

# *Nicaraguan Property Disputes*

The Carter Center

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## **PREFACE**

The Carter Center's Latin American and Caribbean Program is collaborating with the United Nations Development Program (UNDP) in Nicaragua to facilitate an efficient and fair resolution to the complex property conflicts in that country. The Carter Center has a long involvement in Nicaragua, beginning with the observation of the election process in 1989-90, and followed by subsequent meetings between former president Jimmy Carter, Carter Center personnel, and Nicaraguan leaders in Atlanta and Managua to discuss economic recovery, political reconciliation, and international assistance.

In June 1994, former president Carter travelled to Nicaragua to participate in a conference dealing with property disputes and sponsored by the Nicaraguan National Assembly, UNDP, US AID, the Foundation for a Civil Society and the Institute for Central American Studies. Upon his arrival, he was invited by President Chamorro and others to explore ways to help resolve the property conflicts. During that trip, the Supreme Court invited The Carter Center to send a team of legal experts to advise on setting up legal procedures to deal with the approximately 5000 cases expected to be submitted by the Attorney General's office to the courts for resolution.

Consequently, The Carter Center organized a team of experts from the American Bar Association and the Land-Tenure Center/University of Wisconsin to go to Nicaragua in August 1994. Hosted by the UNDP, the team advised the courts and helped design a larger UNDP project to speed up the resolution of property conflicts. The UNDP then worked with the government to develop a comprehensive program to increase the efficiency and capacity of administrative agencies charged with reviewing the 15,985 claims by former owners and the 112,000 petitions for titles by current occupants. The UNDP and the Nicaraguan government signed an agreement in January 1995 to implement the UNDP-funded US\$3.7 million comprehensive program. The Supreme Court accepted the recommendations made by the Carter Center team in August 1994 to designate two courts in Managua to handle property issues, to be followed by three additional courts in other areas of the country. The UNDP is providing funding for extra staff and equipment.

At the UNDP's request, The Carter Center sent a second team of property, mediation, and legal experts to Nicaragua November 29-December 3, 1994 to advise on the legal framework and assess the potential for mediation to resolve the most difficult disputes. The team met with government officials, political party leaders, the president of the National Assembly, the mayor of Managua, international and Nicaraguan groups involved in mediation, and foreign donors. This report is based on the interviews conducted during that trip, supplemented with additional reports and telephone interviews. The first section of the report summarizes the nature of the problems of rural and urban property and obstacles to their solution. Subsequent sections discuss the political context and current proposals for a legislative solution, as well as progress on the judicial reforms. The last section explores alternative dispute resolution mechanisms and makes recommendations for using mediation techniques to resolve property disputes. The report concludes with a set of steps that we believe will be necessary to make progress on this important, but complex problem.

The team's work in Nicaragua was greatly facilitated by the tireless assistance of the UNDP staff, including Alvaro Herdocia, Matilde Mordt, and Silvia Castana; Marcia Kay Stubbs who served as translator; and Carter Center intern Marc McCauley. We thank all of those Nicaraguans who graciously gave of their time and expertise to provide the information presented in this report.

We believe that this is a propitious moment for reaching a political consensus on property for several reasons. The divisions within the two major political forces in the country -- the FSLN and the UNO -- are actually reducing polarization in the country and leading to new legislative coalitions of large majorities, as shown in the Assembly's recent votes on constitutional reform. After being pushed to the backburner during the debates over military reform and constitutional reform in 1994, property issues are coming to the top of the legislative agenda in March 1995. There is a clear social consensus to protect the small property-holders who were beneficiaries of agrarian and urban reform. In addition, an improved administrative procedure is in place to review currently occupied properties, as well as claims by prior owners.

But time is running short. Establishment of a clear and secure legal framework for property rights is absolutely essential for investment and economic recovery. In addition, Nicaragua must show substantial progress in resolving property disputes in order not to jeopardize foreign development aid. For example, U.S. foreign aid and support for loans to Nicaragua from multilateral institutions is contingent on resolution of property claims of U.S. citizens, with the next decision by the U.S. State Department due in July 1995. Further, campaigning for the November 1996 presidential elections in Nicaragua is likely to either put property resolution on the backburner again, or inflame the debate and impede a solution. A window of opportunity exists now to make real progress on a political compromise to remove property from the political debate in the country, to provide security for the small property holder, and to establish mediation and

conciliation mechanisms that can prevent disputes from erupting into political and violent conflict in the future. It is in this spirit that we offer this analysis of the property problem in Nicaragua, and recommendations for establishing alternative dispute resolution mechanisms that could make a long-lasting contribution to Nicaraguan society.

