actually won local elections in 1995. Moreover, indigenous democratic development in the region has stimulated a number of new economic initiatives and investments (García Hierro, Hvalkof and Gray, 1998). Similar land titling projects have also been launched by regional indigenous organizations of the San Lorenzo and Iquitos region, covering most of the indigenous communities of Peru's lower Amazon floodplain.

In Ecuador the Siona-Secoya, a small indigenous group living within the borders of the Cuyabeno

[15] The so-called *uncontacted groups* have in fact had some sporadic contact with outside elements. They are small indigenous fractions who separated from larger groups at some point, seeking refuge in isolated areas to avoid the deadly impact of slave raiders, extractive enterprises and viral epidemics.

[16] Communal reserves are a special type of protected area provided for in Peruvian legislation, giving bordering communities exclusive rights of access for subsistence activities and the right to control the reserves and maintain integrity from colonist intrusion.

Wildlife Reserve in the northern Amazon, have demarcated their territory with the assistance of European funds. The reserve was originally established in 1978 but extended in 1991, allegedly because of the loss of territory to encroaching settlers on its Andean frontier. The extension more than doubled the reserve area to over 650,000 hectares, now covering areas claimed by indigenous groups as well as oil concession blocks and areas of interest for the ecotourism industry. The reserve now included five different ethnic groups within its borders: the Secoya, Siona and Cofán as original inhabitants of the area; and resettled Shuar and Quichua. Growing oil and tourist activities provoked the Siona-Secoya to claim territorial rights overlapping part of the reserve in 1991. They succeeded in demarcating and mapping over 128,000 hectares, and in negotiating acceptance of the territory as a joint management area. A May 1995 agreement, though not formally recognizing the titles, awarded exclusive use rights over most of the area.

In this case the alliance between indigenous organizations and environmental groups allowed for more control over the activities of oil companies within the reserve, as well as facilitating a partnership with the ecotourism industry. By 1998, Quichua peoples had also demarcated their territory within the Cuyabeno reserve, assisted by the same European donor. Indigenous groups now claim most of the reserve and joint management plans appear to be a fruitful means of preventing further colonization by settlers.

Indigenous and black peoples' organizations played an important role in the recent land titling programs in Colombia's Pacific region. Their pressure was largely instrumental in pressing for the special legislation on minority land rights in the Pacific, referred to in the previous chapter. The black community organization (ACIA) persuaded the government to establish an area of special management. And the PCN continued to develop strategies for collective titling and territorial organization and management for black communities in the Pacific.

In Panama, indigenous organizations have undertaken a number of initiatives to title their own lands. In 1993, the Embera General Congress, supported by a national NGO and funds from the Austrian Government, initiated territorial demarcation within the Embera *comarca*. The project was undertaken in coordination with the National Boundaries Commission of the Ministry of Government and Justice, and succeeded in demarcating most of the territory. The Embera and Wounaan congress has also mapped its territory, indicating in the cartography the cultural use that indigenous peoples make of their lands. Also with Austrian funds, the Association Napguana carried out partial demarcation of the Kuna *comarca* after 1993, aiming to identify the most conflictive areas with the presence of colonists, to avoid further settler encroachment and deforestation.

International Agreements and Binational Indigenous Territories

Finally, mention should be made of efforts to consolidate indigenous territorial areas when they straddle national borders. Many indigenous groups have found themselves on opposite side of such borders. Examples are the Embera-Wounaan between Colombia and Panama, the Yanomami between Brazil and Venezuela, some Mayan groups between Guatemala and Mexico, and the Aguaruna and Huambisa between Ecuador and Peru. The ILO's Convention No. 169 calls on governments to take appropriate measures, including by means of international agreements, to facilitate contracts and cooperation between indigenous and tribal peoples across borders.

The importance of the issue can be illustrated by recent proposals for Peru and Ecuador. As a result of a recent peace and border agreement between these two countries, a general plan for development and border integration is now under consideration, with support pledged by international donors including, reportedly, the Bank and the World Bank. Governmental representatives of a Binational Development Plan for

the Border region have also submitted an application to the European Union, seeking substantial funds for development projects for the region.

As the disputed border line is in the center of Achuar, Aguaruna, Huambisa and Shuar indigenous peoples, Ecuadorian and Peruvian indigenous organizations have at the same time been negotiating a *binational plan of integrated sustainable development* for these four indigenous groups. While the initiative is at an early stage, it could present an important alternative to conventional border control strategies of peasant colonization or the establishment of industrial plantations. Similar initiatives have been taken by the Secoyas of Ecuador and Peru, also aiming to establish a binational indigenous reserve. And the Quichuas of Ecuador's Pastaza have also planned to develop an integrated binational program of development, trade and cooperation with their Quichua counterparts on the Peruvian side of the border. The initiative is important in that it covers a zone, which, while under military control for decades, might easily be subject to unrestricted colonization in the aftermath of the border agreement. It calls for a special emphasis on developing an adequate land titling strategy in collaboration with the indigenous organizations.

VI. SUPPORT FOR INDIGENOUS PEOPLES IN LAND POLICY AND TITLING INTERVENTIONS: COMPARATIVE REVIEW OF THE IDB AND OTHER INTERNATIONAL ACTORS

This chapter reviews the land titling experience of the Inter-American Development Bank, and of other international actors as considered relevant. In doing this, it aims to cover both policy and operational aspects. To what extent does the Bank, so far, have a consistent policy or guidelines in the area? If so, how are these applied? Analysis of operational aspects gives most emphasis to the four countries visited during this study; namely, Colombia, Ecuador, Panama and Peru. Reference is occasionally made to other countries, where documentation has been available.

Bank Policy and Indigenous Lands

It is difficult to detect any broad Bank policy in this area. Indigenous groups are highlighted in the Bank's overall strategy for poverty reduction, but no specific attention is given to the land or agrarian dimensions of indigenous poverty (IDB, 1997). A more recent strategy paper on rural poverty reduction (IDB, 1998a) gives some attention to indigenous peoples, together with gender concerns. It observes that, historically, women and indigenous communities have lacked equitable access to land, credit, capital and extension services. Yet the needs of indigenous peoples are not addressed separately in the identification of strategic approaches and options or strategic Bank activities. Overall, this paper sees land titling and cadaster programs as part of the package to ensure efficient market entry, together with such strategic interventions as the establishment of land banks and market-assisted reform schemes.

The Bank's policy paper on involuntary resettlement (IDB, 1998b) contains some specific safeguards for indigenous communities and their lands. This is most relevant to infrastructure and public works investment operations that can potentially have an impact on indigenous communities. The Bank will only support operations that involve the displacement of indigenous communities or *other low-income ethnic minority communities in rural areas* if it can ascertain that their customary rights will be fully recognized and fairly compensated. Compensation options include land-based resettlement. A background paper clarifies that, in order for the Bank to support operations that require the displacement of indigenous communities under exceptional circumstances, it would have to ascertain that full guarantees are in place for their rights as indigenous people to land and resources, including land titling and demarcation.

Finally, a 1997 publication that identifies the Bank's role with regard to indigenous peoples and sustainable development (Deruyterre, 1997), places emphasis on communal tenure as a key aspect of indigenous rights to land and natural resources. One of the key challenges ahead is ensuring that indigenous communal land tenure systems are respected and strengthened.

Operational Issues: Overall Bank Approaches

The titling and regularization of indigenous lands has required attention in different kinds of Bank project. First, there are the land titling projects of national or regional coverage, which are expected to have some impact on indigenous communities. Examples are the national projects in Colombia and Peru, and the regional Veraguas project in Panama. Second, there are

infrastructure projects that, while not targeted at indigenous peoples, require the demarcation of indigenous lands in order to mitigate or prevent any adverse effect. An earlier example is the indigenous land rights component of a 1985 loan to Brazil, to finance a major highway in the Western Amazon. A more recent example is the Darien Sustainable Development project in Panama, the centerpiece of which is support for the Pan-American highway. A third kind of project is the regional development initiatives that are targeted in large part at indigenous communities or other ethnic minority groups and may have a land titling component. Examples are the Pacific Coast Sustainable Development Program in Colombia and the Sustainable Development Project in Guatemala's Peten region. Finally, there are broader policy loans that, while not directly concerned with indigenous issues, can have implications for the manner in which land titling and registration programs are carried out in rural areas of indigenous occupation. An example is Ecuador's Agricultural Sector Program, one component of which recommended reforms for land legislation as it affected indigenous communal lands.

There have been significant differences in the approaches to indigenous peoples in these Bank projects. In part, this may be due to the fact that systematic attention has only been paid to indigenous issues in project preparation since the creation of the Indigenous Peoples and Community Development Unit in 1994. The differences are best illustrated through a comparative review of some of these projects.

