



STRANGERS IN A STRANGE LAW: INVESTMENT, SURFACE RISK, AND PROPERTY RIGHTS IN MEXICO

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Introduction

For foreign and unexperienced investors in Mexico, the country holds key penumbras¹ regarding property governance, including land ownership, be it publicly, privately, or collectively² owned. In fact, investors unfamiliar with the legal framework, culture, and other practices in Mexico may be perplexed by the complicated process for getting access to acreage—whether by purchase, lease, possession, usufruct, rights of way, or other means. If due diligence is lacking, investors can miss important stipulations in property governance, leading to significant cost overruns.³ Worse, when doing business with the government—whether at the federal, state, or municipal level—penalties apply when work is delayed, except in cases of *force majeure* or similar contractual exceptions.⁴ And if there is an increase in the cost of a project due to delays, a once profitable plan can turn into bad business. Thus, investors must consider not only where to acquire land for the construction of a project, but also such things as the rights of way for access and easements.⁵

This paper analyzes land classifications in Mexico according to its constitution, wherein the complexity of the land property law originates. Land classification should be easy, but Article 27 of the Mexican Constitution is laden with historical, ideological, and political minutiae. First enacted by the Revolutionary Constitutional Congress of 1917 (*Congreso Constituyente*), Article 27 is considered not only a source of law, but also a political document, which, over the course of a century, has undergone 20 amendments.⁶ Some basic concepts around land property rights, as provided for in

¹ Penumbras are a term coined by prominent legal scholar Ronald Dworkin, who explains that there exist indeterminate concepts and rules that may result in a difficult application of the legal framework. See Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1978), 1-52.

² In this report, I shall refer to collectively owned lands that are constitutionally termed as “social property,” which is different from private and state-owned properties.

³ See Miriam Grunstein and Michelle Michot Foss, “The Law of the Land. Practices, Policies and Regulations Regarding Access to Lands for Energy Projects in Mexico,” *Oil, Gas & Energy Law* 1 (2020), www.ogel.org/article.asp?key=3869.

⁴ Guillermo Gambero Quezada, “Evoluciones recientes de la contratación pública en México,” *IUSTA*, no. 42, (December 2015), <https://doi.org/10.15332/s1900-0448.2015.0042.05>.

⁵ Grunstein and Foss, “The Law of the Land.”

⁶ The website of the House of Representatives (*Cámara de Diputados*) lists the number of amendments and their corresponding dates. See http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_art.htm.

the law, are also examined. Finally, this paper reviews three basic classifications of land titles: 1) federal ownership; 2) private ownership, as regulated by federal or state agencies; and 3) social ownership, which includes *ejidos*⁷ and communally owned lands, as normed by Mexico's agrarian law (*ley agraria*). Analysis of the most relevant implications of these types of titles will follow.

Constitutional Concepts Regarding Asset Title

Article 27 of Mexico's Constitution is one of the lengthiest and, due to the varied array of topics it comprises, one of the most complex.⁸ The body of judicial rulings that interpret paragraphs, sentences, and even words in the article is vast. Tomes of jurisprudence have been written about single concepts in the article.⁹ Article 27 is about patrimony—public, private, and social.¹⁰ From it come the federal and state civil codes, which provide legislation on property and other forms of land titles. Thus, if property is acquired or used in Mexico, such provisions must be kept in mind, as impractical and wordy as they may be. Attorneys assisting investors must frequently insist that it is not simply the grandiose speech by a founding father of the Mexican revolutionary state. Instead, Article 27 forms the framework for acquiring land rights in Mexico.

⁷ An *ejido* is a form of collectively owned land for peasants deriving from the Mexican Revolution. *Ejidors* were formed as a result of the division of great plots of land that were originally the property of a minority of rich land owners. They were first introduced in the Mexican Constitution of 1917.

⁸ In his book, José Roldan Xopa describes the Mexican Constitution as a moving target with many scenarios that have appeared in different historic moments. See José Roldan Xopa, *Constitución y Mercado* (México: Itam; Porrúa, 2004).

⁹ In an entry in the Mexican Legal Encyclopedia Online, prominent jurisprudence scholar Miguel Acosta Romero names Rafael Martínez Morales, Fernando Garrido Falla, Jorge Olivera Toro, Andrés Serra Rojas, and Miguel Serra Rojas as the classical authors regarding the patrimonial regime in Article 27 of the constitution. See <https://mexico.leyderecho.org/patrimonio-del-estado/>. Further, I recommend the works of Martín Díaz y Díaz and José Roldán Xopa as more recent researchers and commentators on the subject.

¹⁰ See Martín Díaz y Díaz, "Proceso constitucional y relaciones de propiedad. Notas para el análisis del caso mexicano" in *Ensayos Sobre la Propiedad*, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2012, 9-70.

Original Property: Private Property Explained

One of the most perplexing concepts is that of *propiedad originaria* (original property). This term refers to the origins of private property in Mexico. For purposes of further clarification and analysis, it is helpful to refer to the work of Martín Díaz y Díaz,¹¹ which sheds light on this obscure and controversial concept. In essence, original property is a term that embraces the myth—embodied in the constitution—that, from the revolution onward, all previous regimes of title disappeared. The original paragraph of Article 27 puts it this way:

The property of all land and water within national territory is originally owned by the Nation who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation.¹²

This rule has several key implications. Ownership of land and water is not a birthright of the individual, as it is in most constitutions of the liberal tradition,¹³ but something that the nation graciously awards to its people. Thus, what the nation can give, the nation can take. The second paragraph of Article 27 confirms this:

Expropriation is authorized only where appropriate in the public interest and subject to payment of compensation.