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Atlanta, GA

March 1995

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## **ACRONYMS**

ADR

Alternative Dispute Resolution

AMUNIC

Asociación de Municipios de Nicaragua (Association of Nicaraguan Cities; a organization formed by the mayors)

CNRC	Comisión Nacional de Revisiones de Confiscaciones (National Commission for the Review of Confiscations)
FSLN	Frente Sandinista de Liberación Nacional (National Liberation Sandinista Front)
IDEAS	Instituto de Desarrollo Empresarial Asociativo (Associative Business Development Institute; an FSLN-linked NGO).
INCAE	Instituto Centroamericano de Administración de Empresas (Harvard-affiliated Graduate Business School)
INIFOM	Instituto Nicaragüense de Fomento Municipal (Nicaraguan Municipal Development Institute; a decentralized state entity)
INRA	Instituto Nicaragüense de Reforma Agraria (Nicaraguan Institute of Agrarian Reform)
NED	National Endowment for Democracy
NGO	Non-governmental Organization
OCI	Oficina de Cuantificación de Indemnizaciones (Office of Quantification for Indemnization)
OOT	Oficina de Ordenamiento Territorial (Office of Territorial Ordering)
OTU	Oficina de Titulación Urbana (Urban Titling Office)
UNAN	Universidad Nacional Autónoma de Nicaragua (National Autonomous University of Nicaragua)
UNAG	Unión Nacional de Agricultores y Ganaderos (National Union of Farmers and Ranchers)
UNDP	United Nations Development Program
UNO	Unión Nacional Opositora (National Opposition Union)
UPANIC	Unión de Productores Agrícolas de Nicaragua (Union of Agricultural Producers)
USAID	United States Agency for International Development

## **Executive Summary**

## **I. The Problem.**

With the first peaceful transfer of power from one political party to another in Nicaraguan history in 1990, Nicaraguans ended a decade-long civil war and began a process of reconciliation. Within the space of a year, the army was shrunk from 96,000 to less than 15,000 troops, the Nicaraguan Resistance was demobilized, and new forms of dialogue between previously hostile groups emerged. Nevertheless, economic recovery remained elusive in the face of hyperinflation, high expectations and competing demands among organized groups, and a lack of confidence among investors and producers. Disputes over property have played a significant role in Nicaragua's recent political and economic experience, and are a fundamental factor in its future economic recovery and political reconciliation.

Property disputes and an uncertain legal framework for property rights impede investment and economic recovery, and generate political conflict, sometimes violent, in Nicaragua. Stemming from the redistribution of land and property during the Sandinista government, the issue today is a complex one involving groups as varied as peasants waiting for clear title for land granted under agrarian reform, Sandinista and contra ex-combatants seeking land in the countryside, and prior owners from Nicaragua and abroad demanding the return of or compensation for houses, factories and land confiscated, expropriated or abandoned in the past. Resolving the problem requires addressing both fundamental philosophical debates over whose rights to property should take precedence, as well as administrative and legal impediments to sorting out multiple claims to individual pieces of property and modernizing the titling system.

The size of the problem is indicated in the following statistics: Owners whose land was confiscated or expropriated since 1979 are now demanding the return or compensation for the equivalent of two-thirds of all the property acquired by

the State for the agrarian reform, and twelve percent of the land mass of Nicaragua. Over 5,200 prior owners filed claims for 15,985 pieces of property 1, and nearly 112,000 beneficiaries of agrarian and urban reforms are being reviewed for eligibility to receive formal title. By 1992, roughly 40% of the households of the country found themselves in conflict or potential conflict over land-tenure due to overlapping claims by different people on the same piece of property. 2

The government of Violeta Chamorro (1990-1996) established an extensive administrative process to sort out these claims, and by February 1995, the government could claim significant progress: 87% of the 117,178 cases submitted to government agencies had been administratively reviewed and issued either approvals or denials of claims (although appeals were still pending). The government estimates completion of the entire review process by June 1996. But this review process is only the first step in resolving the larger problem. The titling process for urban properties of approved occupants just began in early 1995, with some 600 titles issued by February 1995, while rural titling had yet to begin. Thirty percent of the claims by prior owners had been approved for compensation, but only fifteen percent had actually received bonds as indemnization 3. Even more troublesome, the court system was expecting up to 6,000 cases of denials and appeals to enter into litigation. Why, five years after the Sandinistas transferred power to the UNO government, was property still such a disputed topic in Nicaragua?