Colombia

There was no opportunity to review the Bank's country program for Colombia as a whole. Many ongoing projects were being revised at the time of the country visit because a new government had recently taken office. Two projects were considered of most relevance for this analysis. One was a national land-titling project with ample reference to indigenous peoples in the *resguardos*. The second was a sustainable development project for the Pacific Coastal region, of obvious relevance for both indigenous and black communities in the project area.

The Program for Land Titling and Modernization of the Registry of Deeds and Cadastre (CO-0157) generally seeks the consolidation of an *open, transparent land market in urban and rural Colombia*. Its first two objectives are fairly conventional ones for a land titling project, namely to legalize land ownership by officially recording the deeds, and to modernize the deed-recording and cadastre systems. Yet it has the third objective to *protect environmentally fragile areas and safeguard the collective rights of ethnic minorities against the potential effects of land titling operations in rural areas*. It is seen as an environmental benefit that the program will *help protect the country's environment and native cultural traditions by prohibiting land titling in environmentally fragile areas, indigenous* resguardos*, and black communities' collectively held lands*.

In this project, the concern is evidently to mitigate the potentially adverse impact of individual land titling on indigenous land tenure systems. To this effect, a limited budget is set aside for the geo-referencing of indigenous *resguardos* in the rural municipalities covered by the program. The project documentation observes that the land adjudication process has brought heavy pressure to bear on indigenous *resguardos* and reserves, with peasants and indigenous people competing against each other for the land. Such conflicts have led the government to continue its program of creating indigenous *resguardos* on fallow lands, and to legalize title to the lands already acquired for indigenous communities.

The project could not be examined in any depth in Colombia because it was not yet under way at the time of the country visit. Bank officials in Washington, D.C. and Bogota stated that the newly elected Colombian Government was revising the project to relate it more closely to the emerging peace process. Yet the project does not seem to respond to the main concern voiced by indigenous organizations and land reform

officials in Colombia, namely the lack of funds to purchase additional land for the indigenous communities in the greatest need. This is a matter of crucial importance in Colombia, given the exclusive emphasis on market-assisted land reforms in recent agrarian law and policy.

The Pacific Coast Sustainable Development Program (CO-0059) is only indirectly concerned with land use and management. However, it is part of a comprehensive regional development project, taking place in a region where major initiatives have been under way for the collective titling of the traditional areas of both Afro-Colombian and indigenous communities. A program for the titling and demarcation of indigenous *resguardos* in the Pacific region, and initial activities geared to collective land titling for Afro-Colombian communities, have been financed by the World Bank.

The IDB program has the broad objectives of alleviating extreme poverty in Colombia's Pacific coastal region, an area of enormous biodiversity. Specific objectives cover governance and territorial ordering, including the strengthening of community organizations; the provision of basic services; and sustainable productive activities, including the sustainable utilization of renewable natural resources. To ensure that the program is sensitive to ethnic concerns, its coordinating committee is to include representatives of the indigenous population and Afro-Colombian residents.

The program is designed within the framework of the Colombian Government's *Plan Pacífico*, first proposed in 1992 as a new development strategy for the Pacific coast. Other major initiatives under the Plan include the World Bank's Program for Natural Resource Management, which includes specific land titling components; and the BioPacific project financed by the Global Environment Facility and the Government of Switzerland, which will study and preserve the region's biodiversity.

Panama

The Bank's country program for Panama gives high priority to indigenous development and the safeguarding of indigenous lands. Bank strategy identifies among the principal social challenges in that country the fact that development has bypassed indigenous groups. Some of the problems that the indigenous population faces include the absence of regulations to implement legislation guaranteeing their access to land under the *comarca* modality and the absence of policies to ensure compliance with such legislation. Bank support for participatory local development is to pay special attention to the needs of indigenous ethnic groups regarding access to social services, productive activities and land management. The Bank will support the resolution of environmental disputes, particularly in the case of indigenous groups. Furthermore, Bank support for an appropriate legal and institutional framework for the mining sector will take into account the rights of indigenous groups affected by the concessions.

Three Bank projects in Panama were considered of some relevance for this study. They are: a project for the sustainable development of Darien (in the pipeline at the time the fieldwork was conducted, but approved shortly afterwards), a land titling project in Veraguas province and a project to support the mining sector.

The Program for Sustainable Development of Darien (PN-0116) is obviously of immense relevance for the Embera, Wounaan and Kuna indians who have traditionally inhabited this region, and whose land security could be threatened by construction of the Pan American highway and ensuing settler colonization. The project has broad-ranging objectives, including: environmentally sound territorial ordering; the reduction of deforestation and conflicts over resources; stabilization of the agricultural frontier; and strengthening the administrative capacity of public and local institutions including those of indigenous peoples.

The Darien project has one component for a land cadastre, demarcation and titling. Over a six-year period, it aims to title all of the 5,000 plus farm plots in the Darien region (only about 246 farm plots had title at the beginning of the project, although there is an active informal land market). The project also includes the physical demarcation of the Mandungandí *comarca* in Panama province. A prerequisite for its success is the enactment of a new Darien Law, setting the framework for the territorial ordering. Moreover, the project also envisages the collaboration of the various land claimants (indigenous, Afro-Darien and other settlers) in order to seek peaceful settlement to existing and potential land conflicts.

Careful attention was paid to indigenous concerns during the preparatory phase of this project. A series of studies identified the present-day patterns of indigenous land use and their demands, as well as the areas of conflict between indigenous peoples and outsiders.[17] The consultants who carried out the research contacted the indigenous organizations in Darien, made a rigorous study of existing law and administrative arrangements on indigenous land rights, and formulated some recommendations that were taken into account in project design. In particular, they pointed to the large number of indigenous communities in Darien province, which remained outside the existing *comarcas*, and whose land use had not been regularized. Their land areas had been under constant pressure from settlers, notably those that bordered the Pan American highway. Repeated efforts to have these lands demarcated and titled had not succeeded, mainly because there was no suitable legal entity to recognize collective land areas outside the *comarcas*. The land reform authorities were unable to title land areas in excess of 200 *hectares*. Further problems arose from the fact that several indigenous communities were located within the borders of the Darien National Park, created in 1980 and placed under the jurisdiction of the national environmental authority (now, ANAM). As in other regions of Panama, there appears to be latent conflict between local communities and environmental authorities concerning the utilization of natural resources in these conservation areas.

Interviews conducted by the authors of this report in Panama City and Darien pointed to continuing ambiguities over government responsibilities for titling indigenous lands. And while the project has been carefully prepared, the project document does not specify the manner in which indigenous land areas outside the *comarcas* will be secured. The project places much of its trust on collaborative methods, in the hope that these will resolve conflicts at the local level.

The Agricultural Services Modernization Program (PN-0032) is a fairly conventional project, which aims to improve agricultural productivity through activities that include land titling. One of the four specific objectives is to expand land-titling coverage. The land-titling program, to be carried out initially in the province of Veraguas, has components relating to a rural cadastral survey, cadastre updating, the titling of public lands, and institutional strengthening. Overall objectives of the land titling subprogram are to facilitate access to technology, greater use of credit and the increase of investment, by encouraging greater security of tenure and the development of a transparent land market. Interestingly, although the preparation of this project coincided with the final stages of the negotiations over the Ngöbe-Buglé *comarca* (a small part of which is located in Veraguas province), there is no reference to indigenous concerns in the project document. However, as in the case of Darien, at least fifty indigenous communities are located outside the existing boundaries of this *comarca*. Moreover, there is now an urgent need for physical demarcation of the boundaries of the Ngöbe-Buglé *comarca*, to avert future conflicts as land prices most likely escalate in the context of an effective land titling program. At a meeting with the authors, nonindigenous peasant

[17] In particular: Programa de desarrollo sostenible de Darién: dinámica sociodemográfíca y tenencia de la tierra, POTLATCH consultants, Report No. 1, May 1998 (unpublished report).

leaders from the region stressed the importance of such demarcation at the earliest possible opportunity. Thus, the design of the Veraguas project represents a missed opportunity for the Bank, if it wishes to pay heed to indigenous concerns in the framework of general land titling projects. A component for the demarcation of the *comarca* itself, and for addressing the land claims of indigenous groups outside the *comarca* would have been an important contribution.

The Program to Support the Mining Sector (PN-0114) is a project undertaken with the Ministry of Commerce and Industry, aiming to improve the legal and institutional framework for promoting private investment in this sector, in harmony with the rights and interests of rural and particularly indigenous communities. This is of considerable potential interest to indigenous peoples in a country where so much mineral prospecting is now taking place in indigenous areas. The project document itself observes that as much as 70 percent of potential concessions are within indigenous *comarcas*. As seen in earlier chapters, some of the indigenous legislation for specific *comarcas* goes further than other Latin American countries, in providing for indigenous participation in profits and also a measure of control over mining activities. The project only got under way in mid-1998, and it was only possible to have a brief discussion with the responsible Bank project officer in Panama. A Canadian consultant had been hired to contribute to the component on indigenous community participation, but no further information was available at the time of the country visit.