This is the main risk of the original property concept. The government may expropriate land “where appropriate to the public interest,” with “public interest” defined broadly. What constitutes “public interest” is left to be interpreted by the federal, state, or municipal agency decreeing the expropriation (eminent domain). Of course, such an act is “subject to compensation,” a rule that has been widely discussed in scholarship and, more importantly, within the judiciary. In fact, innumerable

¹¹ According to Díaz y Díaz, original property is a concept that explains the revolutionary intent behind private property in Mexico. While the revolution was not against private property per se and Mexico is not to be confused with a socialist state, in light of revolutionary principles—theoretically at least—private property is still subject to a collective objective called the “public interest.” The latter expression is subject to the authorities’ interpretation and, if it is litigated, will be defined by the competent court. In sum, when acquiring private property in Mexico, one must take heed of the levels of regulatory risk it may imply. See Díaz y Díaz, “Proceso constitucional y relaciones de propiedad.”

¹² Political Constitution of the United States of Mexico, Article 27, paragraph 1 (published in the Official Gazette of the Federation on February 5, 1917).

¹³ Díaz y Díaz, “Proceso constitucional y relaciones de propiedad.”

constitutional challenges (*amparos*) have been filed, leading to various rulings on the meaning of “public interest”¹⁴ and the timeliness and fairness of the compensation owed to the title holder who has suffered expropriation.¹⁵ Paragraph 3 of Article 27 is consistent with the power the nation has over private property:

The Nation¹⁶ shall always have the right to impose on private property such restrictions as the public interest may demand, as well as to regulate, for social benefit, the use of those natural resources which are susceptible to appropriation, in order to make an equitable distribution of public wealth, to conserve them, to achieve a balanced development of the country and to improve the living conditions of the rural and urban population.

This paragraph is significant. For foreign investors aware of this text and unaccustomed to an interventionist regime, this language may be alarming, particularly because its meaning is vague. However, the Mexican Supreme Court has stated that, when issuing an expropriation order (eminent domain), the mere statement that such an act is executed in the name of “public interest” is not sufficient, and the lack of a substantive motive to justify its existence provides the legal basis for such an expropriation to be challenged before the Mexican courts.¹⁷

Direct Domain of Property: *Dominio Directo*

Direct domain is one of the most perplexing items in Article 27, and, as with original property, it has produced much scholarly and judicial discussion.¹⁸ As opposed to original property, this concept applies to the regulation of public assets—specifically

¹⁴ Such opinions can be found in Jorge Fernández Ruiz’s *Derecho Administrativo* in the series *Grandes Cuestiones Constitucionales*, México, Secretaría de Gobernación, Secretaria de Cultura, Instituto de Investigaciones Jurídicas, UNAM, 2016, 100-214.

¹⁵ For a thorough study on the challenges and compensations in cases of expropriation, see Carlos Elizondo Mayer-Serra and Luis Manuel Perez de Acha, “¿Un nuevo derecho o el debilitamiento del Estado? Garantía de audiencia previa en la expropiación,” *Cuestiones Constitucionales*, no. 21 (2009): 99-147.

¹⁶ The Mexican Constitution uses “nation,” “state,” and “government” as synonyms, although conceptually they are different. For instance, Díaz y Díaz defines the nation as a sociocultural construct, whereas the state is an institutional sociopolitical apparatus, and the government is the operator of said apparatus. (Díaz y Díaz, “Proceso constitucional y relaciones de propiedad.”)

¹⁷ Roldán Xopa, *Constitución y Mercado*.

¹⁸ In his book, *Constitución y Mercado*, José Roldán Xopa summarizes the debate between Andrés Serra Rojas, Ignacio Burgoa, and Martín Díaz y Díaz. While Serra Rojas and Burgoa argue that the nation (or state) is not really an owner but a regulator and administrator of assets, Díaz y Díaz argue that the nation is an owner, albeit subject to limitations that an ordinary owner does not bear.

natural resources—that may be exploited by private parties. Minerals of all types, hydrocarbons, fisheries, and other public assets are subject to direct domain, which determines how exploitation rights may be acquired. To parse this out, it is helpful to analyze paragraph 4 of Article 27:

The following elements are the property of the Nation: all natural resources of the continental shelf and the seabed of the islands; all minerals and substances that are in seams, layers, masses or deposits and that have a nature different from the components of the soil, such as minerals from which metals and metalloids are extracted; beds with gemstones or salt; salt mines formed by sea water; the products derived from rock breaking, when their exploitation requires underground works; minerals or organic deposits susceptible to be utilized as fertilizers; solid mineral fuels; petroleum and all solid, liquid or gaseous hydrocarbons; and the space located over national territory, according to the extension and terms established by International Law.

Direct domain sets forth how the state may grant exploitation and/or use of publicly owned natural resources by private parties, while receiving economic compensation in return. According to Article 27 of the constitution, title over these assets may be obtained by means of two main sources—concessions and contracts—as stated in the following text:

In the cases referred to in the two previous paragraphs, the Domain (or Property) by the State shall be *inalienable* and *imprescriptible*, and the exploitation, use or development of those resources, be that by individuals or by corporations incorporated in accordance with Mexican laws, shall not be carried out but *through concessions* granted by the Federal Executive in accordance with the *rules* and *requirements* so established by the laws; exceptions are made for broadcasting and telecommunications concessions, which shall be granted by the Federal Telecommunications Institute. Legal norms regarding works or efforts to exploit minerals and other substances referred to in paragraph four shall govern the execution and oversight of those carried out, or that ought to be carried out as of their entry into force, regardless of the granting date of the concessions, and the breach thereof shall result in the termination of the concessions. The Federal Government is empowered to establish and revoke national reserves. Such declarations shall be made by the Executive in those cases and under the conditions set forth by the laws. No concession shall be granted in the case of radioactive minerals¹⁹ (emphasis added).

¹⁹ Political Constitution of the United States of Mexico, Article 27, paragraph 6.

