



CHEMONICS INTERNATIONAL INC.



GUATEMALA LEGAL ISSUES OF CONFLICT MANAGEMENT

Institutional Study by the Office of the President for Legal Assistance and Land Conflict
Resolution in Guatemala (CONTIERRA)

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Legal Issues of Conflict Management in Guatemala

Background

The present document is the result of an institutional study by CONTIERRA, as well as a review of various documents and interviews, and the analysis of Guatemala's legal and political instruments, relative to land ownership issues and mechanisms to manage conflicts stemming from this subject.

To conduct this study, a multidisciplinary team was established, with funding from the United States Agency for International Development (USAID), Danish cooperation (DANIDA), and the United Nations Development Programme (UNDP), which were in charge of coordinating the team.

Furthermore, I should mention that this report focuses only on legal issues of land ownership and conflict resolution in Guatemala. Other related issues are being addressed by other consultants.

The report is comprised of four issues: a review of the national situation of the agrarian sector, an analysis of CONTIERRA and conflict management in Guatemala, conclusions, and recommendations.

I. Situation of the Agrarian Sector in Guatemala

Guatemala's recent history is very closely tied to its armed conflict, which pitted the armed forces against the civilian population, the Spanish-speaking *mestizo* population against indigenous groups, and Guatemalan nationals against foreign nationals. It is also has to do with the signature of peace agreements and their implementation.

The various commentaries on the peace process, whether they are critical or supportive, and whatever perspective they adopt, highlight the fact that there is no unanimity. Some believe that the peace process does not include all the elements that are needed to pave the way for the country's development, with the full participation of all sectors of society, whereas others, on the contrary, point out that this process has given what the country needs so that it can take the course toward peace. There are even some who have commented that Guatemala, in the next few years, should examine whether it should or should not revise these agreements.

Whatever perspective is taken, there is no doubt that the agreements are in force and that they have provided major guidelines for the agrarian sector, some of which have been implemented, such as the establishment of an institutional framework, conciliation or conflict resolution forums, the allocation of funds for dealing with agrarian issues, among others.

If this has already been done, then why is it important to continue analyzing Guatemala's agricultural reality? It seems that the answer lies in the fact that conflicts involving land ownership have not declined, but rather the more they are neglected the more severe they have become.

On the basis of the above, what is most noteworthy when examining the case of Guatemala is the following:

1.1 There is a highly inadvisable connection between political and technical issues when the subject of land and concomitant conflict management is dealt with. The institutional framework for the agrarian sector has been established, namely, the Land Fund (Fondo de Tierras – FONTIERRA), CONTIERRA, the Technical Legal Unit (Unidad Técnica Jurídica – PROTIERRA), the Secretariat for Agrarian Affairs of the Office of the President (Secretaría de Asuntos Agrarios de la Presidencia – SAAG), the Presidential Unit for Conflict Resolution (Unidad Presidencial para la Resolución de Conflictos – UPRECO), which are all attached to the executive branch of government, with a close proximity to the political sector of government, which could in certain cases invalidate the processes being carried out.

Nevertheless, this is manageable in the light of what is happening in various countries of Latin America, where agrarian institutions are governed by the executive branch of government, although land conflict management is not, except for Mexico¹, which is one of the most atypical cases in the region and, to a certain extent, a successful experience along this line.

The existence of these two jurisdictions in the hands of the State, that is, the regularization of land ownership in conformity to law and agrarian conflict management, administered and managed by public officials, in countries that have been categorized as having public functions that are easily swayed by political considerations and as being plagued by severe agrarian conflicts, is not recommendable. It undermines the stability of government administrations and hampers the sustainability of the agreements that were signed, not only because the conflicts or administrative decisions may effectively be influenced, but also because the parties that do not agree with the resolutions that are adopted will continue to argue persistently that the decisions that have been taken are far from being impartial and objective.

In various countries, as indicated earlier, the jurisdiction for land regularization is administered and managed by the State directly. In other countries, however, this jurisdiction is being increasingly delegated to sectional governments and even to nongovernmental associations, but in no case, except for the one mentioned above, is the management of conflicts, where one of the stakeholders could be the State itself, governed by the State, especially in those countries where the extensiveness of agrarian conflict makes mediation processes a highly sensitive issue.

In some working interviews on this subject, the argument that has been put forth, namely, that the very persons involved in the conflicts are the ones interested in having the President himself, if possible, or at least the institutions that come directly under his jurisdiction, be apprised and

¹ The Mexican Agrarian Legal Office (Procuraduría Agraria Mexicana-PAM) is a public institution in charge of land conflict management, among other functions. The prerequisites that have to be met so that parties to a conflict can submit their conflict to the PAM is that the appeal must be voluntary and that both parties mutually agree to do so. It has been operating for about 10 years and has dealt with about 240,000 conflicts, with a success rate of about 80%.