Overall, the Bank appears to be giving much attention to indigenous concerns in its Panama program. There is a strong focus on environmental issues and care has been taken to consult with indigenous organizations at both national and local levels. The approach goes beyond one of mitigation alone, to address the rights of indigenous peoples in such strategically important issues of mining. Legal and administrative reforms that enable indigenous peoples to title their lands collectively are a prerequisite for the effective protection of indigenous land rights in land titling and sustainable development programs. However, problems can be anticipated as long as these issues are addressed only at the local or provincial levels. The *comarca* structure has proved an effective one for preserving indigenous cultures and integrity and providing an economic basis on which to build development initiatives. Support for the demarcation of existing *comarcas* would be a useful contribution towards furthering this cultural integrity. More importantly, however, there is need for strategic planning (in consultation with indigenous organizations) to find the appropriate mechanisms for addressing indigenous land claims more generally. This is an important aspect of governance and local development in Panama and could usefully be addressed by the Bank from this perspective.

Furthermore, the Bank would be well advised to channel direct technical support to indigenous organizations for land mapping and titling. Some communities have already begun to demarcate their lands in order to stem further land claims by encroaching colonists. IDB technical support would be the firmest possible demonstration of the Bank's commitment to involving indigenous peoples and their organizations in the technical issues surrounding the sustainable development of Darien.

Peru

Indigenous issues have, for the most part, received little specific attention in the Bank's country strategy for Peru, which emphasizes the consolidation of economic reforms and modernization of the State, including reforms to the agricultural sector. The primary goal of the agricultural strategy is to promote private investment and reduce the incidence of poverty by means of properly functioning factor markets and technological development to increase rural productivity and competitiveness. As a result of this focus, only small projects have been targeted at indigenous peoples or indigenous issues, none of which specifically concern indigenous land rights or titling.

One Bank project was nevertheless considered of particular relevance for the study, given its implications for peasant and native communities: the Land Titling and Registration Project (PE-0037), originally approved in late 1995. The project's main objective is to support the establishment of a flexible and transparent land market through conclusive regularization of the ownership of all farm holdings created during the agrarian reform period the modernization of the rural cadastre; and the establishment of a single automated system for registering rural property. Most recent activities have taken place in the Pacific coastal region where most commercial farming is concentrated; however, the project was originally designed to have national coverage.

The project has four components: land regularization, through land titling and the regularization of private holdings; cadastre; public registry; and management and monitoring of renewable natural resources. The land titling component aims to finance the activities of the PETT (*Programa Especial para la Titulación de Tierras*), to conclude the awarding of areas subject to agrarian reform that are in the hands of the State, and also the titling of areas that have been awarded but whose ownership has not yet been transferred to current. This component was designed to cover some 300,000 properties chiefly located in the Andes and the *selva* (jungle). The land regularization component was designed to cover an additional 300,000 properties, legalizing the tenure of land that already belonged to private owners. The final component involved updating the cadastre in agrarian reform areas to record the holdings in the real estate registry and establish a modern system to establish and maintain the rural cadastre. The original goal was to survey close to 1.1 million properties.

The project document views land ownership rights as having been deeply undermined by the agrarian reform process that began after 1969. This process awarded over nine million hectares to 438,000 beneficiary families; however, it only actually issued 66,000 property titles over 5.1 million hectares and most of it has not been registered. Property fragmentation has become a problem. An estimated 400,000 families belonged to associations that held land communally; they have now largely divided up their holdings.

The Bank played an active role in promoting the 1990s land legislation (described in the previous chapter) which facilitates the privatization of land. The dialogue between the Bank and the government has focussed on *removing lingering constraints and restrictions on land and water markets, which stem from the legislation that that was in effect during the agrarian reform. It was agreed with the government that the introduction of land and water legislation in Congress would be a condition to processing investment land titling and irrigation investment projects.*

The reduction of rural poverty was a key objective of the project. Regression analyses conducted to calculate the likely impact of land titling on farm size and rural incomes suggested that liberalization of the land market accompanied by land titling would *increase average farm size significantly*, with the concentration of property seen as a gradual and long-term process. According to the simulation, optimum farm size was less than 20 hectares on the coast and not more than 60 hectares in the jungle.[18] The liberalization of land market was also considered to have *a positive and significant impact on agricultural wages on the coast, but not in the jungle*. The estimates indicated that a successful land titling and registration program would lead to a 35 percent increase in net agricultural incomes, the impact being particularly beneficial for the poorest quintile of the population.

The project design shows no indication of any consultation with representative indigenous organizations. It would not have been an easy task to find a suitable counterpart in the Andes and

[18] It should be noted that the emphasis is on farms, rather than on indigenous forms of production in the *selva*. There is no evidence in the project documentation that these have been taken into account.

the coast for an exercise of this sort because peasant organizations have not identified themselves as indigenous and national peasant organizations have also lost much of their influence over the past decade. This would not have been the case in the *selva*, where an important process for the titling indigenous lands has been underway since the time of the agrarian reform. However, the National Natural Resources Authority (INRENA) made provisions for studies to monitor the project's impact on particularly vulnerable groups such as indigenous communities.

An environmental appraisal undertaken on behalf of the Bank and the Ministry of Agriculture when the project began attempted to assess the potential impact on the peasant and native communities.[19] The report argued that titling would not lead to the eradication of peasant communities, although there would be some changes in their role. Traditional activities such as communal labor were still evident even in communities that had been almost totally divided into individual parcels. However, the roles of the communities were changing; they were increasingly assuming roles such as purchasers of agricultural inputs, marketing of the harvest, and guarantors of credits. Although the role of titling and registration programs for native communities should be to preserve cultural diversity, and under no circumstances to lead to land parceling, the study warned that, in some areas, the native communities no longer served their original purpose and that outsiders had often married into the community to obtain land titles. The study made some important recommendations, such as the need for legal support units to advise communities on the implications of the titling and registration process.

During their time in Peru, the authors made every effort to assess the impact of this project on indigenous peoples and their lands. Meetings were held with the PETT national leadership in Lima and with PETT and Ministry of Agriculture officials in several parts of the Andes and the *selva*. Yet, some issues were difficult to determine, including the distinction between Bank-funded and other titling and registration activities. The following account captures the main elements and views expressed.

Full statistics are not currently available concerning the titling and registration of peasant and native communities. A senior PETT official stated that some 310 peasant communities per year are now being titled and that 1,772 remain to be titled. The titling of 139 native communities was currently pending, though 85 percent of these had requested an extension of their boundaries. As of November 1999, the project had completed the physical and legal clarification of property rights to 1.7 million parcels, of which close to 700,000 had been registered in local public land registries. It is anticipated that the remainder of the titles will be issued through the completion of this project, and a new phase scheduled to commence in the year 2000. Approximately 12 percent of these titles cannot be registered for a variety of reasons, including outstanding land conflicts (2 percent to 4 percent).

The program has undergone changes in orientation and working methods. The program began mainly in the departments of Piura and Tumbes by means of contracts with service enterprises. It now operates through its own regional teams, working in close cooperation with the Ministry of Agriculture, and the main area of activity is now in the commercially dynamic coastal regions where the demand for individual titling is evidently the strongest.

The PETT program is principally dedicated to individual titling. However, there are provisions for the titling of peasant and native communities. During the first three months of 1999, for example, 84 peasant communities and 23 native communities received titles and titling of an additional 575 peasant communities and 106 native communities was planned. Interviews conducted by the authors pointed to some

[19] Evaluación del impacto ambiental del proyecto de titulación y registro de tierras, Ministerio de Agricultura y Ganadería y Banco Interamericano de Desarrollo, September 1995 (unpublished document).

markedly different perceptions concerning the project's basic approach. In Cuzco and Satipo, for example, representatives of the ombudsman's office were highly critical of the attitude of PETT officials and of their lack of understanding of indigenous and Andean cultures. Yet, some interviews in the Andean *sierra* painted a more complex picture. PETT officials in Cuzco and Puno distinguished between areas where there was strong demand for individual titling and others where there was a firmer communal tradition. Their aim was not to promote one land tenure system over the other and cited examples where communal land titles had been issued (including an invitation to the authors to participate in a titling ceremony in the Puno region). Bank officials have clarified that, specifically in the case of this project, there are restrictions on the types of land that can be titled, and there is no promotion of one land tenure system over another.