Several key characteristics are mentioned here that deserve further analysis. First, it is said that this title—domain or dominion—is “inalienable” and “imprescriptible.”²⁰ By inalienable, it is meant that the state does not have the right to sell or encumber those resources as long as they remain in their natural state and location. This means that for resources that have not been extracted from the subsoil, not even the government itself,²¹ or a third party by means of a concession, may acquire title over these assets. As long as they remain underground, minerals and/or any other resources may not be a part of any commercial transaction. “Imprescriptible”²² refers to the impossibility of anyone acquiring title as a result of the passage of time. In Mexico, as in other jurisdictions, property may be legally acknowledged if possessed peacefully, publicly, continuously, in good faith, and if the possessor acts as owner for a period of five years.²³ Could this happen with minerals or other substances in the subsoil listed in the constitution? In these instances, the owner of the surface land cannot acquire mineral rights by acquisitive prescription. That is, even when land is privately owned and has mineral resources underground, the land owner is not entitled to exploit those resources without a proper governmental concession and the duties, taxes, and royalties payable to the government as the administrator of the nation’s patrimony.²⁴

Furthermore, there are specific resources that are not eligible for private ownership through government concessions. Hydrocarbons, for example, are resources under the direct domain of the nation and are subject to a specific constitutional regime, as follows:

In the case of petroleum and solid, liquid or gaseous hydrocarbons found underneath the surface, domain by the Nation shall be *inalienable* and *imprescriptible*, and *no concessions* shall be granted. In order to obtain revenue for the State and contribute to the long-term development of the Nation, the State shall explore for and exploit oil and other hydrocarbons through assignments to productive *state-owned companies*, or *through contracts to be executed with them or private*

²⁰ The most authoritative legal dictionary in Mexico is the *Diccionario Jurídico Mexicano*, México, Instituto de Investigaciones Jurídicas-UNAM, 1982.

²¹ *Ibid.*

²² Pursuant to Article 1136 of the Federal Civil Code. The acquisition of goods by way of their possession is called positive prescription. The requirements to be fulfilled are established in Articles 1151 to 1153.

²³ *Ibid.*

²⁴ These are established in the implementing laws of Article 27 of the constitution such as the Mining Law (*Ley Minera*) and the Law on Fiscal Compensations for Hydrocarbons.

parties, in accordance with the implementing law. To fulfill the purpose of said allocations and contracts, the productive state-owned companies may enter into contracts with private parties. In any event, *subsoil hydrocarbons* shall remain property of the Nation and it shall be so expressed in the allocations and contracts²⁵ (emphasis added).

The current wording of the constitution is a result of the 2013 energy reform, which permits private parties to exploit hydrocarbons through contracts, though not concessions, as is the case with other minerals. The reasons for this are found in Mexico's history. Former Mexican President Lázaro Cárdenas spearheaded the oil expropriation in Mexico in 1938 and barred all such concessions as a form of acquiring the rights to hydrocarbon ownership and exploitation. Since the 2013 reform, however, private parties and state-owned companies, as well as Pemex, Mexico's national oil company, may acquire the rights to exploit hydrocarbons through contracts, but again, not through concessions. The effect is the same, for practical purposes, but it is important to be aware of the language and terms. The distinction was an agreement among Mexico's political parties in 2013, designed to respect the will of Cárdenas.

Public Assets in the Constitutional Text

We have so far examined the implications of the terms original property as it relates to the genesis of private property and direct domain as it refers to national assets. Now, to add to the conceptual mix, the constitution also utilizes the term "public property," otherwise called national assets.²⁶ In what sense is public property different from original property or public domain? In the absence of an authoritative interpretation, from scholarship or from judicial rulings, public property—whether federal, state, or municipal—can be understood as an overarching category in which original property and direct domain are included. However, not all public assets have been symbolically transferred, as with original property, or are subject to direct domain, as applies to resources that can be used and/or exploited through concessions or contracts.

As a category, "national assets" is broad and comprises all assets mentioned in the constitution and a few more—including artistic, historic, and archeological objects of special interest—over which the state has title. The regulation of these goods is contained in the National Asset Law, which will be analyzed below.

²⁵ Exploration and production contracts, by which the operator can acquire a title to hydrocarbon production, were a result of the 2013 petroleum reform in Mexico. Prior to that, only Pemex, Mexico's national oil company, was granted hydrocarbon ownership, and it compensated the state through the payment of taxes and duties to the fiscal authorities for the extracted natural resources.

²⁶ Public property is regulated in paragraphs 4 to 8 of Article 27.

The National Asset Law: The Implementing Code of Article 27 of the Constitution

Secondary legislation should clarify constitutional wording, which may be laden with political and ideological jargon. This is particularly true of the Mexican Constitution, which, more than a document containing essential legal guidelines, also serves as a political manifesto.²⁷ Thus, its implementing legislation should be as practical as possible and aim to reduce uncertainty and transaction costs.

Unfortunately, the National Asset Law does not allow us to arrive at a clearer interpretation of the constitutional intent. For this reason, it is necessary to interpret some of the rules concerning possession and access to publicly owned assets, particularly land.²⁸ Instead of going deeper into the terminology, which could be long and pointless, this paper intends to make a pragmatic interpretation of the law by concentrating on the topics that concern the administrative processes that allow access to publicly owned lands and the obstacles that may be encountered throughout the process.

For the purposes of this paper, the most relevant aspects of the National Asset Law are the applicable rules for the acquisition, titling, administration, control, and oversight of the sale of federal property and for the organizations of the decentralized federal government agencies that oversee this²⁹ (except for those properties to which special regulations apply).³⁰ The law also contains rules for the appraisal of state-owned assets, as this is important for investors who seek to acquire rights (land property, use, and easements) for their projects. For the sake of brevity, this report is limited to federally owned lands.

²⁷ Roldán Xopa, *Constitución y Mercado*.

²⁸ It is worthwhile to note that Article 3 has a rather long list of things that are to be considered state-owned assets that I do not replicate in this report as I deem it unnecessarily cumbersome. Also, the law assigns competences for the administration and recording of national assets. This is crucial to know in a country where a filing or a request before the wrong authority may cause delays and significant increases in transaction costs. Thus, the National Asset Law assigns competences among the agencies of real property in order to create and operate the administrative system for all federally owned real property. This includes the information corresponding to the Federal Real Property Public Register.