According to some critics of the system, this large amount comes from the fact that most of the cases that are handled involve small conflicts, while the large ones continue to generate social conflicts. This type of government institution in Mexico is very closely related to the Mexican tradition of local legal settlement offices in small towns. That is, since the nineteenth century, Mexico benefited from local authorities who worked at reaching conciliatory agreements. Therefore, in Mexico, it would seem that an institution like the PAM is very much in keeping with the country's social and agrarian tradition.

process the conflicts. This however is nothing more than a reflection of the weakness of the institutions, whose agreements and resolutions will be difficult to sustain over time if the same structure is kept. The parties to a conflict only require the appearance of the head of a structure when they do not trust the mechanisms that have been created to resolve said conflicts.

Another negative incidence stemming from the proximity being examined is that changes of government, depending on the political biases of the new authorities, generate administrative changes that influence the technical development of these structures, leading to new approaches, among other problems, that contradict processes that have already begun, confounding the beneficiaries of these services.

Frequently, in the working interviews, we heard that one single conflict was handled by two or more representatives of CONTIERRA, throughout the processing of the conflict, either because the official was no longer working in the institution or because he/she had been assigned new duties. Although these situations might also appear in an institution that is not tied down by political changes, at least it would be able to take more independent decisions about what technical actions should be adopted, especially in respect to human resources, as it would not be subject to the administrative laws governing the labor obligations of public officials.

According to some of the officials who were interviewed, this meant that new officials or the stakeholders themselves did not have adequate knowledgeable about the process, which led to delays and sometimes even to uneasiness among the parties to the conflict.

A third issue along this line is that, in conflicts where the State itself has a specific stake in the process, because it is a party to a conflict, the impartiality of CONTIERRA will surely be questioned, because it is felt that the State, although separated into different jurisdictions and institutions, is ultimately one single body, which would make the State a judge in its own case or a mediator in a conflict to which it is a party.

One last argument for the need to rethink the political connection to technical decision making is efficiency and effectiveness: So that an institution, especially a public one, can be both efficient (requiring the least amount of time) and effective (providing high-quality service) in performing its duties, it needs at least two elements: political support and budget resources. We assume that a public institution has political support, but reality indicates that its budget is limited and this makes it difficult for it to carry out its functions.

In view of this, since conflict management comes exclusively under the jurisdiction of CONTIERRA, it would seem that efficiency and effectiveness might well be questioned, because among other reasons it will be depending on a sound budget to hire and motivate highly skilled human resources and give them enough incentives for them to be present most of the time in the zones of conflict; because, to tackle more conflicts, it needs more capital to extend its scope of action; and because the possibility of delegating its jurisdiction to sectional governments or even to nongovernmental organizations (NGOs), so that they can look for and secure funding to cover related costs, is not being considered (at least nothing has been done to this end).

Along this same line, the Institutional Commission for the Development and Capacity Building of Land Ownership, the Technical Legal Unit (Comisión Institucional para el Desarrollo y Fortalecimiento de la Propiedad de Tierra, Unidad Técnica Jurídica — UTJ-PROTIERRA) was initially in charge of developing land registry systems as the final element for a process of regularizing land ownership and titling. In the majority of these countries said systems are being managed in sectional governments, but in the case of Guatemala conflict management is in the hands of this centralized institution. Now, as of January 2002, as a result of the Government Agreement creating the Secretariat for Agrarian Affairs, this Commission has come under its jurisdiction and therefore, by the same token, under the Office of the President of the Republic, because this Secretariat is answerable directly to the President, as will be explained below.

This provides further evidence on how political institutions continue to accumulate clearly technical activities under their jurisdiction.

As a result, a reengineering of agrarian procedures in Guatemala should obligatorily involve a review of the advisability of having these functions so closely attached to the executive branch of government or should at least ensure that jurisdiction for agrarian conflict management be duly separated from the executive branch.

1.2 Sustainability and empowerment of the solutions that are adopted could come up against difficulties in the future because they were conducted and promoted by a state institution, rather than with the direct participation of civil society, sectional governments, and local organizations.

When approaches to development are examined, it is easy to identify at least two schools of thought currently governing this area: one is aimed at empowering local players, whereas the other strives to substitute them for external players.

The consequences of both schools of thought have been fully analyzed. The second has led to all those situations where paternalistic and welfare-dependent conduct is evident. As for the first approach, it continues to fight for the utopia of self-management.

Along this line, the work of CONTIERRA apparently consists of taking over conflict management, which involves traveling to the place of conflict, convening the parties to the conflict, as well as other stakeholders, and finally, in the best of cases, jointly reaching a solution.

This scheme of work would be fine, except for some elements, which have to be emphasized:

When the stakeholders, whether municipalities, NGOs, churches, or representatives of conciliation forums, participate in this process, they are parties to the conflict and even key players for the validation of the agreements, but they are not the agents convening the parties. Sectional governments, for example, usually participate in these processes, but no step has been taken that would lead us to believe that they could eventually become the spokespersons of the State to coordinate conflict management, probably not implemented by them directly, but

outsourced to NGOs, church groups, or conciliation forums, among others, consolidated as a single body.

