



1- PD-AX-051  
ISA 53927

Land Tenure Center  
1475 Observatory Drive, 310 King Hall  
University of Wisconsin-Madison 53706  
Cable Address: LAN TENURE, Madison, Wisconsin  
Telephone: 608 262-3857  
Telex: 28 54 82 Attn: Land Tenure  
GWX: 910-256-2729 Attn: Land Tenure

18 July 1980

To: Tom Mehen, DS/RAD

From: LTC

Re: Proposed Agrarian Reform Law for El Salvador

1. The proposed law represents a very complex retooling of the 5 March legislation. A major change is the introduction of the agrarian tribunals (Considerando III and Title IX Article 191-232) which must be established to adjudicate in agrarian reform potential conflicts (Article 207). The workings of the court will be cumbersome but at least force will be replaced by law. One question: will this make all reform proceedings that began on 5 March subject to litigation? If so--and we can see nothing to prevent it--this will be a major problem.

Further questions:

- a) Is this a simpler or just as complex a procedure as available in regular courts? It seems overly complex (Article 208 et. seq.).
- b) Most basic laws of this type have an attached document explaining the need for the law, as well as explaining the articles themselves. This is lacking here, so it is hard to know why this agrarian court system is necessary and how it will function. On its face, however, the text seems overly detailed and complex and would appear to open the door to lengthy litigation which could tie up the agrarian reform process.
- c) The law does not explain whether the agrarian reform process is suspended while the court tries the case. This is a crucial point. Nor does it provide for legal assistance for campesinos, another important deficiency.

2. In Article 3 (c) "The banking system" is not clear. Is this BFA? The entire nationalized system? This concern comes from our discussions in San Salvador with the BFA which had not been allotted funds for "credit assistance." It seems as though the responsibility for this function ought to be clear.

3. It is not clear in Article 5 (b) how agro-industrial complexes, sugar mills, plants for industrializing primary agricultural products and "other installations" will be identified, especially if they are not on the property to be expropriated and it is not clear in the remainder of the law how they will be valued (who sets the price), how beneficiaries will pay for them, and how they will be operated. Their identification, "que sean indispensables para la transformación de la materia prima de la producción agropecuaria de la región" is a bit vague especially since, say, one sugar mill is likely to serve reform beneficiaries and non-beneficiaries alike. It appears that all public agricultural properties under 100 hectares are to be transferred to FINATA. Why? The draft offers no explanation. This matter will probably go through ISTA right into the courts resulting in interminable litigation.

4. Article 6 is not clear on the conditions under which a property under 100 hectares will be transferred to FINATA (100 hectares is the minimum legal reserve). It appears that all public agricultural properties under 100 hectares are to be transferred to FINATA. Why? The draft offers no explanation.

5. In Article 7 (b) who decides whether lands are not "aptas para cultivos" and whether lands are "sin uso agrícola"? Can third parties interpose their own evidence as to this matter?

6. To fulfill its social functions (Article 8) must a property fulfill (a) through (f)? How many of these points? We assume that all conditions must be met for a property to qualify as having fulfilled a "social function." But who has the burden of the proof? The owner or ISTA? Proving any one of these, let alone the entire complex of factors, will be an interminable job in an administrative sense.

7. It is not clear in Article 9 (b) how the legal reserve size will be decided if a farm has soils in classes I-IV as well as soils in classes V-VII, which may very well be the case. Indeed it is not reasonable to expect that farm will fall neatly into two soil type categories. I can see many of such cases subjected to a great deal of litigation unless this point is legally clarified. This offers an enormous loophole to landlords.

8. Article 11 could be interpreted so that a reserve would be left for each member of a landowning family. This should not be the intent of the law, but how can it be prevented? What about divisions made among family members between 5 March and the time this law is promulgated?

9. What happened to the stricture in the 5 March legislation that the landlord could claim his reserve after one year had elapsed? This would likely have reduced the number of claims for reserves.