²⁹ Decentralized organizations in Mexico are state-owned institutions that either engage in economic activity or provide a public service and are usually subsidized. As they have relative autonomy before the government, their assets are subject to a specific legal framework pursuant to Articles 117 and 118 of the National Asset Law.

³⁰ Specifically regulated assets are those assigned to determined agencies. For example, historic, archeologic, and artistic monuments are under the custody of the National Institute of Fine Art (*Instituto Nacional de Bellas Artes*) and are not subject to the generic laws of public assets. See National Asset Law, Article 4, paragraph 2.

Administration of Federal Lands

Up until 1994, the areas of patrimonial administration of the Secretariat of Social Development (SEDESOL) and the formerly called Commission of National Asset Appraisal (CABIN) were in charge of the management of federal property. In 1994, the latter became a specialized entity with specific legal powers to administer federal property and work in public buildings. Since its creation, the specific task of CABIN was to perform appraisals so that acquisitions, sales, and rentals could be executed with and for government facilities. Such appraisals were the basis for remedy when expropriation proceedings of owned property occurred. But even when CABIN became an agency dedicated to the appraisal of federal property, it failed to create a systematic record and administration system for such assets. Its records show that there were significant gaps, inconsistencies, and even contradictions over the same—and certainly over different—land areas.³¹

After 77 years of uninterrupted rule by the Party of Institutional Revolution (PRI), there was a transition of power in 2000, when the National Action Party (PAN) won the elections. Although PAN President Vicente Fox Quezada pushed through a substantial change in the management of government-owned property,³² the enactment of the new National Asset Law in 2004 did not bring about a true transformation of patrimonial management policy. In the opinion of Ignacio Galindo Garfias,³³ there were no genuine efforts to build modern institutions of accountability with regard to the use of public funds for the administration of public lands and facilities.³⁴ With the enactment of the General Law of National Assets of 2004, the National Institute for Administration and Appraisals of National Assets (INDAABIN) was created to replace CABIN within the institutional structure of the Secretary of the Public Service (*Secretaría de la Función Pública*). To this day, this agency remains in charge of the protection, control, security, administration, and appraisal of federally owned property. However, by 2005, there was still no classified or systematic information regarding the value, location, and use of properties leased by the federal government. INDAABIN's main challenge, as the pillar of federal property policy, is still to achieve a balance between the sales of property that are inadequate for use in public service and to have enough assets in the nation's patrimony. The existing inventory of assets has been the result of a joint effort between different government agencies in the federal government by way of purchase, expropriation, exchange, merger, partition, judicial award, etc.³⁵

³¹ Ignacio Galindo Garfias, "Algunos comentarios a la Ley General de Bienes Nacionales de 1981," México, Facultad de Derecho, Universidad Nacional Autónoma de México, 1983.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

Concession of Federal Lands: The Regulatory Labyrinth

Pursuant to Article 2, Section VII of the General Law of National Assets, federal land is one that, with or without construction, is owned, possessed, controlled, or used by the federal government acting as an owner. Property owned by third parties is not considered federal, although the federal government may possess, control, or administer it as a result of a legal transaction.³⁶

As many infrastructure projects extend throughout and across Mexican territory, it is likely that developers will require the use of federal lands. Article 16 of the law stipulates that such use may be obtained by concession, permits, and authorizations. However, this does not amount to property rights and only creates rights and obligations between the agency representing the government and the other party.

This type of title has important legal implications. Namely, the rights of the holder are subject to the conditions set forth in the concession, and there are clauses that make such rights contingent upon the government's will. Article 6 of the General Law of National Assets establishes that such rights may also be cancelled due to public policy or natural security reasons, as long as they provide remedy to the affected parties. The wording that makes such revocation possible is quite broad and could be used as an arbitrary measure against investment.³⁷

Granting a concession of federal property is a common way by which the government allows the use of its property for economic, social, or cultural activities, subject to the limitations established in other laws.³⁸ Such concessions may last up to 50 years and could be longer, by one or more times, with the consent of the granting agency.³⁹ Getting a concession as well as an extension from the government depends on how much money is likely to be invested in the project, the length of the amortization period, the presence of social need, the potential benefits of the project, and the compliance of the company to the rules and regulations. Also, the term of the concession is based on the value of constructions on the land and the value of the reinvestment for the improvement of the facilities used for the services rendered. It is important to note that once the term of the concession has expired, the works and constructions therein will become national assets, with the exception of some specific projects.⁴⁰

³⁶ National Asset Law, Article 2, Section VII.

³⁷ As happens with expropriation (eminent domain), in the revocation decree it wouldn't suffice to say that such rights are voided due to "public or national interest." Such decree must contain substantial reasoning, as José Roldán Xopa explains in *Constitución y Mercado*.

³⁸ National Asset Law, Article 72, paragraph 1.

³⁹ National Asset Law, Article 73, paragraph 1.

⁴⁰ Ibid.

Concessions may expire due to reaching their term, by relinquishment before the awarding authority, disappearance of their purpose, nullification or revocation,⁴¹ a “rescue order”⁴² due to national security, or for any other reason established in applicable laws and regulations the government deems appropriate. A concession may also be terminated based on the failure to initiate use or enjoyment of the land or to build the planned constructions and improvements within the term established in the title.⁴³

Revocation is the more frequent legal measure applied to federal property under concession. Revocation is different from expiration and termination. While the latter does not result from the material fault of the awardee, revocation does. And while expiration of a concession does not carry sanctions (such as being barred from obtaining future concessions from the government), revocation of a concession may have such penalties. Some of the reasons why land under concession can be revoked include: failure to fulfill the object for which the concession was awarded; use of it for an unauthorized or unlawful purpose; breach of the conditions established in the title or in the legal and regulatory framework; default on the duties and taxes; reassignment of the rights and obligations set forth in the concession without permission of the authority (or the issuance of a lease or permit for the use of the acreage without authorization); unauthorized construction; damage to the environment as a result of the use, enjoyment, or exploitation of the acreage; and any other cause applicable in the law. Once the concession is revoked, the property of all works and constructions contained therein become part of the property of the federal government.⁴⁴ Further, economic sanctions may be applicable to the awardee based on the profits received, the damages caused, and the unpaid taxes and duties.⁴⁵

Transmission of Rights of Federal Lands

Pursuant to Article 2 of the General Law of National Assets, the federal government may sell property to private parties who require it for the creation, promotion, or conservation of an enterprise that may benefit the community at large, or for housing or urban planning programs. These properties may be leased, loaned, or given in usufruct to institutions that provide social assistance or conduct scientific research, as long as these are nonprofit activities. Other applicable laws may establish ways by which these properties can be acquired. Property that is no longer

⁴¹ National Asset Law, Article 74.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ National Asset Law, Article 92.