Furthermore, the usually widespread belief that municipalities cannot be agents of change, because now they normally show signs of pollination and corruption, and that local communities themselves mistrust them has converted them into mere observers of these processes.

Continuing to use the above-mentioned paradigm is the best way to exclude municipalities permanently from decentralization efforts, thus preventing central government from delegating to sectional governments many of the duties it has been unable to perform or, when it has performed them, done so inefficiently and ineffectively. This belief has also been the primary reason why modern States have created structures far removed from local reality, oftentimes using techniques and tools that have little to do with local needs.

Along this line, I do not wish to refer exclusively to the participation of sectional governments, but rather to local organizations themselves and their local vision of development.

It is clear that, when one of the parties is involved in a conflict, it cannot belong to those that are facilitating the resolution of that same conflict. Nevertheless, if grassroots communities have a conflict, then the organization(s) to which they belong as subsidiaries could very well perform this role just like when families or individuals from the same region or community that have a conflict resort to recognized traditional authorities or nongovernmental bodies to act as mediators. Among other benefits, this would enable a conflict management approach that takes advantage of local cultural patterns, processes conducted in native languages, the recognition of common cultural imagery and worldviews, easily accessible testing and accountability systems, among others.

Nevertheless, the establishment of this type of body has not been sufficiently explored, because of the removal of public officials from these local events. It should be recognized, however, that this is not an exclusive or excluding task of civil society through its organized groups. But if the State wishes to start doing it, when it could resort to those who have already been doing it, it would be an unnecessary waste of human and economic resources and time.

On the basis of the above, the next step that should be taken by the State is to promote at all cost a decentralized and local participation in all activities come under the jurisdiction of public administration, especially in respect to conflict management.

1.3 The issue of indigenous community lands is one of the country's major weak spots. The subject is tinged with obsolete, scattered, shallow and discriminatory notions.

The notions are obsolete because they promote criteria that are no longer being used, not even in the region, much less in Latin America as a whole, such as the handling of the case of plantation laborers now claiming land rights after having lived on the same land for several generations as if it were a labor problem rather than an agrarian issue.

They are also scattered, because the issue has been circumvented and rendered invisible by creating individual land ownership schemes that undermine the validity of community land ownership and confound the beneficiary themselves.

They are shallow, because criteria claiming that community land is not productive and does not contribute to the country's development have been disseminated, while other benefits stemming from this type of land, among which environmental services, maintenance of landscape beauty, the conservation of archeologically important areas, have been neglected.

Finally, they are discriminatory, because, considering that more than 50% of Guatemala's population is indigenous, there can be no logical explanation for the State to keep its current structure, including lack of access to education, legislation that does not protect indigenous land ownership, failure to give priority to the indigenous people as the primary beneficiaries of the land, among other indicators. This can only happen because they have been discriminated against in all of the country's development processes.

When examining the agrarian situation in Guatemala, with emphasis on indigenous territorial rights, the approach that has been adopted is amazing. Based on the above-mentioned population figures, one would think that the State would give priority to drafting laws that would ensure justice for the majority of the population, but in practice this is not the case. On the contrary, a series of laws and statutes was promoted to provide for precisely the contrary. Evidence of this can be found in the Law for Supplemental Titling for the State and its Decentralized and Autonomous Institutions², which provides, in Article 1, that: *"The State and its decentralized or autonomous institutions that acquire real estate that is not duly registered in the Land Ownership Registry Office, shall be entitled to register their ownership of these lands in accordance with the procedure provided for this purpose by the Law."*

In paragraph a) of Article 3, it continues to indicate that, in order to register ownership, it is required that, in the proceedings that are filed, the municipality with jurisdiction in the matter be consulted and that the persons with a stake in these procedures, among others, be notified.

There are many stories about cases where, at a time when fear and uncertainty prevailed, communities entrusted their land to municipalities and transferred their land rights to them to safeguard their land from expropriation. Ultimately, what occurred turned out to be the same, because today, after many years, when a new era has started, with new authorities, their ancestral rights as indigenous communities are being ignored. Thanks to the above-mentioned law, the communities have already lost the battle to recover their land even before it has started.

To put the finishing touches to this vicious circle of injustice, those communities that do not hold duly registered land deeds or have been unable to legalize them for different reasons have lost their land, because someone benefiting from political leverage under this Law was able to obtain a land ownership deed that is now duly registered. On the basis of this Law, even though this community may physically hold the land, the right of the duly registered "landowner" prevails over any other right.

² Decree-Law No. 141-85, published in the Official Register of December 23, 1985.

The corollary to this is that the community has already lost its land. Although it can file an appeal, the marginality and absence of transparency of judicial systems prevent any indigenous community from winning a case in this kind of dispute. Furthermore, they probably cannot even claim the right that is provided for by Article 4 of the law, which states that: *“The person who believes he/she is affected by a registration made pursuant to the present Law, shall be entitled to a judicial appeal of its validity, as long as the registration of its acquisition has not been duly made...”*

To this must be added the lack of suitable legislation to regulate the subject of indigenous community land. Guatemala must effectively be one of the few countries in the region that has no positive or procedural law on how ancestral collective groups can gain access to land ownership rights.