The answer is a mixture of political polarization, scarce economic and administrative resources, and the ravages of eight years of civil war. The challenges include:

1. a legal framework including laws passed between the February 1990 election and the April 1990 inauguration of President Chamorro, whose validity and perceived abuses are contested by a sizable segment of the population;
2. multiple ownership claims resulting from land distribution practices during the Sandinista government when titles were not always formally transferred to the



- state upon confiscation or expropriation, and when subsequent transfers to the beneficiaries of reform provided only provisional titles;
3. political disputes over whether to return property or compensate former owners, and whether current occupants of land and houses should pay for their property, and how much. Neither the political parties in the National Assembly, nor the Assembly and the Executive branches, were able to agree on a comprehensive property law in the first five years of the Chamorro administration;
  4. a judicial system that will be overwhelmed by the estimated 6,000 cases coming to litigation. One justice estimated that even if the courts dealt with nothing but property cases it would still take ten years to review all of those cases;
  5. low valuation of bonds used for compensating prior owners, currently trading at 17% of face value, which decreases the potential to resolve cases through this method;
  6. lack of coordination among administrative agencies charged with property matters that were dispersed physically and functionally until a physical consolidation of offices in February 1995;
  7. an antiquated cadastral, titling and registration system whose records are partially destroyed and whose resources are inadequate for the tasks of physically surveying the properties, proper titling, and inscribing titles in the Property Registry; and
  8. inadequate funding, personnel and equipment of government agencies.

In addition, there is the complicating factor that property claims include claims by U.S. citizens, many of them naturalized Nicaraguan citizens. At the time of President Chamorro's inauguration, less than twenty citizens had filed property claims with the U.S. government; today the State Department has over 600 persons with 1,631 claims on file. (Only 501, or 31%, of those properties were owned by U.S. citizens at the time of expropriation or confiscation; the remainder were owned by Nicaraguans who subsequently became naturalized U.S. citizens). <sup>4</sup>

Although Nicaragua has recently resolved the seven high-profile cases of U.S. citizens' property claims involving high-level government officials' property, as well as 372 other U.S. citizens claims, future U.S. foreign aid and support for loans to Nicaragua from multilateral institutions is by law contingent on the return of properties claimed by U.S. citizens or a procedure offering "prompt, adequate and effective compensation" for the remainder of these properties.

## **II. Possible Solutions in the Judicial, Legislative and Mediation Arenas.**

The terms of reference for the Carter Center/Land-Tenure Center expert team traveling to Nicaragua November 29-December 3, 1994, included: a) assessing progress on recommendations for judicial reform made by a previous expert team in August 1994 to speed up court cases, b) analysis of legislative proposals for the resolution of small property cases, and c) proposals for alternative dispute resolution mechanisms, especially mediation.

**Judicial reform.** The August expert team recommended creating two additional civil courts and judges in Managua and three outside of Managua to handle the approximately 6,000 cases expected to go to litigation. The UNDP is providing funding for these courts, with operation scheduled to begin in May 1995.

The December team further recommends that these courts be supplemented by the appointment of quasi-judicial officers (such as law clerks and lawyers) to facilitate case processing in the courts. These officers would prepare the cases for quick determination, freeing the judges from personally managing the pleadings and other preparatory documents. External funding would be required for training and support.

**Legislative reform.** By March 1995, property was once again high on the legislative agenda with draft laws to privatize the national telephone company Telcor, whose revenues will be used to increase the value of the property bonds, and competing proposals for a comprehensive property law. A broad social consensus exists to protect Nicaraguans who legitimately occupy small pieces of urban and rural property (about 90% of the 112,000 claims by current occupants). However, there is not a universal agreement that new legislation is required to provide legal security. Instead, some feel security already exists. Under the administrative review process, current occupants who meet the legal criteria (such as owning only one property) receive a *solvencia* -- an administrative document certifying conformance with the law as a prior step to

titling. But because the *solvencias*, as administrative certificates, carry less legal weight than formal titles, they do not necessarily protect the occupant from eviction by the courts if a prior owner successfully presses his claim. Neither do the *solvencias* contain a geographic or cadastral description of property boundaries, necessary for inscribing titles at the Property Registry. Consequently, they do not provide a secure legal basis to mortgage, buy, sell, or rent the property.

A new law could protect the large "block" of smallholders while the complicated problem of titling is resolved (which may take years), and free up the court system to deal with the more complex cases. Draft proposals by the FSLN and the Conservatives, as well as the resuscitated UNO Law 133 (passed and vetoed in 1991), all reinforce the administrative process and would recognize the rights of smallholders providing they meet the conditions for agrarian and urban reform. The draft laws call for the State to expropriate the land in those cases, compensate the prior owner, and transfer formal title, first to the State and subsequently to the occupant.