⁴⁵ Ibid.

useful to the provision of a public service can be sold, exchanged (for other properties of similar location and characteristics), given in donation to government agencies whose objects are either education or health, or leased, given in usufruct, or loaned by the government.

The general rule applicable to the sale of federal lands is by way of a public auction.⁴⁶ If no acceptable offer is made during the course of the auction, the federal government may choose to undertake additional public auctions by reducing the cost to 80% of the property's appraisal in the second attempt, and to 60% of the appraisal in the third (this is the minimum acceptable bid). If none of these amounts are offered, it will be awarded to the person offering the highest value in the last auction, as long as the appraisal ratios are still applicable. Sales of federally owned lands are formalized before notaries of federal property, appointed by the Secretary of Public Service.⁴⁷

Private Land Titles in Mexico: The Path of Least Resistance

Project development and transactions in general are costly when there is uncertainty in property rights. While it should be obvious that development projects need land, it is common to find developers surprised at the level of difficulty in acquiring land in Mexico, even in cases of privately owned acreage. The reasons are many, but a key factor is the long-standing tradition of not formalizing the transactions. Tabasco attorney Erik Priego Sobrino explains that, as in all of Mexico, “informal property transfers are commonly found in Tabasco.” He writes that in his experience as a real estate law practitioner for large-scale infrastructure projects, he has found the most peculiar forms of transmitting property—including unwritten contracts, payment for gambling and bets, probates in life, and even as compensation for taking care of aging parents. He has also found that people often transfer their property without leaving a trace of how or when the transaction was executed. Curious to researchers, but alarming for prospective buyers, he has even found testimony of purchases documented in napkins and tortilla wrapping paper.⁴⁸

In Mexico, private land transactions are subject to the legislation and jurisdiction of each state; and although the rules are fairly clear in each of the local codes, uncertainty of title in acquiring private land is one of the principal problems encountered.⁴⁹ As Priego Sobrino relates, particularly in the provinces and rural

⁴⁶ National Asset Law, Article 85, Sections I-III.

⁴⁷ National Asset Law, Article 97.

⁴⁸ Erik Priego Sobrino, “La deconstrucción del Viejo Sistema y la Transición al Nuevo Modelo Energético Mexicano,” in *Nuevo Modelo Energético y Cambio Climático en México*, eds. Erik Manuel Priego Sobrino and Rafael Loyola Díaz (Mexico: Miguel Ángel Porrúa, 2018), 198.

⁴⁹ Article 72 of the Mexican Constitution states that anything not explicitly reserved to the federation is of the purview of local authorities. The same article lists all matters reserved to the

zones, people reach atypical arrangements, much in accordance to their own traditions and practices rather than following the formal steps of the law. The various local and federal tax regimes, depending on the acreage, establish relatively high costs to formalize land acquisitions. Land purchases are “formal” transactions, meaning that the parties may agree on the *substance* of the contract, but the *form* the contract takes must follow certain rules.⁵⁰ After the buyer and the seller shake hands and agree on a price payable for a certain size of property, they must agree on hiring a public notary before whom they will formalize the transaction. The public notary will also perform a thorough investigation in the Public Registry of Property (*Registro Público de la Propiedad*) to make sure that the seller is the lawful owner and that the property is free of liens and other burdens. This research may happen rapidly in some cases, but not always, as it depends on a series of socioeconomic factors.⁵¹ As already mentioned, in rural areas, duly formalized agreements are the exception, not the rule,⁵² and transfers of property may have been irregularly executed for decades. Thus begins what civil scholars have called the “diabolical proof,” or the search for the first owner who made a lawful purchase.⁵³ Often the search is truly “diabolical;” a needle in a haystack would be easier to find in many instances. If a legally sound title is impossible to find, then the parties have a few options. A very cautious buyer may abort the transaction, which is a rational but infrequent choice. Another option is to have the buyer request the positive prescription of the land while paying the seller rent in exchange for the use and occupation of the property during a period of five or more years.⁵⁴ Meanwhile, the buyer can “peacefully, publicly, duly, in good faith and acting as a true owner” await the ruling of a local civil judge who will declare the property his or hers, as long as no other owner with a better title claim shows up during the process. This could occur, because once the judicial process begins, it must be publicized in bestselling newspapers and in the *Judicial Gazette*.⁵⁵ If someone with a legally sound title does

federation. The purchase and sale of private lands is not listed explicitly in the article, and thus it is a local matter.

⁵⁰ All of Mexico’s civil codes set forth that the sale of real property must be in writing and to have effects against any third party must be executed before a public notary and recorded in the corresponding Public Registry of Property (*Registro Público de la Propiedad*).

⁵¹ Priego Sobrino mentions that in Tabasco, his home state, there are many obstacles to having certainty in land rights. These obstacles range from the absence of a proper system for public records to government corruption to the lack of financial resources and a generalized disregard for the rule of law. See Priego Sobrino, “La deconstrucción del Viejo Sistema,” 187-192.

⁵² I would like to thank attorney Josué Almazán Mancilla for his recount of rural transactions given in June 27, 2021 in Villa del Carbón, State of Mexico.