10. The idea in Article 13 that ISTA decides where the reserve will be will presumably prevent the landlord from cutting the infrastructural heart out of the property.

11. The proof required for the state to add 20% to the reserve if the landlord added to productivity or introduced improvements after 5 March, is almost an impossible job, provides the landlord one more thing to litigate about, and has the net effect of accommodating fewer peasants. Also it appears as though it is more of a reward to the landlord than an incentive for him (see Article 14). In Article 17: Can it be implemented? Do registrars have the resources to do it? Is the article realistic?
12. Article 16 again seems to imply that if a landlord had divided his property such that each family member had the area described in Article 9 (b) the farm would be untouched. The question becomes: is the possible problem taken care of adequately in Article 18? Again there is confusion: does this article cover legal sub-divisions? Possibly it is meant to cover only de facto partitions.
13. It seems that individuals cannot claim that their property or others is part of an urban plan, but that this is part of a pre-existing government urbanization plan; else this might be a big loophole. Private lands in process of reforestation would seem to provide a loophole for landowners. Again, who decides this and with what criteria? Can landowners plant a few trees and claim exempt status as well as tax benefits? This needs clarification.
14. Proceeding by zones as called for in Article 21 didn't work last time it was tried in El Salvador and probably won't work now. Since there are ISTA offices in all parts of the country now, why can't they all be working on the farms over 100 and 150 hectares that remain. Given the work that will have been done between 5 March and the promulgation of this law that shouldn't be too many; that is, unless this law contemplates going back to these 350 plus properties and working all of them through the system established by this law. (If that is the case, there will doubtless be a massive rollback of the reform to date due to the cumbersome nature of this law.) In addition, who establishes priority of zones? What criteria? How long? Meanwhile, can owners in other zones sub-divide, reforest, etc.? It is not clear whether the expropriation process in Articles 21-26 can be interrupted by owners' filing of complaints at agricultural or regular tribunals.
15. An article on "inafectabilidad" is buried deep in the law at Article 238. This Article exempts "Asociaciones y Organizaciones Agropecuarias" from the law. What is to prevent incorporation for purposes of evasion? Partnership? What are the associations mentioned in Article 238? Who can join them? How are they organized? Who do they represent?
16. FINATA or Financera de Tierras Agrícolas is created by Article 6 of the law. It is not clear what functions it has vis-a-vis MAG, ISTA, the banking system (including BFA), the new agrarian tribunals and the Corte de Cuentas. Article 6 promises that FINATA will be used throughout the law but it isn't in Article 22, the next time it is used, and it is called something different in other places, such as in Articles 153 and 154. The role of FINATA is explained vaguely in Articles 139 et. seq.,

but it is not at all clear how it will be organized, financed, staffed, etc. Article 190 promises a special law, but meanwhile more detail is required. Why have two agencies--ISTA and FINATA? This can only result in more bureaucracy, delays, and expenses.

17. It would appear from Article 23 that many tortuous legal steps will have to be taken before campesinos will be able to plant their crops. If so, this will involve large production losses. It appears that ISTA can take possession fairly quickly, under Articles 23 and 24. But the wording is ambiguous and imprecise and leaves open the possibility possession can be delayed. I.e., it is not clear whether courts can interrupt taking, or whether landlords can use other delaying tactics.

18. The manner of valuing the property outlined in Article 27 doesn't seem very streamlined and will probably always be litigated. This article also provides a reward for those landowners who did not declare a value for tax purposes during 75-77. They can bargain with ISTA whereas those who declared a value are bound by their figures. It also leaves the door open for "discretionary" action by ISTA. Articles 30-32 speak of payment for cattle or improvements. There are no criteria given as to how their value will be established.

19. It is not clear what is meant by agrarian reform bonds (Article 23). There appear to be three types, and the difference between them is not spelled out. (Series A--bonds appear in Article 29, 1 and 2, Article 32 and Article 24. Series B--bonds are mentioned in Article 29, 3. Series C--bonds appear in Article 29, 4.)