The more difficult problem remains the two thousand medium to large-size houses. Disagreement exists over (1) whether and how much current occupants should pay to receive title, (2) how much to compensate prior owners, and (3) the value of the compensatory bonds.

**Alternative Dispute Resolution.** Currently, there are no legal requirements to engage in mediation, conciliation, negotiation or arbitration to resolve property disputes, and only nascent organizations and mechanisms exist to provide such alternatives to litigation in the courts. The team recommends a two-track approach to help resolve property disputes and stimulate the long-term growth of peaceful dispute resolution in Nicaraguan society. None of the recommendations require any new legislation.

First, the team recommends establishing an **ombudsman's office** to serve as a complaint handler and problem solver for the clientele of the administrative agencies and the titling offices. The ombudsman's office would provide information to claimants and help them through the maze of administrative offices, thus taking pressure off the agency personnel. Ombudsmen would also refer claimants to mediation services, thus helping to reduce the burden on the courts and potentially produce faster resolution of cases.

Second, the team recommends that the UNDP and Nicaraguan government support the development of an **independent, nonprofit non-governmental organization (NGO) dedicated to conflict resolution**. The NGO would develop a panel of mediators as well as have staff to monitor court dockets and encourage disputants to refer the case to mediation. Judges could also refer cases to the NGO for mediation. Since the expected 6000 cases coming before the courts are estimated to take upwards to ten years to resolve, the creation of such a mediation NGO will serve several purposes: a) it will reduce the load on the courts and speed up the resolution of property disputes in the short-term; b) it will provide training to other mediating groups in the medium-term; and c) it will provide the basis for alternative dispute resolution mechanisms for other conflicts in Nicaraguan society in the long-term.

Two important issues must be addressed to implement the recommendations for alternative dispute resolution: 1) the impartiality of the mediators and administering organization; and 2) training for mediators. Because of the politicization and perceived partiality of most organizations in the society, the team recommends a collaborative effort between two established and respected institutions perceived as broadly representative of different political perspectives in society, such as the law school of UNAN-Leon and the graduate business school of INCAE, to develop the NGO. **In the short-term, mediation efforts by**

existing groups, such as the farmer associations of UPANIC and UNAG, should be encouraged and supported with training. External training for mediators will be required initially because of limited national capacity.

### III. Next Steps

Further progress in resolving the complex property issues in Nicaragua requires both short-term and long-term efforts. We suggest the following steps, in order of time urgency. Existing international programs to support these efforts are noted; however, additional international support will improve the prospects for successful completion of the program.

1. **Raise the bond values.** It is essential to provide adequate compensation to prior owners. Pending legislation to privatize Telcor and use a substantial portion of the revenues to back the bonds is currently the most promising means to increase the incentives for prior owners to accept indemnity and transfer title to the state, thus clearing the way for titling of current occupants.
2. **Establish ombudsman's office.** An ombudsman's office, as described in this report, should be opened very quickly to facilitate the work of the administrative review agencies and titling offices, and to reduce frustrations of claimants.
3. **Improve legal security for small property holders.** Greater legal security to holders of *solvencias* needs to be explored to protect legitimate occupants from eviction while awaiting formal titles. Current proposals for new property legislation offer greater protection for legitimate beneficiaries of agrarian and urban reform.
4. **Completion of administrative review process.** The current rate of review needs to be sustained to complete it by mid-1996. The UNDP project has supported the consolidation of the various property agencies into a single building, and the government created a new post, the Vice Minister of Property, within the Ministry of Finance to coordinate these efforts. Improved coordination, physical proximity, and greater access to resources is already speeding up the review process.
5. **Address grievances of ex-combatants.** Both demobilized Sandinista army and Nicaraguan Resistance soldiers expected to receive land and assistance from the government to start a new life. Delays in such assistance have led to violent confrontation in the countryside. These grievances need to be addressed.
6. **Open new courts and improve judicial capacity.** The proposed five additional courts with appropriate staff need to be opened immediately to begin dealing with the expected 6,000 litigation cases. The UNDP project provides support for staffing of the new courts. This would be complimented by a U.S. AID Administration of Justice program which aims to modernize and professionalize the judicial system, including introducing a Public Defender's Office and training NGO's and Ministry personnel in community mediation techniques.