On the contrary, what the State has done is generate extensive legislation to award lands to individuals and holders, and even to campesino communities, which is set forth in the Land Fund Act of June 16, 1999. This Act facilitates access to the land by means of any of the following procedures:

- a. Access to land by means of loans, better known as land purchasing.
- b. Regularization of State land awarding processes.

In the first case, according to Article 20, the beneficiaries shall be *“...Guatemalan male and female campesinos, either considered as individuals or as organized groups, for access to land and agricultural, forestry, and hydrobiological production.”*

Referring to the campesinos, it gives priority to those who are landless, those whose land is insufficient, and those who are living in situations of poverty.

The second case refers to the finalization of outstanding claims whose processing had not been completed by the land institution that was replaced by FONTIERRA. We mean the National Agrarian Transformation Institute (Instituto Nacional de Transformación Agraria — INTA), although it does not refer to recognizing or initiating any new processes for regularizing land titles.

This said, the same Act explicitly mentions, in Article 45, that *“The present Act does not have jurisdiction over the following land: private property of any kind, indigenous community land, protected areas, and territorial reserves....”*

For these jurisdictions, each one is subject to its own laws. But what has occurred with the Indigenous Land Act is that there is simply no Act at all. There is a bill that has been doing the rounds for several years now, but every time it is dealt with by a government body, what is always deleted is the part focusing on indigenous land ownership rights.

Indigenous communities do not even have a procedure to be legally registered as a human group. This should also be part of the contents of the Indigenous Act. It is evident that the communities, to be awarded their land as a legal entity with collective rights, should be legalized as a

community, so that they can benefit from the category of subject of rights and obligations, but Guatemalan legislation does not provide indigenous communities with the status of legal entity subject to rights and obligations and therefore also entitled to being awarded land, free of charge, as established by most Latin American laws.

As a result of all of these complications, in Guatemala there is an unusual phenomenon. No one, including NGOs and other organizations working on land issues, insists any longer on legalizing indigenous community lands, but rather they have proceeded, in most cases, to legally register these lands as the real estate assets of campesino associations known as PACs (patrimonio de asociación campesina). This mechanism, however, is far from being a suitable way for indigenous communities to legalize ownership of their land, because campesino lands are those rural lands settled by agricultural, forestry, or hydrobiological users who legalize ownership to make the land productive on the basis of a management and/or working plan. In addition, these campesino associations, just like the individual beneficiaries of land awards, pay for the value of the land.

This is one of the basic differences, because according to agrarian tradition concerning the titling of ancestral land, no value to the land is attached, because it does not involve the purchase or sale of an asset, but rather legal (official) recognition by the State of those who have occupied the land even before the State itself existed.

It is on the basis of this approach that recent processes for awarding land in the country have been by individual property deeds, since as indicated earlier Guatemala's agrarian system ignores the ancestral rights of communities to decide for themselves the type of landholding they wish to claim, nor does it adequately explain the advantages and drawbacks of each regime. This has to be emphasized because the argument that is constantly being put forth is that the communities themselves are the ones requesting individual land titling.

On the other hand, the State has not provided any incentives or guarantees for collective ownership to preserve values and customs that contribute to ensuring not only the security of human groups and their cultural reproduction, but also to the country, even though these landholding systems foster land and resources conservation that support the national economies in other countries.

Another element that is adverse for the agrarian system is the linkage of land ownership issues with labor issues. Under the Guatemalan system, the right to the land of campesinos who farmed the land, which in any other agrarian reform process would simply involve the affected land, involves a dispute over labor rights in respect to these lands.

1.4 The impact of land ownership insecurity on Guatemala's economic development

The subject of land ownership in most poor countries continues to be the Cinderella of history, because it is an issue that is not well studied or understood and therefore it is a topic for which there is the least investment.

It is clear that the majority of the countries that have stable developed or developing economies benefit from legal and land registration systems to guarantee land ownership, among other aspects they have in common.

By contrast, in those countries that have the most problems and poverty, land ownership insecurity is highest either because of squatting or settlements, lack of legal titling, or overlapping jurisdictions for ownership rights, among others.

Unfortunately, Guatemala is included in the list of countries that have invested little in this problem, and it has done so more because of political pressure (Peace Agreements) than out of any real conviction that land ownership security and the resolution of agrarian conflicts will be able to contribute directly to the country's development.

“How does the regularization of land ownership contribute to a country's development?” It contributes to social, cultural, ecological, and economic development.

Regarding social development, it contributes to reducing conflicts and paves the way for governance, which in turn leads to citizens who are more interested in their country's development.

As for cultural development, it means that individuals and communities can promote their development without fear of losing their habitat and can give free rein to expressing their culture, which helps to ensure more involved citizens and collectivities.

In respect to ecological development, the imperative urge to prove ownerships leads to the felling of trees, the burning of forests, and land use conversion, which in turn contributes to the loss of biodiversity. Once legalized in a framework of coherent policies, however, land use is based on a management plan.