Moreover, despite some recommendations to this effect in the earlier appraisal reports, there were no signs of any educational or training programs for the communities that received land titles, or of any integrated follow-up services. In one community, on the day that a collective land title was issued, community leaders asked the authors of this report what the implications of the land title were and expressed concerns that the titled lands could still be claimed by a former landowner. In fact, the titles issued by the project serve as evidence of full property rights. And once they are duly registered, only a judicial finding against the public registry could overturn the registered title. However, given the uncertainties over this issue at the local level, there is a need to expand a legal rights and public awareness component of the project, including the training of community representatives.

The Peruvian experience yields a number of lessons regarding the involvement of indigenous and other communities. The privatization and parceling of communal lands is a highly sensitive issue, which threatens to weaken the social fabric. There may be persuasive economic arguments for legalizing individual tenure when communal lands have already, in practice, been parceled out among community members. The social role of the community may also be evolving in accordance with changing economic opportunities and policies. But it is absolutely vital that such a program be discussed in detail at local and national levels with representative organizations of the indigenous and peasant populations. And where sensitive law reforms are being promoted as part of the program, it is equally important to have the collaboration of the social actors involved. There should be mechanisms within the program for ongoing involvement by indigenous organizations, as required by the ILO's Convention No. 169 now ratified by Peru. And there should be integrated follow-up to the titling and registration components, to ensure that communities are fully aware of the law and its application.

Ecuador

The case of Ecuador is similar to that of Peru. Both are Andean countries with a substantial indigenous population living in both highland and lowland regions although, in the case of Ecuador, the greatest concentration is in the Andean highlands. A key difference between these two countries is that indigenous peoples through their representative organizations are now important political actors in all parts of Ecuador and their participation is evident, for example, in several articles of the 1998 constitution. It has also had implications for the Bank's country strategy and program development.

The Bank's most recent country strategy (prepared under a previous government) pays little specific attention to indigenous peoples as a target group. It observes that they figure among the poorest groups in Ecuador and identifies the need for a study on the problems of the indigenous population, to define the range of their specific problems in the political, economic and social areas. A comprehensive study on indigenous poverty and development in Ecuador was undertaken on behalf of the Bank in 1999 (Encalada et al., 1999). Support has also been given

to indigenous organizations through the Bank's small projects facility, however, this support was not directly related to land titling issues.

The authors paid most attention to the Agricultural Sector Program (EC-0048) approved for Ecuador in 1994. This projects provides for broad-based support to the agricultural sector with a strong emphasis on legal and policy reforms. Project documents assert that a prerequisite for achieving agricultural growth and higher incomes for low-income producers is *overcoming distortions and constraints on legal, institutional and policy matters*. As a result, one of the actions is to liberalize land and water markets by modifying the legal framework, and another is to reduce intervention in marketing by state institutions and restructure agricultural enterprises in order to free up fiscal resources now going to medium-sized and large-scale producers. The project also proposes the reorganization of the Ministry of Agriculture, eliminating national programs that intervene in production and marketing activities, and promoting private sector organizations. The Ministry is to be organized around several essential processes, including policy setting and land-use planning. The project foresees the strengthening of the institutional framework for renewable natural resources, including strengthening environmental management at the national and sector levels.

The project's background and the Bank's analytical framework for program design are fairly similar to those already described for Peru. Ecuador's 1964 Agrarian Reform Law is viewed as having worsened the security of land tenure and acted as a disincentive to investment and the conservation of renewable natural resources. For example, most land transactions required prior state authorization. The reform encouraged awarding land to communities and cooperatives, which came to control some three quarters of the farms larger than 100 hectares, while the legislation prohibited the free transfer of this land and limited the minimum size of holdings that could result from a process of subdivision. Yet most holdings have, in fact, been subdivided through an informal land market, their owners lacking access to credit from financial agencies and having little incentive to increase their levels of investment. Finally, the analysis sees the awarding of land titles by the then state land reform agency (IERAC) as *drawn-out, inefficient and bureaucratic*.

Thus program actions have included the enactment of the 1994 Agricultural Development Law, which repealed the 1964 Agrarian Reform Law in order to promote market-oriented agricultural policy objectives.

Only a small part of the project touches upon land titling *per se*, even though the law and policy reforms are bound to have major implications for land tenure. In forest areas, the project analysis points to the environmentally unsustainable effects of the agrarian reform and IERAC's implementation of it. IERAC's requirement that the land be farmed as a condition for granting title also required, to a certain extent, that forests be destroyed prior to awarding titles. The project thus provides for support to the INEFAN for designing a land-titling plan in coordination with the new INDA.

Furthermore, a technical cooperation subprogram provides support to INDA, the agency responsible for implementing the new Agricultural Development Law. Support is to be provided for, *inter alia*, the analysis of land conflicts, preparation of the strategy for land registration and titling, preparation of a land information system, and regular analyses of the impact of institutional policies and enforcement of current legal provisions. Other activities included regulations redefining INDA's functions to focus on land registration and titling in rural areas and provisions relating to the treatment of community property.

The program takes indigenous concerns into account in different ways. First, some indigenous participation is built into the INDA technical cooperation program because indigenous and rural persons will elect their representatives to the INDA Board of Directors. Second, a policy letter addressed to the Bank President before the

project's approval states that *The government intends to guarantee property rights and facilitate the unrestricted operation of the land market while ensuring the sustainable use of renewable natural resources and protecting the rights of indigenous and* campesino *communities.* And under the plan of operations for the land registration and titling component of the technical cooperation program, advisory services to INDA are to evaluate the impact of the new legislation on indigenous and farming communities.

An assessment of this program as it affects the tenure and titling of indigenous lands is clearly not easy. The program has no operational land titling components, given that it is a fast-disbursing balance of payments operation. Moreover, it was designed and implemented at a time of considerable economic and political turbulence in Ecuador. The agricultural policy reforms were themselves designed at a time of considerable indigenous militancy, including the indigenous uprising of 1992 demanding further land distribution. Widespread indigenous opposition secured the amendment of an earlier version of the 1994 Agricultural Development Law, in order to recognize the ancestral possession of their land by indigenous, Afro-Ecuadorian and *montubia* populations.

This program resulted in several policy reports (written mainly by agricultural economists from the United States), and a small booklet of accomplishments published by the Ministry of Agriculture. The reports make little reference to indigenous concerns, beyond criticizing the provisions of the 1937 Communes Law which are seen as an anachronistic restriction on the freedom of land market operations. A technical study for an INDA System of Inventory and Land Titling (SITT) was published in February 1998, but it makes no reference to questions of indigenous and communal land tenure. A Bank mission in early 1998, conducted jointly with the World Bank and FAO, pointed to continuing grave deficiencies in the database around which titling policies could be constructed. In the absence of an agrarian census since 1974, there were no reliable statistics concerning state, communal or individual properties.

The most serious problem found by the authors was the weakness of the state institutions, including INDA's limited resources to carry out systematic land titling programs. As observed earlier, almost all land titling programs in which INDA has participated have been funded through agreements with national and international NGOs and, most recently, with the World Bank. There has been some collaboration between INDA and INEFAN, but ambiguities remain regarding each agency's responsibilities for land titling.

The new Ecuadorian constitution, particularly its provisions concerning the inalienability of community lands and those on the indigenous and Afro-Ecuadorian territorial areas will now pose some major challenges. There are other huge challenges to carry out the physical demarcation of the vast territorial areas of the *selva*, where a program of land clearing is necessary to secure the lands over which indigenous communities have already been accorded title. Finally, there are the problems of overlapping between the protected areas under INEFAN patrimony and the lands adjudicated to indigenous peoples.

What additional elements might have been incorporated within a project of this nature, either to enhance indigenous participation, or to make it more sensitive to indigenous concerns? First, it would have been useful to incorporate more baseline studies concerning the social and political as well as economic functions of the *comunas*. The Bank's entry point for analysis has been a largely negative attitude towards the legislation on the *comunas*, seeing this only in terms of restrictions on land market operations. Yet this position has apparently not been based on empirical analysis or fieldwork. As is clear from the Bank's documentation, it has little idea how land transactions take place within the *sierra* communities, how land is allocated for communal pasture, what active demands there are for land titling, and what economic arguments (such as taxation) might be put forward against a titling

program. A baseline study of this nature, carried out with the participation of indigenous communities, could have helped inspire more peasant and indigenous confidence in the program. It would also have placed the Bank in a sounder position to assist the process of territorial ordering, which should now be implemented in accordance with the 1998 constitution.

In the Amazon, where the sector program places strong emphasis on environmental concerns and the role of the state agency, there could have been far more emphasis on the area of actual or potential conflict between indigenous peoples and state agencies, as well as the mechanisms for improving collaboration between them. Ecuador has experienced particularly strong conflicts between indigenous peoples and petroleum companies, conflicts that may well escalate in the years to come if an adequate normative framework is not devised. While indigenous communities are sometimes negotiating directly with multinationals, they also expect some leadership from state agencies in determining the parameters of such negotiation. As observed earlier, these problems can be most serious in the areas that are traditionally occupied by indigenous peoples but nevertheless recognized under law as state patrimony. A subprogram addressing such concerns, carried out with the participation of indigenous organizations, might have strengthened the environmental component of the sector program.