⁵³ Rafael Rojina Villegas explains the concept of “diabolic proof” and how proof of the original owner is impossible to find. See Rafael Rojina Villegas, *Compendio de Derecho Civil. Bienes, Derechos Reales y Sucesiones* (Mexico: Porrúa, Universidad Nacional Autónoma, 2008), 111.

⁵⁴ Federal Civil Code, Article 1156.

⁵⁵ *Ibid.*

appear, the person occupying the property will most likely be evicted⁵⁶ unless arrangements between the parties involved are made. Needless to say, acquiring property by way of positive prescription is a lengthy and risky process, filled with anxiety for the purchaser.

The following is the most common, though imperfect, solution: The buyer and seller reach an agreement by which the title is transferred without the formalization of a public notary, and no taxes or duties are paid. This is a practical and agile transaction, but there are great risks. The law orders these transactions to be executed before a public notary⁵⁷ to ensure the visibility of the transaction. Further, the public notary collects the taxes from both the buyer and seller, charges a fee, and proceeds to record the sale agreement before the Public Registry of Property in the corresponding state. Once the agreement is recorded, no one can claim title against the purchaser. In Latin this is called a property right *erga omnes*, which resists the claims of any person. A private transaction between buyer and seller only ensures legal security between the buyer and seller. If a person with a better title (a notarized, recorded contract) appears, he can evict the purchaser from the property.

These circumstances are particularly burdensome when hundreds, sometimes even thousands, of acres are involved in projects that need access to land use, easements, excavation, and rights of way, among other uses that require negotiations—not only with the owner, but also with other occupants of the acreage. Still, private transactions, albeit complex and costly, are doable and preferred over public and social land ownership, which are analyzed below.

⁵⁶ Federal Civil Code, Article 1168.

⁵⁷ Law of Notaries (*Ley del Notariado*), Article 11.

The Strangest of All: Social Property

Social property,⁵⁸ often called communal property, is the result of a long and complex history of land reform stemming from the Mexican Revolution (1910-1920). The distribution of land⁵⁹ in the 75 years after the revolution was an intricate process, involving arduous debates to create institutions “responsible for the implementation of the reform legislation, including a vast number of laws, regulations and codes pertaining to land distribution, titling and enforcement of the agrarian law, as well as for overseeing the proper functioning of agrarian communities.”⁶⁰ In this process, important aspects of the constitution and the law concerning the administrative architecture of social property, as well as policies and programs regarding the use and transmission of these lands, were carried out, once the revolution ended the system of *latifundios*, whereby large plots of land were worked by underpaid peasants, almost to the point of slave labor.⁶¹

⁵⁸ “Social property is ‘held’ by a group of people. Social property includes those properties held by *Ejidors*, indigenous communities and agrarian colonies. Under this classification, the members of these social groups (*Ejido*, community and colony members) acquire use and enjoyment rights only.” Further, social property is composed of “1) Small private property. The owner has the right of use and usufruct of the land and the right to sell or dispose of it. The Constitution limits the amount of land allowed in private holdings. 2) *Ejido*. Agrarian community created by land distribution under agrarian reform (1917-92). Land was given to the members of an *ejido* for use and usufruct, but remained the property of the nation. The rights are inheritable. By land endowment, peasants were given access to land in order to constitute an *ejido*. This process was often legally complicated; years could pass before the peasants finally had the title. 3) *Comunidad agraria*. Agrarian communities are collective owners of their land under a common property regime. Restitution of land is the mechanism by which agrarian reform restituted the land. Communities had to prove that they were the rightful owners of the land of which they had been illegally dispossessed. If the documents (often dating from the colonial period) were retrieved, community boundaries were often ambiguous and the rights of different groups and private holdings, as well as rights to other natural resources (such as water and forests) often overlapped.” See Kirsten Appendini, “Land regularization and conflict resolution: the case of Mexico,” *Land Reform*, 2002, <http://www.fao.org/3/y3932t/y3932t00.htm#toc>.

⁵⁹ According to most recent statistics published by the agrarian authorities, 52% of Mexican territory is comprised of social property, 40% is private property, and 8% is public property. In addition to this, a significant amount of social property belongs to *ejidos* that are located in the coastal areas, which certainly increases the interest of real estate and tourism business investors in this type of land. See Appendini, “Land regularization.”

⁶⁰ *Ibid.*

⁶¹ *Ibid.* Most of this complexity is due to the fact that *ejidos* are very heterogeneous in their activities. Some engage in commercial agriculture while others are comprised of households cultivating food crops for their own consumption. According to Appendini, “the growth of urban zones may have encroached upon the territory of nearby *ejidos*, so that their lands may be urban or semi-urban. Depending on their geographic location, fishing could be the primary activity, or if situated near beaches, they could engage in collective tourism. Other *ejidos* partake in ecological tourism if they are situated on a natural reserve. Despite the general notion that

It is worth noting that between 1917 and 1992, different governments under distinct legal regimes and institutional architectures distributed 51.4% of Mexico's territory to peasants. "Land distribution was carried out by land restitution, land endowment, expansion of the *ejido* system, and creation of new *ejido* population centers. The procedures by which land was given in possession to *ejidos* and agrarian communities included a long list of legal instances and decisions at different levels, from the local institutions and authorities to the president of Mexico."⁶²

A crucial event occurred in 1992 when Article 27 of the constitution and the agrarian law was reformed so that peasants could transfer the rights to their land lots (*parcelas*). These changes took place under former President Carlos Salinas' banner of "social liberalism." This apparently contradictory term meant that peasant land would remain under the principles of social communitarianism (in which collective interests prevail over private ones), while citizens also embraced liberalizing notions like land transfers and property rights. Under the latest agrarian law, "peasants may have full property rights (attain privatization) over their plots and the right to decide the destiny of the common lands and the collective resources of the *ejido* and agrarian communities. The reforms were intended to create an active land market, promote efficient resource allocation and enhance investment in agriculture."⁶³

The reform to Article 27 required a program for the regularization of land titles with the purpose of securing property rights for millions of peasants. In 1993, this program was named PROCEDE⁶⁴ and was established by the then-new Office of the Agrarian Attorney (*Procuraduría Agraria*). The program faced the enormous task of resolving pending conflicts concerning land tenure, such as disputes between, as well as within, communities. This had to take place before being able to award the *ejidos*, as well as the individual peasants, with documents certifying the physical location and characteristics of the communities, the individual plots, the land use, and the identification of the persons with legal rights and the right of ownership of the plots.

these lands are mainly for agricultural use, each *ejido* has its specific opportunities and challenges."