Finally, regarding economic development, land ownership promotes a land market for individual and campesino properties, because individuals and production associations can gain access to credit and can invest. It has been demonstrated that more is invested in a property when it is belongs to the investor than when he/she runs the risk of losing it. Finally, community lands mostly comprised of important forest resources can generate economic wealth for the country and for themselves and can take part in international environmental service sale systems” (Morales, 2002).

To illustrate this theory, the footnote below expounds the case of Ecuador and the benefits that would come from regularizing rural land ownership.³

1.5 Lack of any linkage between land ownership and natural resource management

This is one of the issues that are noteworthy in Guatemala's agrarian sector, because throughout all the interviews and the analyses of information and land legislation, this very important linkage for development is not mentioned at all.

³ **Benefits from a project to regularize land in Ecuador**

According to existing literature on the topic and empirical observations, the principal economic benefits stemming from a possible program for regularizing land titling in the country would be as follows:

- 1) **Greater land ownership security:** The beneficiaries and owners of land to be regularized will have, as one of their principal benefits, ownership security to cope with the danger of land squatting and expropriation. At present, the conflicts prevailing between land-holders who do not have any legally registered property deeds and the constant confrontations, sometimes involving the use of arms, between disputing parties, are causing considerable damage for the production activities of the lands that are the focus of conflicts. In addition, the security provided by the legal titling of land would promote investment in the land, because the owner would view his/her land deed as a guarantee of ownership.
- 2) **Higher investment in the land:** As a result of greater security in land ownership, the owner will be motivated to invest in personal property and real estate to improve the land's infrastructure. The owners would also be willing to invest in building housing, latrines, fences, and even irrigation and crop systems. This higher investment would also lead to greater care for crops and grasslands, and investments would be made for better fertilization techniques, phytosanitary management, and post-crop management
- 3) **Access to credit:** At present, our country's financing policy is one of the bottlenecks preventing the full development of any production activity. The formal financial system requires land ownership deeds, not only for the land itself but also for real estate property, to grant mortgages or secured loans. Because of this, a landowner with a legal property deed would have the possibility of obtaining formal loans and would no longer depend on self-financing or the abusive power of informal bankers or loan sharks. Thus, the growth and consolidation of a land market would give impetus to both the financial system and rural land investment.
- 4) **Environmental benefits:** When the owners see an improvement in their financial standing, with the possibility of gaining access to credit, the higher value of their land, and ownership security, they will exert more moderate pressure on the natural resources belonging to them. They will be encouraged to take care of the forest and the natural vegetation, and they will even take care of the zone's native flora and fauna. In addition, landowners will enjoy greater security in terms of placing their money in long-term investments, such as reforestation.

In addition to the above-mentioned benefits, there will be countless indirect benefits stemming from the regularization of land ownership. The conditions that are adequate for the management of land that has already been legalized will become available and this will permit the orderly planning of land resource policies in the country. The demarcation of land plots and boundaries, not only of private land but also of public land, and the delimitation of protected zones such as Natural Areas, the State's Forest Heritage and the Buffer Forest will lead to better coordination between the institutions in charge of safeguarding the country's environment. Indigenous and Afro-American communities will benefit from the establishment of boundaries for their lands and as a result conflicts stemming from this problem will decline. Thus, the project for regularizing land ownership in the country will contribute to improving living conditions of the poorest sector of Ecuador's population, which is located in the country's rural zones.

Because of this, on the basis of economic theory and the practical observation of affected zones and bearing in mind, as a reference, studies conducted in other countries for the same purpose,³ it can be asserted that "the sale value of rural land reflects the net present value of net profit flows from productive activities over the medium to long term." Thus, impetus given to the land market uses the price of this land as its principal indicator. As a result, the higher value of lands with legal ownership deeds would be reflecting the economic benefits stemming from greater security, higher investment, and access to credit.

It is imperative for the region's countries to internalize the risks associated to viewing land use as a problem that has nothing to do with land ownership. This is traditionally one of the causes for the deforestation of thousands of hectares on the planet.

Some of the mistakes that have been made along this line in the region are listed below:

- a. Requiring that the land-holder clear the land to prove ownership, as evidence that he/she was occupying the land for a certain period of time.
- b. Failure to consider that the conservation of natural areas on the land is also a way to manage the land and that it should be included in the new proposals for territorial ordering.
- c. Requesting as a prerequisite a work plan rather than a natural resource management plan.
- d. Establishing permanent requirement to submit work plans for agricultural purposes to award the land, when in many cases the land that is being awarded is more useful as a forest.
- e. Failure to establish inter-institutional linkages so that the follow-up of the management plans for the land awarded can be in the hands of a public institution specializing in natural resources management and in land awards" (Morales, 2002).

This background, which is applicable to many countries of Latin America, is also applicable to Guatemala, because in the current legislation, there is no provision linking the topic of land ownership to the sustainable management of natural resources. Therefore, this should also be an element to be considered when referring to the regularization of land ownership.