Land Titling Projects of Other International Agencies: Comparative Assessment

The World Bank seems to have been the most active international agency in the field of indigenous land titling. In the 1980s, it financed a range of so-called *Amerindian special projects* in lowland South America, many of them aiming to mitigate the potential adverse impact of large-scale development projects through special components for the demarcation and titling of indigenous lands. A review of this experience was published in 1991 and covered thirteen such projects (Wali and Davis, 1991). It concluded that the early demarcation and regularization projects had been instrumental in protecting forest-dwelling indigenous peoples in the lowlands. At the same time, the land regularization would not be sufficient in itself to protect indigenous peoples' land security. Thus, more recent World Bank projects were linked to the promotion of sustainable development, incorporating indigenous peoples' knowledge of natural resource management and environmental conservation.

During the 1990s, the World Bank's concern for indigenous peoples in Latin America has progressively extended beyond the tropical lowlands and now also includes the indigenous peasant populations of Mexico, Central America and the Andes. A revised operational directive on indigenous peoples, issued in 1991, included a broader range of population groups than hitherto. An important feature of the new directive is that, for an investment project that affects indigenous peoples, the borrower should prepare an indigenous peoples' development plan consistent with the World Bank's policy. Any project affecting indigenous peoples was expected to include components or provisions that incorporate such a plan. The new policy could require consultation with representative indigenous organizations whenever a land-titling project of national coverage is undertaken in a country with a significant indigenous population.

The practical implementation of this policy is well illustrated by the World Bank's Guatemala Land Administration Project, approved in late 1998 after several years' preparation. The project consists of three components: cadastre and land regularization, land registry, and a project management unit. The World Bank project is part of a longer-term National Land Administration Program, financed by a number of international donors as part of their support of the Guatemalan peace process. The broader program's aims are to increase land security in Guatemala and strengthen the legal and institutional framework for land registry and cadastre services nationwide. The World Bank's support is essentially for a pilot phase of this program in

the tropical Peten department, where approximately half of the population is indigenous.

In the initial design of this project, the World Bank conducted a series of consultations with indigenous organizations at the national level. Consistent with its operational directive, it aimed to formulate a multi-sector indigenous people's development strategy. Consultations were also held with Mayan elders and leaders, in conjunction with the government's National Peace Foundation (FONAPAZ). Indigenous peoples were thus able to formulate their own preferences as to the area where the pilot phase of the program should start and to participate in the negotiations. Moreover, the World Bank aimed to design and negotiate the project by reference to sector accords of the Guatemalan peace process, in particular, the indigenous and socioeconomic accords.

In Peten, a social assessment was carried out to understand indigenous aspirations with regard to land titling.[20] It found that most of the predominant Mayan group, the Q'eqchi indians, preferred individual titles, unlike the Itza Maya who preferred communal arrangements. It was also found that among the Itza and Q'eqchi existing legal options were in conflict with traditional beliefs about land holding. As a result, one of the recommendations was the establishment in each municipality of a bilingual legal office to assist local people with land claims. These offices should be staffed with Q'eqchi lawyers in southern Peten, to help adjudicate land claims in ways consonant with Mayan customary law and the peace accords. The assessment also pointed to an urgent need to accelerate legal reforms so that the commitments of the peace accords related to Mayan customary law and equitable access to land could be implemented. It was suggested that more legal options for land ownership might lessen the pressure for individual private titles. The recommendations were incorporated into the project document.

An example of a more deliberately targeted approach is the World Bank's Indigenous and Afro-Ecuadorian Peoples Development Project, approved in late 1997. The basic rationale of this project, seen by the World Bank as the first of its kind, is to build on the positive qualities of indigenous cultures and societies, *including a sense of ethnic identity, close attachments to ancestral land, and the capacity to mobilize labor, capital and other resources to promote local employment and growth*. Support for the regularization of land and water rights is one component, comprising: titling and regularization of land tenure rights in selected productive, forestry and protected areas; land purchase (financed by International Fund for Agriculture Development (IFAD) and the Government of Ecuador); diagnosis and development of an action plan for community-owned irrigation systems; and support for a program of selected legal reforms.

The project was prepared in collaboration with the National Council of Indigenous and Afro-Ecuadorian Development (CONPLADEIN), an organization comprising representatives of the main indigenous organizations and headed by an indigenous person with Ministerial rank. A series of background papers were commissioned on issues including the land tenure situation. This analysis is reflected in the project appraisal document (World Bank, 1997), which observes that indigenous organizations are continuing to pursue their land rights agenda, in the context of a gradual shift towards market-based mechanisms for the allocation of land resources and an increasingly narrowly defined role for state interventions. Elements of the indigenous land rights agenda consist, *inter alia*, of: strong pressure to resolve second-generation land conflicts caused by earlier land reform efforts; a high demand for the titling and demarcation of indigenous territories to ensure property rights, together with a specific interest to avoid privatization of communal lands; and indigenous claims to ownership of protected areas, or a delegation of the management of these areas to their member communities. The analysis points to the importance of the customary land property system. Whether indigenous in origin or community-

[20] Data taken from project appraisal document for the Guatemala Land Administration Project, Report No. 18550-GU, World Bank, November 10, 1998.

based, this operates under a different set of rules to give legitimacy and security to land transfers within the community. And given the high transaction costs, smallholders are seen as having little personal benefit to legalize land transfers in the formal system.

On the basis of this analysis, different types of land regularization are earmarked for financing under the project. One will be lands claimed by indigenous and Afro-Ecuadorian peoples with rights of ancestral possession; another will be land purchase, with IFAD support; a third will be indigenous rights over forest lands already declared patrimony of the State, which are under INEFAN jurisdiction. Implementation of the project requires some legislative and administrative reforms, for example, to resolve uncertainties over titling responsibilities in forested areas. At the time of the authors' visit the project was only just beginning the land regularization activities. In the first instance, it appeared likely that most emphasis would be given to land titling in the Ecuadorian *selva*.

In Colombia, the World Bank's Natural Resource Management Program (Loan 3692-CO of 1994) has components for the titling and demarcation of both indigenous *resguardos* and black communities. The agency took rapid initiatives after the enactment of Law No. 70 of 1993, which for the first time allowed for the collective titling of black community lands. World Bank finance provided for, among other things: studies to estimate the level of demand for collective titling; fieldwork with communities to inform them of the titling procedures, supporting their organization and subsequent first phase of the titling process; execution of planimetric maps of each community's land; and processing by Colombian Agrarian Reform Institute (INCORA) of each community request of land titling and registration. As seen earlier, such support allowed for rapid progress to be made in the collective titling of Afro-Colombian lands in the latter 1990s.

In Mexico and Peru—the two countries where the impact of recent tenure reforms on indigenous land security has proved most controversial—the World Bank experience has some similarity to that of the Inter-American Development Bank. There are some predictable tensions between economists who advocate a freer land market without restrictions, and social scientists who seek to consolidate common property regimes as a basis for strengthening indigenous cultures. For the most part these tensions have been played out at the level of policy analysis, rather than through specific projects. In Mexico, an agricultural policy paper issued in 1990 recommended some liberalization of the *ejido*, though permitting members to sell their land parcels internally and not to outsiders (Heath, 1990). A more recent analysis of the *ejido* reforms[21] (in draft at the time of writing) contains a largely positive appraisal of the liberalizing land tenure reforms.

At the same time, a recent community forestry project designed by the World Bank in Mexico has pointed to the importance of indigenous common property as a basis for sustainable development in the state of Oaxaca.[22] The project's specific objectives are to improve natural resource management and conservation by community and *ejido* forestry resource owners, and to increase the range of options for generating forestry-based income. While the project is not specifically concerned with land titling, the resolution of indigenous land tenure and boundary conflicts is a key element for its success. The project appraisal found that over half the communities for which official data exist have some form of conflict, while eight percent lack clear documentation of their land rights. The project includes training activities to help forest *ejidos* and communities to resolve conflicts, informing them about the process of legal adjudication and regularization where conflicts are involved.

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[21] Mexico Ejido Reform: Avenues of Adjustment—Five Years Later (Decision draft, September 1998).

[22] Information taken from staff appraisal report for Mexico Community Forestry Project, Report No. 16134-ME, January 21, 1997.