⁶² Ibid.

⁶³ The new Agrarian Law of 1992 made several important changes. First, land reform through land distribution was discontinued. Second, the rights of the *ejido* members were extended. A key stipulation that remained, however, was the right of members to lease or sell their individual plots. Furthermore, the assembly was left in charge of deciding how to assign common lands and enter associations with external capital. Third, the plots assigned for housing in the *ejido* population nucleus were allotted as private property.

⁶⁴ "In 1992, due to generalized conflicts existing within the *Ejidors*, the government recognized the need to regularize and give certainty to the tenancy of the land already 'granted' to *Ejidors*. It therefore also decided to stop granting more land to *Ejidors*. Due to this circumstance, a process called PROCEDE (*Procedimiento de Certificación de Derechos Ejidales*/ Procedure of Certification of *Ejido* Rights) was created under the current Agrarian Law." See Appendini, "Land regularization."

“In the process, new tensions and conflicts emerge[d],⁶⁵ ... as the institutional setting governing rural property rights is very complex, as is the heterogeneous countryside with its different agroecological, socio-economic and ethnic contexts.”⁶⁶ One of the most crucial tasks of PROCEDE was the certification of rights. By way of PROCEDE, each *ejido*, and its various components, which will be described below, are surveyed, numbered, and allotted to an individual *ejidatario* (someone who holds a share of an *ejido*), accompanied by its respective “title” or “certificate” as proof of legal tenancy.⁶⁷

Before 1992 and the development of the PROCEDE program, *ejido* members alone had the rights to use and enjoy the land, but as they were not true owners of their plots, they could not transmit these rights. As a result of PROCEDE, *ejidatarios* today are legally able to “i) Assign their rights to parcels between members of an *ejido*; ii) inherit their *ejido* rights; iii) enter into long-term (30 years, renewable) association agreements with third parties to exploit their parcels and common use land; and iv) acquire full ownership and title to *Solares* (lots) and transfer them to any third party including foreigners, without restrictions.”⁶⁸

Another important task performed by PROCEDE was the classification of the types of acreage within *ejidos*. The classification is important, because to each class of land corresponds a legal regime that varies in terms of the use and transfer of rights.⁶⁹ The classification is as follows:

- i) Parcels (*parcelas*)—These are lots for the use and enjoyment of *ejidatarios*—individuals or families with individually conferred rights. It is legally possible

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ana Lilia Lozano, “How Realistic and Reasonable Is Acquiring Ejido Land In Mexico?” Lozan, Abazan & Associates, 2016, <https://mexicanattorneys.com.mx/en/que-tan-realista-y-razonable-es-adquirir-tierras-ejidales-en-mexico>.

⁶⁹ Ibid. *Solares* are sellable to any third party, including foreign individuals or entities, as the *ejido* members are the owners and “title holders.” Unless parcels have gone through PROCEDE (certification) and have attained *dominio pleno* (full domain), they will not be subject to any transaction. Once they have, rights can be transferred as in the case of any private property. “Parcels converted into private property are sellable, but the first sale is subject to the notification of ‘right of first refusal’. If this notification is not made, the sale can be nullified.” Rights to parcels not converted into private property can be transferred between or among *ejido* members of the same community, but even so, the assignment must fulfill certain formalities. For example, all assignments of rights to parcels must be recorded before the National Agrarian Registry (RAN) and the existing parcel certificate has to be cancelled in order for a new one to be issued in favor of the new ‘certificate’ holder. No private persons, be they companies or individuals, domestic or foreign, may become an *ejidatario*. Parcels and common use land can be subject to long-term agreements as permitted by the law. These agreements may be in force for 30 years and are renewable. Common use and human settlement acreage, with the exception of *solares*, cannot be sold or be subject to any commercial transaction.

to enter into association agreements with other *ejidatarios*, and the parcels can be converted into private property via the *dominio pleno* procedure,⁷⁰ after which they may be acquired or leased by third parties pursuant to private (civil) law.⁷¹

ii) Common use land—These are areas within the *ejido* destined for the use of the community, such as land used for agriculture, industry, recreation, and other facilities. This type of land may not be subject to privatization.

iii) *Solares*—These are the urban lots granted to *ejidatario* families and/or individuals for settlement purposes. “*Solares* are granted through ‘Property Titles’ and the *ejido* members acquire full ownership and are able to transfer them to any third party without restriction (including foreign individuals and entities), as they are the ‘owners.’ They are not properly *ejido* territory, as they are the urbanized area within an *ejido*.”⁷²

By means of PROCEDE (with the exception of *solares* or lots from which *ejido* members acquire ownership and “title,” as described before), *ejido* members only acquire use and enjoyment rights that are recognized or supported by certificates. However, these certificates are not property titles, and they can only be transferred among *ejido* members at this point.

***Dominio Pleno* or Full Domain: The Conversion of *Ejido* Land to Private Land**

The certification of rights and the award of title have a dual purpose. First, they aim at creating legal certainty for *ejidatarios*, the true owners of their parcels. Second, they create the primary conditions that allow parcels to be sold or made subject to commercial transactions. Before this is possible, PROCEDE rules must be followed.⁷³ Further, once the certification and validation of title is complete, the title holder seeking to transfer his or her land rights must first obtain the consent of the General Assembly⁷⁴ of the *ejido* to obtain the *dominio pleno*, which is translated as full ownership or full domain.

⁷⁰ Lozano, “How Realistic and Reasonable.”