II. Political-Legal Analysis of CONTIERRA

The first impression regarding CONTIERRA when it was examined as an institution was that it was an institution with considerable responsibilities, although lacking adequate legal, administrative, and financial tools.

Above all, it should be recognized that CONTIERRA handles the most sensitive element of Guatemala's reality, namely, conflicts over land. Second, its efforts are noteworthy because the institution performs a leading role in this matter. Third, financial constraints force it to do without many important elements in conflict mediation, such as the following:

- a. Understanding the local vision of development, which is different for each human group, whether as individuals or groups.
- b. Promoting a dialogue between the different parties. In other words, dialogue within a mediation process is praiseworthy, but a fair dialogue cannot be promoted when one of the parties suffers from social disadvantages and the other benefits from all the social services such as education, health, food, among other differences.
- c. Understanding these differences means that CONTIERRA is promoting one of its jurisdictions, the Legal Advisory Service for Conflict Management.

It is in this framework that CONTIERRA carries out its activities. It is an institution created by Government Agreement No. 452-97, published in the Official Register of June 25, 1997, as an agency attached to the Office of the President of the Republic. Afterwards, in 2000, it was transferred to the Ministry of Agriculture, Livestock, and Food. Finally, on June 19, 2002, after the establishment of the Secretariat for Agrarian Affairs of the Office of the President of the Republic, under the direct responsibility of the Office of the President of the Republic, CONTIERRA returned to the executive branch.

Nevertheless, its principal objective has remained unchanged, as set forth in Article 1 of the original Government Agreement: “...*Its principal duty shall be to facilitate and support, at the request of the parties, the conciliatory or legal resolution of those situations where one or various stakeholders are contending at the same time for the same land ownership rights.*”

This analysis of the institution’s status makes us realize that there are at least four elements that have to be taken into account to take the next steps for the development of CONTIERRA’s activities.

2.1 CONTIERRA

CONTIERRA addresses the country’s agricultural reality. It should not be otherwise because institutions and laws reflect what countries need. Despite whatever we said before, it is in line with the analyses of the country’s agrarian reality as described in the preceding chapter, rather than in line with the reality that the country needs.

This is the only way to explain how an institution that was created to act as a legal advisor and to manage conflicts was established under the aegis of the Peace Agreements, as a body to generate a culture of peace and, specifically, to manage hundreds of conflicts that have been registered in the country.

Furthermore, this institutional vision has removed CONTIERRA from other important matters of the country’s reality, which are also at the root of some existing conflicts:

- a. Absence of an Indigenous Territorial Affairs Act.
- b. Absence of a Mediation and Arbitration Act
- c. Weak incorporation of local government in conflict management.
- d. Weak development of legal assistance for parties to conflicts.
- e. Failure to generate conflict management models such as those that have been generated by civil society institutions, among other issues.

On the basis of the above, the approach to CONTIERRA should give priority to issues and actions that are necessary to consolidate conflict management. At the same time, even the most passionate advocate of the institution must admit that CONTIERRA plays an ambivalent role because it has the competence to mediate but none to oblige anyone to comply with its decisions.

In the face of this problem, it has been proposed that, for this to materialize, CONTIERRA itself would have to transform its institution so that it could become a Superintendence or an Agrarian Court, which are matters that I will be referring to below.

2.2 Coercive power of the Resolutions of CONTIERRA for conflict management

As mentioned to us in some of the working interviews, the best description of CONTIERRA regarding its objective to generate a culture of peace and dialogue is that it involves an effort to generate peace but without any binding force behind it.

For some, this means that the decisions taken by CONTIERRA after the agreements have to be binding for the parties. Before giving our opinion on this matter, let us review some issues:

The basic principle of mediation is that the parties, through dialogue, should be able to harmonize their interests and that any resolutions that are made would be endorsed by the parties.

This has been the principal motivation behind mediation as a social and juridical institution throughout history, because it should be recognized that mediation is as old as mankind itself. But in those times, mediation was effective in itself and did not need any coercion for its decisions to come into force. Today, in modern States, legal reality, protected by positive law, is different. Positive law provides that any decision or resolution from a competent authority should be legally registered and will come into force as a legal decision, only when a writ of execution has been issued, which means once it has complied with all the substantial formalities provided for by legislation.

This means that the resolutions of CONTIERRA, to be binding, have to be issued as a judgment or writ of execution by a court or tribunal.

But the question that is being asked is whether this is really the focus that should be used for the decisions of CONTIERRA. In the light of the experience of the Mexican Agrarian Legal Office, these obligations are not necessary, because any reconciliation stemming from a mediation process should be executed by its own force, as it would seem to be the case for PAM, where agreements, according to those at the head of PAM, are implemented even before the Agrarian Court ratifies them.

What does truly differ in terms of jurisdiction is that, if the parties come to an agreement, the PAM has two key elements that can help it resolve conflicts, so that litigation in the agrarian courts is not the last resort for an appeal.