In Peru, the World Bank has now identified members of the peasant communities of the *sierra* as indigenous peoples. The staff appraisal of a Sierra Natural Resources Management project, approved in 1997, observes that all project beneficiaries can be categorized as indigenous people of the Andes (World Bank, 1996). Since then the World Bank has conducted a program strategy study for indigenous peoples' development in Peru, which touches extensively upon land tenure and titling concerns, and is critical of any policy which could undermine the present tenure regime of the peasant and native communities. The study advocates a new strategy of indigenous peoples' development, built around the strengthening of the present community structure in both the Andean *sierra* and the *selva*. It refers to concerns that the individual titling of community lands could lead to a massive loss of indigenous lands, and observes that changes in the law which purport to weaken indigenous communities will be met with emotional opposition (World Bank, 1998). At the same time, an agriculture development strategy prepared for the World Bank by Peruvian consultants argues that continuing market-oriented reforms will help improve agricultural output and incomes. The study identifies the lands owned by peasant communities as a source of agricultural inefficiency, and argues for an intensification of the titling process facilitating the division of communal land into individual tradable plots.[23] This illustrates the widely differing perceptions within such an organization, concerning policy approaches towards communal lands.

Other international financing agencies have also played a role, albeit a minor one. At one time, the member countries of the Amazon Cooperation Treaty (*Tratado de Cooperación Amazónica,* TCA) played an important role. In 1991, the TCA decided to pay particular attention to the question of *indigenous lands and areas*. To this end, a temporary secretariat was established, first in Quito and later in Lima, with financial support from the European Union. A major regional program for the consolidation of indigenous territories was carried out between 1993 and 1995. Its overall aim was to support the indigenous communities of the Amazon region in the legalization and demarcation of their territories, and to create the conditions for sustainable community management and conservation of natural resources. Bolivia, Ecuador and Peru were selected for pilot project for future strategic models. The specific components of the pilot project were:

- socioeconomic and legal studies to precede the process of demarcation and legalization, and biophysical and anthropological studies for the development of management plans;
- demarcation of territories;
- organization of protective measures, enabling indigenous communities to counteract natural resource depredation within their territories; and
- elaboration of management plans.[24]

The TCA project was implemented in close coordination with national and regional indigenous organizations. It never succeeded in carrying out all the territorial demarcation and legalization that were originally envisaged. Yet, the project yielded some very important experiences, including training seminars, resource mapping, and the construction of special maps. Arguably, the most important outcome of the program was to familiarize national administrations with the complexity of the issue of indigenous territoriality and to demonstrate the value of cooperation between joint technical teams of governments and indigenous organizations. The initial pilot experience has not been followed up so far by either the TCA or the European Union.

IFAD recognizes that the *most important and pressing issue facing indigenous peoples in Latin America is the access to and ownership of*

[23] Peru: Agriculture Development Strategy (green cover draft, March 5, 1998).

[24] Tierras y áreas indígenas en la Amazonía. Una experiencia regional participativa, Secretaría Pro Tempore, Tratado de Cooperación Amazónica SPA-TCA No. 54, Lima, Peru, February 1997.

territory. Yet, a survey carried out in the mid1990s found that IFAD had played only a minor role in promoting indigenous land and territorial rights (Helms, 1994). The Beni Indigenous Peoples' Development Project in Bolivia was the first IFAD project to include a component for demarcation and titling of communal territories. Activities included topographic mapping, perimeter planning, soil classification studies, cadastre and other measures. USAID interventions have, for the most part, been led by environmental concerns and have sometimes—as in the case of Guatemala's Peten—clashed with the land claims of indigenous peoples. USAID shared an early draft of a land tenure policy paper with the authors. The early draft reflected a market-oriented approach. The programs of the European Union (which may well become an important actor) could not be reviewed in any detail. It is know to have certain relevant programs, an example being a cadastre and indigenous land-titling component in the Chaco Development Project in Paraguay.

Among bilateral donors, the efforts of DANIDA deserve to be singled out. DANIDA has been the major international contributor to the Bolivian Government's program to clarify and title the lands claimed by indigenous peoples in the eastern lowlands. It has also undertaken important initiatives in Nicaragua through an innovative transport sector program supporting indigenous and black community projects in the Atlantic region, now supplemented through programs of decentralized government and indigenous resource management. DANIDA has also financed Danish NGO support programs for indigenous peoples, including a large-scale land-titling program in the Peruvian Amazon.[25] A feature of Danish support has been the capacity to work simultaneously with government and indigenous organizations, often in complementary fashion.

[25] The largest project funded by DANIDA has been the land titling of 160 indigenous communities in the upper Ucayali river area in the Peruvian Amazon, carried out by the Copenhagen-based International Work Group of Indigenous Affairs, IWGIA.

VII. LAND TITLING AND INDIGENOUS PEOPLES: ELEMENTS OF A NEW STRATEGY

While this study was commissioned as a technical paper, the authors were also invited to contribute to the Bank's evolving strategy on indigenous peoples and community development. This final chapter aims to do two things. First, it reviews the policy findings of previous chapters, identifying the main problem areas and challenges, and assessing how successfully the Bank and other international actors have responded to these challenges. Second, it looks to the future, proposing some elements of a future strategy. This covers both broad policy concerns, to be addressed through a program of research and analysis, and more operational issues in the design and implementation of Bank projects.

Policy Concerns and Findings

Bank Approaches to Land Titling and Indigenous Peoples: General Assessment

Overall, the Bank has paid rather limited attention to the demands and aspirations of indigenous peoples in its land administration and titling projects. The projects themselves have to be divided into two major categories. First, there are larger infrastructure or sustainable development projects that can have components for the demarcation and regularization of indigenous lands. Second, there are the land programs of more general application, in which the concerns of indigenous peoples can be addressed.

To the best of the authors' knowledge, few projects in the first category have been undertaken. Some projects were been identified in Argentina, Belize, Bolivia, Panama and Paraguay, among other countries. The authors only visited the project for sustainable development in Darien, Panama. The design and preparation of this project showed the Bank's commitment to addressing seriously the land claims of indigenous peoples and other ethnic minority groups, reviewing legislation in detail, consulting with indigenous organizations, and including program components for consultation with indigenous organizations and for conflict resolution. Yet neither in Panama nor in the other projects is there evidence of a longer-term strategic vision, building on the titling components to support longer-term sustainable development objectives.

The issues surrounding the general land titling programs that can have an impact on indigenous peoples are far more complex. These issues were addressed in detail by the authors in their fieldwork in Colombia, Ecuador, Peru and to some extent Panama, and in their working sessions with both policy and operational divisions of the Bank. There have been incipient programs (such as in Colombia), where the main policy decision was to *exclude* indigenous peoples from the coverage of land titling programs, thus ensuring that individual titling does not have a negative impact on recognized indigenous communal land areas. In Ecuador and Peru the programs are expected to have an impact on communal forms of land tenure, including the promotion of individual land titling with the consent of the communities concerned. The programs were not designed on the basis of careful baseline studies in the communities concerned, nor does the available project documentation point to detailed knowledge of communal land tenure systems or their degree of market interaction. In Ecuador and Peru, the programs are clearly designed to promote more efficient land markets, as part of broader agricultural policy reforms. Through its country dialogue, the Bank has assisted governments in implementing market-based legislative and administrative reforms with implications for indigenous communal land tenure systems.

The review also covered the land administration and titling programs of other agencies, including the World Bank. The World Bank has been quite active in this area, recently devising targeted programs for indigenous development, which include land-titling components. There are also some examples of careful consultations with indigenous communities and baseline studies concerning indigenous forms of land tenure, in the context of general land titling programs. Some of this experience could serve as a model for future IDB interventions, especially baseline studies and the projects targeted specifically at indigenous communities.

Strategic Visions: Land Markets and Indigenous Cultures

A coherent strategic vision is necessary if indigenous rights and cultural identity are to be respected in land titling programs (either general land titling programs, or those targeted specifically at indigenous communities). This vision must be based primarily on knowledge of how indigenous agrarian systems and land markets currently function and on indigenous aspirations in this regard. What land titles, if any, do indigenous peoples currently possess, and what conflicts are there over the validity of these titles? Do indigenous peoples actively seek land titles today, and why? What kind of titles? To what extent do existing laws and land titling procedures accommodate indigenous systems of land use and resource management? If not, what can be done about it?

Indigenous peoples themselves may not have uniform visions. In the Andes, for example, there have been longstanding tensions between indigenous organizations in the lowlands and those of peasant-based farmers of the highlands (which in some countries are only now beginning to identify themselves as indigenous). This makes it all the more important for external actors to consult carefully with indigenous communities and organizations at national as well as local levels and conduct meticulous baseline studies before embarking on land programs that affect indigenous peoples. The Bank's Darien Sustainable Development Project in Panama and the World Bank's land administration project in Guatemala are examples of cases where this appears to have been done effectively.