⁷¹ Ibid.

⁷² Roberto Escalante, “El Mercado de Tierras en México,” Digital Repository, United Nations, Economic Commission for Latin America and the Caribbean, 2001, <https://repositorio.cepal.org/handle/11362/4494>.

⁷³ Ibid.

⁷⁴ Appendini, “Land Regularization.”

Receiving the consent of the assembly to approve the *dominio pleno* can be tricky, as the assembly is composed of however many *ejidatarios* are members of the community—sometimes hundreds or even thousands of individuals.⁷⁵ Should that authorization be granted, the Agrarian Tribunal must validate the decision of the assembly. Once these steps have been cleared, the law sets forth that the parcel(s) involved are subject to the “right of first refusal” in favor of other *ejido* community members. This notice is given to the *ejido* representatives (*Comisariado Ejidal*) and must take place “30 days prior to the sale, in writing and before a notary and two witnesses. If this notification is not made the sale can be nullified.”⁷⁶

Thus, only after the parcels have been certified, the title has been legally conferred, the corresponding assembly approvals have been granted, the Agrarian Tribunal has validated said approvals, and the right of first refusal of other *ejidatarios* has been exercised, will the holder of the parcel obtain *dominio pleno*, full property or domain. On top of this complex and lengthy procedure, local institutional practices are not simple. They are interpreted rather subjectively by the authorities and may differ among stakeholders.⁷⁷ Further, assemblies may be divided and often are. For example, in order to elect representatives to the *Comisariado Ejidal*, different “parties” (*planillas*) are formed, and sometimes complex election processes take place among groups with differing and even conflicting interests. Thus, while some assemblies (or some parts of them) may be amicable toward the idea privatizing a parcel and including a stranger in the *ejido*, other members may be opposed to their presence in the territory. To ensure there is substantial consent, the assembly, as required by law, must rule on whether or not the applicant is considered to be residing (*avecindados*) among the other *ejidatarios*. The complexity of getting this social acceptance may be varied and may take any length of time, as there is no statute of limitation set forth in the law.

In light of the above, there is data,⁷⁸ albeit already 20 years old, that most *ejidatarios* have chosen the path of least resistance, which is to agree upon the use and possession of the land as if it was subject to a private regime. Unfortunately, the most complete

⁷⁵ My gratitude to agrarian attorney José Almazán for providing a vivid testimony of *ejido* living.

⁷⁶ Escalante, “El Mercado de Tierras en México.”

⁷⁷ Appendini, “Land Regularization.” Appendini writes, “It is important to note that not all peasants have rights as *ejido* members. In some *ejidos* there is not enough land for everybody, particularly in the case of children and third-generation *ejido* families who received land decades ago, or in cases where the expansion of the *ejido* was not sufficient or not achieved. Consequently, there may be people living in the urban nucleus of the *ejido* who do not own land and do not participate in the assembly because they have no rights as *ejido* members.”

⁷⁸ See Escalante, “El Mercado de Tierras en México.”

study, performed by the Economic Commission for Latin America and the Caribbean,⁷⁹ is two decades old, and there is a lack of data due to the absence of statistical studies performed by the government. The last census performed by the National Institute for Geography and Statistics dates back to 2007,⁸⁰ which makes the task of finding reliable and current data impossible.

This is a perplexing situation given the importance of the problem of land rights and risk in Mexico. If 53% of the land in Mexico is under the provision of the agrarian law, it is difficult to understand why such a crucial topic lacks reliable data and studies of critical depth and substance. In *ejido* lands there may be a source of wealth unimagined by its title holders and external investors.

Conclusion

Mexico is a country rich in natural resources, and one of them is the vastness of its territory and its privileged geographic location. However, there is a generalized and superficial view that Mexico poses no challenges to acquiring land with optimal legal and therefore commercial conditions. Land acquisition in Mexico can be costly and can have uncertain outcomes depending on several institutional and organizational factors. In the case of private acquisitions, the title holders intending to sell must have a regular and solid title to the land, which may not occur due to the abovementioned transaction costs (notarization, payable duties and taxes, recording). Also, the quality of notarial services varies greatly from state to state depending on the quality and professionalism of the individual involved and the stringency of the legal requirements to become a public notary in each state.⁸¹ Finally the modernization of the Real Estate Recording Office and its operative tools is vital to provide legal certainty to sellers and buyers.

As for publicly owned acreage, obtaining a concession for land may vary in complexity depending on several factors, including the will and discretionary power of the bureaucracy to grant the concession, the accuracy of the information about the land from the INDAABIN, and the amount of economic interest in attaining the use of the acreage, which may generate competition among stakeholders. Also, limitations and requirements imposed by the legal regime are important, especially in cases

⁷⁹ Although the study performed by Roberto Escalante is rich and rather resourceful, it was published in 2001, 20 years ago.

⁸⁰ The agrarian census of 2007 was the ninth census taken and only represents continuous demographic data up to 2007. See *Censo Eiidal 2007*, Instituto Nacional de Geografía y Estadística (National Institute for Geography and Statistics) <https://www.inegi.org.mx/programas/cae/2007/>.

where there is an overlap of federal, state, and municipal oversight. As for the social land category, the process of land acquisition involves a very lengthy process with many stakeholders, and it may take years until the interested parties become owners under the full protection of Mexican law.

In sum, although a rather vast number of infrastructure projects have matured and prospered in Mexico, this may have been largely a result of specific social-political junctures, rather than the existence of a robust architecture of rules providing certainty. In other words, connections to federal and state governments, and their own stake in large projects, may be the true dealmakers of today—and this is not the basis for generating certainty in any land market. Great challenges lie ahead in terms of legal, regulatory, and institutional transparency and simplification of Mexico's land regime. These factors must be addressed in order to make land ownership and use more efficient both for title holders and parties interested in developing projects in Mexico. Given the López Obrador administration's relative hostility toward private investment, now is the time for real estate and infrastructure developers to take heed of the many challenges involved in Mexico's land governance regime.