- a. In addition to the competence to mediate, PAM has the competence to arbitrate conflicts, which can only be used when conciliation has not worked.
- b. PAM also has the responsibility of being an ombudsman for agrarian issues in Mexico. In other words, it safeguards respect for human rights and guarantees constitutional rights in respect to agrarian matters.

Therefore, it would seem that the course taken by CONTIERRA is completely correct. It involves promoting a culture of peace in a country caught up in confrontations. To do this, however, this task should not be viewed as an exclusive and excluding right and obligation of the State, but rather a series of legal and institutional mechanisms should be channeled to ensure that conflict management becomes a practice promoted especially by civil society and fully endorsed by the State. This can be obtained by enacting the Arbitration and Mediation Act, which should provide clear mechanisms for participation and mediation, where the State is simply one other player promoting and facilitating dialogue.

2.3 Weak legal foundations and efforts to transform or complement the institutional framework of CONTIERRA

Much has been said about how the absence of a leading role by CONTIERRA in Guatemala's agrarian sector could probably be resolved by installing an agrarian court or a Human Rights Ombudsman's Office in Agrarian Affairs.

Let us examine each one of these proposals:

The only thing that the existence of an agrarian court will resolve is the provision of a specialized legal entity in this area, one that would deal with cases such as litigations coming under the legislation providing for them. These courts belong to the country's judicial branch of government.

This option is maybe not completely outrageous, if we clearly establish that only those controversies that do not rely on an administrative decision, whether from INTA, FONTIERRA or UTJ/PROTIERRA, will be processed by regular justice (agrarian courts, if any). This would mean that anything stemming from an administrative decision for the awarding or purchase of land, would have to be resolved by an administrative institution, for which there are no clear options within the framework of the current situation in Guatemala.

Regarding a Human Rights Ombudsman's Office in this area, the same approach can be adopted. Either it can be established or jurisdiction can be given to CONTIERRA itself. The problem is that these institutions do not have any enforcement powers; they are rather institutions aimed at inducing compliance.

This shows that an agrarian legislation in line with agrarian reality, which is highly complex and diverse, is missing. This lack of adequate legislation generates two problems: first, it does not address the real causes and impacts of agrarian problems, and second, it generates new problems related to the solutions that are adopted. This is especially visible when most solutions adopted to manage a conflict involve the purchase of land.

This legislative weakness should be questioned and, at the same time, it should serve as the starting point for proposing a legal framework for the agrarian sector that would resolve the loopholes and contradictions that have already been pointed out.

On this basis, what should be promoted above all is a review of the scope of the jurisdiction of CONTIERRA, one that would extend to arbitration, if possible.

2.4 Current legal foundation for the agrarian sector

Agrarian legislation seems to involve a series of legal instruments that are not connected to each other, issued under different circumstances, and not responding to country processes, but rather to the interests of each new government.

This is all the more evident when we see that three institutions such as FONTIERRA, CONTIERRA, and UTJ/PROTIERRA are unable to keep up with the demand for the resolution of agrarian problems and whose jurisdictions, as we have already indicated, should be revised so as to incorporate new issues and broaden the participation of other institutions of sectional government and civil society.

At the same time, as we have already examined, the discussion and incorporation of new legislation needed by the country to contribute to the objective of finding peace in agrarian affairs should be promoted. This legislation would consist of the Indigenous Territoriality Act, the Arbitration and Mediation Act, and the Agrarian Act, which should incorporate agrarian reform, among other issues.

At the same time, some laws should also be amended or repealed, such as the Supplementary Titling Act, among others.

One subject that has to be considered along this line is the grass-roots proposal to create an Agrarian Development Ministry, that would bring together under one single institution the functions and jurisdictions that are now scattered throughout many different institutions.

As for the legal base of CONTIERRA, mechanisms should be sought so that it can perform its role as simply one more player in conflict management, with emphasis on arbitration above all.

Conclusions

In short, Guatemala's agrarian structure is unwieldy and highly bureaucratic. Unfortunately, what is occurring with the laws, institutions, and participation of civil society merely serves to highlight the gap between what is being regulated and local reality.

There are very few professionals specializing in agrarian matters. This will continue to prevent Guatemala from finding solutions to its agrarian conflicts.

The magnitude of land ownership problems has not been duly incorporated and internalized in the country. Many issues are not being mentioned not because they are unknown but rather because they denounce the orientation of agrarian activities. These issues include agrarian reform, indigenous community lands, land ownership and land use, among others.

The local viewpoint of indigenous community development has been omitted from different perspectives. As long as no investments are made in building up these human resources, land ownership problems will continue to be major issues on the agenda.

Society as a whole has a major role to play in conflict management and in understanding the distinct points of view of each group and their differences.

Land ownership does not appear as an important issue for the country's development, but it is perceived as a politically obligatory subject.

Recommendations

The recommendations presented below are outlined as three scenarios: the first scenario involves working on the country's perspective of agrarian issues; the second involves introducing certain legal, institutional, and social reforms; and the third scenario would involve a combination of elements but based on the status quo.

First scenario: Political incidence at all levels.