There are nevertheless obvious tensions between most notions of indigenous land rights and tenure, and the views of economic planners promoting market-based land and agricultural policy reforms. As indigenous organizations gain strength throughout Latin America, a key aspect of their demands is land and natural resource rights. International instruments such as the ILO’s Convention No. 169 place emphasis on the collective aspects of the relationship between indigenous peoples and their lands or territories. Yet, many recent agricultural policy reforms and the Bank's own analysis are critical of the collective land tenure arrangements and consider them a legacy of past agrarian reforms. Individual land titles are now seen as the underpinning of land security, to compensate for the failures of the past and promote greater agricultural efficiency.

These tensions, evident Latin America, are to an extent being played out in the corridors of the multilateral development banks. There are signs that policies are being debated by persons at different ends of an ideological spectrum, neither of which adequately reflects reality. Some economists are determined to eliminate all restrictions on free markets for land, while *communitarian* social scientists may see market forces as the principal threat to indigenous cultures and lifestyles. The former may be willing to countenance special land tenure regimes only for those communities who are considered to be outside the market economy. The latter may press for an unrealistically high level protection and isolation, with restrictions on all market transfers, even where indigenous peoples are participating extensively in the market economy and have long been engaged in land rentals or transactions with outsiders.

The main strategic challenge is a fairly obvious one. How to enable indigenous peoples to benefit from modernization, without sacrificing their cultural identity and traditional institutions? *Development with identity* is the phrase often used by indigenous peoples themselves to formulate this concept. Land demarcation and titling may be an important precondition for this, enabling indigenous communities to develop economic strategies on a sound foundation. But there are still some difficult decisions to be taken both for governments and indigenous communities.

Indigenous peoples recognize the need to participate in the market economy. Countless indigenous informants expressed similar views to the authors, whether on the Amazon or in highland areas. Incomes are important for all communities, in particular as more and more of their members are now migrating outside the community of origin. Thus indigenous organizations in the tropical lowlands generally aim to negotiate with energy multinationals, for example, rather than to oppose their operations outright. In highland areas, too, communities are having to decide which goods to produce and market, how to invest, whether to encourage joint ventures with outside investors, and similar decisions taken by other individual or corporate actors in the modern market economy. They may have difficulty obtaining credit and financial services, but this is hardly the fault of the indigenous communities themselves. It is the private financial sector that has tended to show a bias against them, insisting on individual land titles as collateral for loans.

Political and Economic Dimensions of Indigenous Land Rights and Territorial Ordering

Governments too are having to face difficult choices. To what extent should land and territorial ordering take place along ethnic lines? Is a measure of indigenous autonomy a manageable concept in countries where indigenous and non-indigenous rural populations live alongside each other. Some innovative experiments and new trends in legal and administrative practice, have been examined in countries including Bolivia, Colombia, Ecuador, Mexico and Panama. Some reforms are keen to consolidate indigenous forms of local governance as part of decentralization programs and sometimes fiscal reforms. From the study, it is impossible to conclude how well this will work in practice. In Colombia, the 1991 constitution has still not been adequately codified, to give real effect to the indigenous territorial entities. In Ecuador, the 1998 constitution with similar provisions has only recently been adopted. In Panama, there is longer experience, but no model at the national level to permit indigenous fiscal participation. There are *prima facie* reasons to believe that this figure will be more applicable in practice in the tropical lowlands, where indigenous people inhabit large and contiguous territorial areas, than in the highlands where their communal land areas are far more fragmented. Against this has to be weighed the fact that the majority of Latin America's indigenous population is concentrated in highland areas, where their traditional forms of governance may be in most urgent need of consolidation.

While it may be too early to assess these recent developments, it must at least be recognized that they are an important part of the land policy agenda. Land policies must consider the political and social, as well as economic, aspects of land ordering. A review of customary practices and forms of governance, in particular as they affect land allocation, must be an important part of any baseline study.

Indigenous Communities: Collective and Private Tenure

In the policy literature there can still be an unfortunate tendency to portray indigenous communal tenure systems as collective, open-access regimes. This study, consistent with most informed literature on the subject, has preferred to depict them as an alternative form of private land tenure with both individual and collective

aspects. Obviously, there are huge differences within the indigenous economic world, depending on climate, habitat, agroecology, market opportunities and also the impact of state law and policies. As a general rule, particularly in non-tropical areas, it is widely known that land parcels tended to be divided out among individual families and particular areas are reserved for grazing and other communal activities. Moreover, this study has described tremendously complex systems of land allocation within indigenous land tenure systems; in some, for example, families may occupy a large number of parcels in different ecological zones.

As regards the active demand of indigenous community members for land titles, it is vital to distinguish between two aspects. One is the collective title to protect the community against external encroachment and resolve conflicts. The other is the internal need to safeguard land rights *vis-à-vis* other community members. Where communities do survive, the demand for collective title appears to have remained immensely strong. Bolivia, Colombia, Guatemala, Mexico and Peru offer examples of this. Communities often strive for decades to share recognition of their ancient titles or of titles promised under agrarian reform programs, often pressing for expansion of their land areas. Internally, there is evidence of an active demand for documents that safeguard the tenure rights of individual families. Tenure and inheritance claims within the communities are becoming complex, as the younger generation undertakes seasonal and sometimes longer-term out-migration. The land rights of women are also an important factor, especially because under some traditional systems the death or departure of a husband can prejudice the land security of a woman.

A problem of land titling and registration systems throughout Latin America tends to be the absence of any intermediate forms of recognition between individual and collective titles. As far as the state is concerned, land is vested in either individual or corporate ownership. Communities, like any other cooperative or corporate entity, can nevertheless develop their own organic chapter within the framework of certain principles determined by law. The charters of the Panamanian *comarcas*, or of the Peruvian peasant communities, go some way towards a normative framework for internal land use and transfers. It is normative work of this kind that now needs more attention. There are signs that this is happening in some projects, for example, in recent World Bank projects in Ecuador and Guatemala. An alternative and decentralized form of land titling and registration, which enhances the security of indigenous family members within the communal structure, holds out considerable promise of enhancing investment without undermining the social fabric of indigenous communities.

State Support for Indigenous Communities

A generalized concern of this study is the weakened capacity of state institutions to respond to the needs of indigenous communities, either through titling programs or through follow-up support services once the titles have been issued. Progress has been mainly at the normative level. This has not been matched by programs to demarcate lands, to clarify rights within contested areas, or to provide the financial services that would enable indigenous communities to develop their lands and resources. Obviously, there are differences between one country and another. The deficiencies were most apparent in Ecuador, where the state agency responsible for land titling had no programs to carry out resources on its own initiative. Mexico, by contrast, appears to have devoted substantial funds and resources to the PROCEDE land-titling program of rural *ejidos*. Colombia's *resguardo* amplification program has stagnated for lack of state funds to buy out improvements or clarify contested land claims. Bolivia's land titling program in the tropical lowlands depends almost entirely on DANIDA support.

The needs of forest-dwelling and *campesino* communities for state support are likely to be different. In the tropics, the need is for rapid

interventions to avert further encroachments and conflicts, either with national settlers and colonists, or with the energy multinationals and other international investors. In Bolivia and Peru, much criticism has been directed at the drawn-out procedures for clarifying and titling indigenous lands. As will be discussed below, there is much to gain by financing the endeavors of indigenous organizations themselves, increasing their technical capacity, and enabling them to cooperate with state institutions. With some technical support and empowerment, indigenous organizations can negotiate environmentally sound resource management arrangements over protected areas, the biosphere, and can even promote innovative agreements over national borders. The importance of potential indigenous participation in the peace and border agreement between Ecuador and Peru has been discussed in earlier chapters. In these areas, if the state manages its policies judiciously, it can eventually reduce its efforts and rely on the empowered indigenous organizations to perform an important role.

In the indigenous highlands, the current scenario and future outlook tends to be bleaker. There is a tendency for the state to withdraw from these areas. The pressure for individual land titling is all part of this scenario. The state—often with influential policy advice from international financial institutions—aims to eliminate subsidies, withdraw extension agents, and leave the ground open for private financial operators and NGOs. During the transitional adjustment era, the main contribution of the banks has been compensatory social funds with some community participation. Yet, anecdotal evidence suggests that private creditors are, for the most part, not lending to indigenous peasants, even once they have obtained individual land titles.

Importance of Indigenous and Black Participation in Land Titling Programs

As should be clear from the study, land titling for indigenous peoples can never be a narrowly based technical process. It cannot be left to the nonindigenous technical experts, however great their skills and however modern their equipment. It is only the local communities who can really understand patterns of land and resource use within their own environments. In this regard, most of the headway has been made in the Amazon through programs (described in earlier chapters) that have some international support. More recently, there have been signs of innovative programs with the participation of black communities in Pacific regions. These programs have paid considerable dividends, involving local communities, ensuring their participation and confidence, and also providing them with the technical skills to complement their local knowledge. In a context of declining state resources for carrying out much needed land demarcation and titling programs, some useful partnerships have been developed between governmental and indigenous organizations.