20. Who has the burden of proof that land has been worked during the last 6 months? (Article 35) It would be very easy for landlords to start some economic activity.

21. How is it proven that land is "deficientemente explotada" (Article 36)? This has been tried in Chile and Colombia and it didn't work. No one could prove "deficient exploitation".

22. Article 36 contains a lot of nice phrases but given the fact that this is a law they are pretty empty and meaningless.

23. How are people selected for these Asociaciones Campesinas which will receive the land? (Articles 37, et. seq.) Article 39 is an impossible standard to meet (witness Frei's agrarian reform).

24. It is not clear what "necesidades basicas" are and this is important since the way Article 40 is written, these "necesidades" will be covered before the AC's make a land payment. Implementing Article 40 would require a small army of bureaucrats in each farm. Surely, no one seriously thinks this can be done. By the way, no provision is made for interest on the unpaid debt or readjustment of the unpaid debt for inflation nor is there a provision for cash advances.

25. Article 43 does make the provisional title sufficient for borrowing purposes "ante las Instituciones crediticias del estado." The problem

is that we don't know whether this is the entire expropriated banking apparatus or whether it is primarily the BFA. Whatever the institutions, they will have to be readied for a wave of borrowing.

26. The term "Asociaciones Campesinas" is used in Articles 37-38. In Article 39, Empresa Campesina is introduced, AC is returned to in Articles 40-43 and in Article 45 EC is used again. Is AC=EC? How is the price to be paid by the Asociaciones established? What does it include? Can the beneficiaries reject some improvements, animals, etc., or must they accept and pay for everything ISTA "hands" them?

27. This is clarified somewhat later but in Article 46 (c) one immediately begins to worry about the top-down nature of this law. It looks like MAG gives the plan which it and ISTA works out to the EC in a very paternalistic fashion. If the lands distributed are not subject to foreclosure, what security will national banks receive for their credits?

28. Again the point comes up, from where do the campesinos for an AC or an EC come? It seems that if ISTA names them, it is asking for real trouble. The groups should probably have for the most part, worked in the area before, or be a self identified group. The problem of "cabida" is a tricky one that is not adequately treated in Article 39 or in Article 50. Again, the process sounds very paternalistic. Note how the problem of who will participate is skirted in Articles 51, 52, 53, etc.

29. The AC looks complex in organization as outlined in Articles 62-79. But who keeps the books? All of these social functions need to be taken care of but what about the economics of the AC? And how will other technical assistance be plugged in? And credit? Who pays the bills? Who approves the inputs purchased?

30. Articles 51-54: Who are these campesinos? Are they selected by MAG? With what criteria? (Notice mention of "list" in Article 53. What "list"?) There is nothing here on "non-official" associations of campesino unions--they have apparently no voice or role in this process. Note that Article 101 excludes those campesinos who belong to other campesino associations.

31. Articles 59 and 60 give ISTA yet more power over the Empresa Campesina. This adds to the top-down nature of the EC.

32. Articles 62 et. seq. establish an elaborate formal organization for the Asociaciones, but notice how any important decisions of power are reserved for the Government--i.e., Article 70 (incorporation of new members must be approved by MAG).

33. In Article 66 we may not understand it, but isn't it a bit strong to have ISTA intervene for a lack of attendance?

34. How does the unnamed governing group of the AC, whose functions are spelled out in Article 69 (b) through (i) (By the way, "a" is missing.) differ from the Consejo de Administracion which is defined and whose duties are spelled out in Article 72 (a) through (j)? The AC seems to be very

over-governed in some areas while others are completely omitted. At least in 72 (c) we see that the AC has some participation in designing its cropping pattern (plan anual de explotación). (Also see Articles 80 and 81.) It may be that Article 79 refers to the entire Asamblea General. But if so, some of its outlined duties would be better performed by a smaller group.