In view of what was analyzed and to incorporate agrarian issues with a constructive approach rather than a conflict perspective, I propose the formulation of a country-wide project whose main objective would be to discuss and agree on the country's vision of agrarian issues, not only in terms of its declarations but also in terms of its operation.

This would include identifying and working with groups interested in these issues and obtaining from each their insights and interests. On the basis of these ideas and proposals, a wide-ranging national dialogue would be promoted, from which policy guidelines and a plan of action to tackle these issues would be drawn up.

The outcome expected from these efforts would be a summary of Guatemala's agrarian interests, which should address at least the following matters:

- Impact of land ownership insecurity on economic development.
- Indigenous community lands.
- Priority to indigenous problems in the framework of the country as a whole.
- Land use and biodiversity conservation.
- Alternative conflict management systems.

This scenario should become operational by implementing a project as indicated above. This process will serve to level the field of national sectors for dialogue. Special attention should be focused on those indigenous and campesino populations who have traditionally encountered difficulties in participating in this kind of dialogue.

Second scenario: In-depth legal proceedings

For this scenario, I propose that work be done at three levels: national, departmental, and local.

At the *national level*, enactment of at least three laws should be promoted: the Agrarian Act, the Indigenous Territoriality Act, and the Mediation and Arbitration Act.

Regarding the *Agrarian Act*, to the current project should be added the competence to judge controversies in this matter, the rights of indigenous peoples to free land titling as ancestral owners, the levels of priority for the beneficiaries of the awards, the linkage between the process of awarding land and land use, joint surveillance of compliance with the land titling management plans among agrarian institutions and natural resources management plan, agrarian courts, arbitration, among other issues.

The *Indigenous Territoriality Act* should recognize and facilitate the establishment of legal entities with these characteristics, permit local organization in their own jurisdictions on the basis of natural resources management, in keeping with traditional knowledge. It should also include everything related to ethnic education and traditional administration of justice based on ancestral practices.

The *Mediation and Arbitration Act* should established systems whereby organized civil society or citizen groups can become dialogue and mediation facilitators, setting up mediation centers that would be supervised by an institution of the judicial branch of government. These centers would have full powers to promote agreements and would be funded by their own sources, donations, and fees that could be charged for the cases to be managed. It should also recognize and promote traditional conflict management approaches.

At the *department level*, I propose that work be carried out with the municipalities along two lines of action:

- a. Involve the municipalities more actively in activities connected to land regularization, which would obligatorily include technology transfer and technical assistance for the development of a land registry system, as well as greater leadership in local conflict management.
- b. Effectively carry out decentralization processes for local management issues, namely, control of natural resource management, coordination of territorial ordering, promotion of local efforts for training and dialogue, among others.

At the *local level*, I propose that investments be made in training local human resources in conflict management, support for the regularization of land ownership, and the establishment of land survey and registry systems.

One of the experiences that comes closest to this idea is the one in Ecuador referred to as Paralegals or the one being promoted in certain parts of the country, which is know as Agrarian Legal Officers.

In both cases, the similarity lies in the effort to develop local skills in topics directly involving land conflicts. It involves training men and women in regions immersed in conflicts, who are

trained in managing juridical, social, geographical, and leadership skills to exert a positive impact on the issues to be resolved.

The idea is to develop a program that combines the following: training, research, and action. This means that while training is being provided, research is also being done with the people themselves on their problems so as to obtain up-to-date information on conflict typification and characterization, on the basis of which corrective and operational actions are proposed for this purpose, so as to generate projects and proposals for attending these zones, through strict control and supervision.

These local development agents also become assistants and liaison officers between the State and the local population, which helps to close the gap between public authorities and citizens.

This scenario would be implemented by means of a series of projects at all levels, but they should be aimed at achieving a single common objective.

Third scenario: Expand participation with CONTIERRA as leader.

In this scenario, I propose that some of the previous actions be combined to generate a more feasible model:

CONTIERRA would be kept as a government institution to help in land conflict management and would be entrusted exclusively with handling those projects that could not be resolved by the Mediation Centers.

This means that the proposed Mediation and Arbitration Act should be part of the agenda of any scenario, as it would ensure that conflict management is shared with civil society and, at the same time, it would train local people to build up these processes.

Along this line, CONTIERRA continues to be an arbitration institution exclusively for those conflicts that are unresolved. In addition it would have the duty of providing legal assistance. This means that its support would involve providing teaching materials, organizing training workshops, and conducting research on the land ownership issues for the population in general, so that the institutions that manage conflict mediation can benefit from parties that are more informed for this purpose.

As result, it would be possible for CONTIERRA to play its own role and to be separate from the state institution in charge of conflict management itself.

This scenario should be implemented through two kinds of projects: one addressing legal and institutional changes and the other providing training and transferring responsibility to the local level. The State, in turn, should pledge the resources that are needed to fund these actions.

<p>There is a wide range of options, but I do not recommend, under any circumstance, that conflict management be funded on the basis of the current scheme without promoting at least some changes.</p>

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