Fewer signs of this are evident in the Andes. But in this vertical and fragile environment, local knowledge is equally indispensable. One of the major drawbacks of earlier Bank projects in the Andes has been the absence of community participation. Enabling indigenous, peasant and community organizations to carry out some technical aspects of future land titling programs would be a major step forward.

Recommendations

General Policy Concerns

The Need for a Policy

A fundamental challenge when indigenous claims are considered in any form of land titling and regularization program is to pursue a consistent policy and coherent vision. Indigenous land issues, inevitably highly complex, cannot be addressed in an *ad-hoc* or piecemeal way. Working methods need to be defined if this issue is going to be addressed seriously. It is imperative to move beyond a potential "dialogue of the deaf" between

exclusively market-oriented economists on the one hand, and communitarians on the other, each of whom can have their own vision as to the ideal land tenure system for indigenous peoples. Land tenure systems are constantly changing every where. The main argument of this study is that indigenous land and resource systems can represent a particular form of private tenure, adapted to market opportunities under certain conditions.

Mainstreaming Indigenous Concerns in Policy Analysis

Instead of treating indigenous peoples as a vulnerable group for whom special protective arrangements should be made, their concerns need to be mainstreamed into overall policy analysis. This is the spirit of new Latin American approaches to multi-ethnicity and multiculturalism, promoting the involvement of indigenous peoples in policy concerns of national importance including those related to territorial ordering or natural resource management. Land tenure policies may once again be at the crossroads in Latin America, as governments experiment with new forms of territorial ordering. These complex issues cannot be addressed only from the perspective of agricultural productivity, for example citing the titling experience of a remote country such as Thailand as a reason for introducing similar models in Latin America. Cultural integrity can be as important to indigenous peoples as economic advancement. Policy analysts need to comprehend the cultural and governance dimensions, as well as the economic and agrarian ones, of any land titling programs that may affect indigenous peoples.

The Need for a Multidisciplinary Approach

The conceptual basis for addressing indigenous concerns in land titling programs has so far been too narrow. In some countries, including Ecuador and Peru, rather narrow economic assumptions have been put forward for advocating legislative and policy reforms that affect indigenous lands and livelihoods. A major interdisciplinary effort is now required, involving *inter alia* planners, topographers and other land specialists, lawyers, anthropologists, ecologists, and in some cases also historians. Cross-fertilization of ideas is also needed from other regions of the world, where traditional forms of land tenure are being adapted to the needs of modernization. In Africa, for example, where there have been similar pressures for land privatization in the past, there has been more recent research concerning the linkage between communal agrarian systems and productive efficiency. More research of this kind is urgently needed in Latin America.

The Need for Empirical Research on Indigenous Production Systems

Far more empirical research is needed on the indigenous and peasant commune, in particular its productive and governance dimensions, including the provision of social services. The Bank has begun some important conceptual research on indigenous economies, for example identifying ways in which indigenous peoples might participate more actively in land rental markets.[26] However, from available documentation, rather little seems to be known about the actual functioning of agrarian systems in countries such as Ecuador and Peru. The Bank's recent indigenous poverty studies, as well as the country profiles undertaken by the World Bank, appear to have had insufficient focus on this area. A series of policy-oriented and multidisciplinary studies could be a useful area of future collaboration between the IDB and the World Bank.

Negotiating Land Use Rights with Indigenous Authorities

Further land use and tenancy reforms are likely to be needed in most countries, to enable indigenous communities to participate in land rental markets, and have greater access to financial markets, without undermining their communal land tenure regimes. It is important that representative indigenous authorities be engaged in

[26] See in particular Carlos Perafán, Adecuación de servicios financieros a las economías tradicionales indígenas, Inter-American Development Bank, SDS/IND, unpublished document, May 2000.

this policy debate, and be enabled to formulate their own recommendations as to the most appropriate arrangements. The Bank could facilitate policy dialogue on this issue, perhaps organizing workshops with the participation of land policy specialists and indigenous organizations.

Special Land Rights and Other Ethnic Minorities

Moreover, it is now clear that communal agrarian systems cannot be addressed from an exclusively "indigenous" perspective. Definitional problems aside, there is a need to spread the net more widely. A technical study, examining the potential for special systems of land and resource management by black and other ethnic minority communities, would now be of enormous importance. This mobilization is clearly growing throughout the continent, and in some countries has already led to legislative and policy reforms. But the implications of ethnically or racially based approaches to land use and resource management need to be assessed critically, again from an interdisciplinary perspective. Will black communities adopt the existing international normative framework for indigenous land rights? Or will they pursue their own path? This is a crucial policy concern for several Latin American governments. The international financial institutions, beyond their specific projects in certain countries, would do well to participate in the wider policy debates.

Indigenous Peoples and Resource Management

In the Amazon countries there is some crucial normative work to be done concerning indigenous control over the management of renewable and nonrenewable resources in the context of land titling programs. There is a need to seek more consensus over these issues between governments, indigenous organizations, environmentalists and private companies. This can be a vital area of future technical assistance, perhaps using multilateral investment funds to bring together the different actors from the public and private sectors.

Design of Land Titling Projects Affecting Indigenous Peoples

The Importance of Consultation

Some of the weaknesses of project design have been identified above. The key to the preparation of land titling programs of general application is that consultation must take place at various levels. Proposed legislative and policy reforms should be discussed in advance with the national indigenous and peasant organizations likely to be affected. This is a legal obligation for governments under the ILO's Convention No. 169. It is also common sense and a prerequisite for eventual project success.

Indigenous Participation in Baseline Studies

It is also important to carry out baseline studies, with community participation, in specific areas to be covered by land titling programs. These have apparently been absent from earlier land titling programs. Though there is evidence of local consultation in the more recent programs, there is still a lack of detailed baseline studies. The aspirations of local communities with regard to land tenure must be a key element of such studies. Without such preparation proposed legislative reforms will meet with justified opposition.

Implementation of Land Titling Projects

Indigenous Lands Should be Titled First

Indigenous land security has in many cases been prejudiced when titling programs have attended first to the claims of nonindigenous settlers and colonists. It is thus recommended that any Bank project with specific land titling components give priority to the demarcation and titling of indigenous areas, before dealing with individual properties of nonindigenous ownership. At the very least, when Bank land titling projects cover areas used or claimed by indigenous peoples, these should always be addressed in the initial stages of project implementation.

Support for Local Indigenous Institutions

Land titling programs that are part of an integrated package of agricultural reforms and development should include components to support local institutions. A first and necessary phase is information, concerning the implications of land titling laws and programs. There could also be broader institutional support for communities and organizations.

More generally, an implementation structure should favor the participation and establishment of indigenous and peasant organizations. This should be at the local and regional levels, as well as at the national level in cases where the projects have a regional focus. There seems to be ample provision for this in some recent projects, such as the Darien project in Panama. Such provisions appear to have been absent in some earlier land titling programs.

Mechanisms for Indigenous Participation and Support for Indigenous Organizations in Land Titling Programs

Enhancing the Technical Capacity of Indigenous Organizations

This study has stressed the significant contribution made by indigenous organizations to land titling when they have had the technical capacity to do so. Their knowledge of the local environment and traditional patterns of land use makes them uniquely qualified to undertake certain tasks. Specifically, the Bank could support the development of an advanced registry and cadastre system using GIS and remote sensing in technical cooperation with indigenous organizations.

Whenever possible, indigenous organizations should be equipped with the technical capacity for cadastre and mapping to create a qualified technical partnership with government institutions and an improved guarantee of continuity in the accumulation of experience.

Including Indigenous Peoples in Technical Teams

Indigenous personnel and delegates from representative indigenous organizations should be included in all technical team, including visual inspection teams, land survey teams, topographical teams, land classification, boundary demarcation, cadastre work, GIS lab work, or legal teams.

Training Indigenous Leaders in Resource Management

A special training program for indigenous leaders and negotiators on the technical, economic and juridical aspects of the exploitation of renewable and nonrenewable resources (including minerals and hydrocarbons) could be developed in collaboration with indigenous organizations and environmental NGOs.

A general program of integrated management plans and joint management of protected areas and natural resources could be offered to both indigenous organizations and the responsible government ministries.

A Trust Fund for the Purchase of Indigenous Land

There is a general absence of funds to improve indigenous access to land in the case of conflicts with nonindigenous sectors. Governments have had insufficient resources to provide compensation for improvements on the lands claimed by indigenous peoples. The Bank could demonstrate its commitment to indigenous land security by recognizing the land purchase and compensation initiatives of other agencies. This could conceivably de done under the aegis of the existing Indigenous Fund, which already enjoys Bank support.

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