35. Wouldn't it be better if there were some continuing members on the Consejo de Administración? Article 74 gives them all three year terms which means a complete turnover each three years. Also, what happens if a President is voted out after one year? Article 74 would still have him serving on the Consejo de Administración for two more years. Perhaps Article 76 clears this up, but its language is convoluted.

36. In Article 82 (b) the term "eventualmente" is tricky. Won't most members want their "pequeños huertos" now or at least at some pre-determined time in the future? "Eventually" is a term seldom used in laws of this nature. Production plans, etc., (Articles 80-83) seem to be entirely controlled by MAG.

37. The term "net income" (ingreso neto) in Article 91 is surely incorrect. We assume that net income as used in Article 91 refers to  $a + b + c$  in Article 40. But these two Articles should mesh and "net income" should mean the same thing each time it is used.

38. In Article 96 "ingreso adecuado" is as vague as it was in Article 40. Why can't an AC contract labor except in seedtime and harvest? Does this mean that older children non-members cannot accept wage work? By the way, how does the AC grow? What happens to the next generation? Figuring out the right number of beneficiaries-members for each Asociación Campesina is likely to be either a very complex, lengthy process, or a golden opportunity for discretionary action by the Government authorities.

39. Is the Fondo de Distribución referred to in Article 97 the total of the various funds in Article 91?

40. Articles 101, 102, and 103 appear to say that wives are not AC members and that they have no voice nor vote.

41. Title VI seems to indicate that ACs cannot be taxed. At least no provision seems to be made for it. Has GOES thought about this matter?

42. Articles 119, et seq. seem to be the "sugar-coating" articles: in return for their agreement to join the tightly government controlled associations the campesinos are promised several tax advantages and subsidies for the associations.

43. In Article 132 which begins the "land to the tiller" section: Why is the maximum 7 hectares? The entire section (Title VII) meshes poorly with the remainder of the law. It is confusing since one doesn't know which of the provisions before Article 132 still apply to those campesinos covered by Title VII.

44. It is not clear what happens when the land the campesino is working exceeds the maximum size permitted under Article 9. Does this mean he can now qualify for a parcel larger than 7 hectares? Or does it mean that this land no longer can be parcelled individually and can only be adjudicated to a Asociación Campesina. The latter is the rational answer, but the language is ambiguous and imprecise. It is important that this question be resolved through clear and precise language. Article 135 helps somewhat, but note departure from Article 9 (b).

45. Article 133 adds to the above confusion. What happens if the size of the whole farm is larger than the maximum size allowed by Article 9? Do the tillers still get individual parcels? The language is very ambiguous and imprecise. Article 136 does not speak to this question.

46. Somewhere in this law there must be some provisions clearly explaining the division of functions and jurisdiction between ISTA and FINATA. This explanation is not available in this version of the law, leading to confusion about the respective roles of both institutions. In practice, this is likely to result in jurisdictional battles and poor coordination.

- 1) Some farms will be left uncovered by either agency;
- 2) Others will be fought over by both;
- 3) There will be political and other pressure by campesinos, landlords, etc., to be in one or another category;
- 4) Opportunity for delays, arbitrary action, corruption, etc., are increased;
- 5) The costs will be higher: two bureaucracies are always more expensive than one.

47. ISTA only acts in previously defined "zones" and in farms larger than 100-150 hectares (Article 135). But we are not sure this is the intent of the law because of the ambiguous and imprecise language used.

#### Summary:

In general, this is a very hastily and poorly drafted law. There are huge gaps and questions left unanswered. It is full of loopholes, contradictions and ambiguous, imprecise language, which is likely to result in time-consuming litigation. Substantively, the law is very paternalistic. It sets the stage for a top-down land reform process tightly controlled by government, with no significant participation by campesinos at any level. Also, it creates a cumbersome two-tier bureaucratic structure for acquiring and distributing land, which is very inefficient and likely to lead to large inequities.