7. **Identify and train mediators.** An alternative dispute resolution mechanism, as described in this report, could potentially remove hundreds of cases from the laborious litigation process and help reduce political and social tensions in the country.
8. **Improve titling process.** Currently, the institutions responsible for titling -- the physical and fiscal cadasters and the property registries -- are dispersed among three separate Ministries as well as the mayors' offices. These need to be integrated and modernized. Two existing programs take the first steps. The World Bank is supporting a program to provide clear titles to agrarian reform beneficiaries by modernizing the physical cadastral survey and mapping capacities, and computerizing the Property Registry system. The UNDP project supports the new Office of Urban Titling (OTU) which issues titles for urban reform properties. These and other projects need to be well-coordinated. This is a long-term process that will take years to complete, but which is essential for secure property rights in Nicaragua.
9. **Improve access to land markets.** Small farmers with inadequate access to credit, supplies, and markets for their goods are forced to sell their land in an unfavorable land market. There are some indications of a reconcentration of land ownership in the 1990s. In order for agrarian reform beneficiaries and ex-combatants to gain access to land markets, programs should be explored such as mortgage guarantees, land banks, mortgage lending directed to the poor and disadvantaged groups, and agriculture credit programs. One example is a European Union project which supports a credit delivery program using farmer organizations rather than banks.

## 1. Introduction

The difficulty in solving multiple claims to property and establishing a secure legal framework to guarantee property rights has generated political conflict, slowed investment and foreign aid, and impeded economic recovery in Nicaragua since 1990. Owners whose land was confiscated or expropriated since 1979 are now demanding the return or compensation for the equivalent of two-thirds of all the property acquired by the State for the agrarian reform, and twelve percent of the land mass of Nicaragua. Over 5,200 prior owners filed claims for 15,985 pieces of property, <sup>5</sup> and nearly 112,000 beneficiaries of agrarian and urban reforms are being reviewed for eligibility to receive legal title. By 1992, roughly 40% of the households of the country found themselves in conflict or potential conflict over land-tenure due to overlapping claims by different people on the same piece of property. <sup>6</sup> Although most Nicaraguans agree that the property issue is the key to spurring economic recovery, a formula for addressing it has been elusive.

During the Sandinista (FSLN) regime (1979-90), property was expropriated or confiscated for agrarian and urban reform, and abandoned property was taken by the state. As in other Latin American countries, however, ownership was not always properly transferred to the state at the time of expropriation, and persons receiving land under the reforms were often granted tenure rights without full ownership rights. Therefore, when the FSLN lost the February 1990 elections to the opposition UNO coalition, the FSLN-dominated National Assembly hurriedly used its last months in office to pass a series of laws to give ownership to thousands of beneficiaries of the reforms, as well as to Sandinista officials and others who were living in houses taken over by the government. These laws (Laws 85, 86 and 88) and other perceived abuses became known as the "pinata" by those who opposed the frantic effort to legalize the transfers of property before the inauguration of Violeta Chamorro in April 1990. Since that time, they have generated enormous controversy in Nicaragua, and an administrative nightmare as the government has attempted to sort out multiple claims to property.

In the first two years of the Chamorro administration, property disputes generated violent confrontations as prior owners attempted to evict peasants and urban dwellers who held only provisional titles from previous agrarian and urban reform efforts, or none at all. (Part of the conflict arose from disgruntled ex-combatants who believed they had not received land promised as part of their demobilization.) The disputes also affected the National Assembly when the FSLN walked out of the Assembly during discussion of a controversial property law, approved by UNO legislators in August 1991. That law, which repealed the "pinata" laws, was partially vetoed by President Chamorro, leaving all sides dissatisfied.

The government attempted to resolve the disputes by setting up an administrative process to review claims by both prior owners and current occupants. But competition among the branches of government again added to the confusion. Presidential Decree 11-90 established the National Confiscation Review Commission (CNRC) under the Attorney General's office to determine the legitimate owner of property. By the deadline of 30 December 1990, the CNRC had received claims from 5,288 persons. However, in June 1991, the Supreme Court suspended the decisions of the CNRC with the assertion that dispute resolution was a judicial function, rather than an administrative function. The Court declared the administrative dispute resolution system unconstitutional as it violated constitutional separation of powers. President Chamorro reactivated the CNRC in September 1992 as a vehicle for determining the appropriateness of providing compensation to prior owners. Constitutional problems with the dispute resolution system were cured by allowing appeal to the ordinary judicial system.

The administration also created two new offices: the Office of Territorial Ordering (OOT) to review the assignment of urban and rural properties during the period between the February 25 1990 elections and the April 25 1990 inauguration, and the Office for the Quantification of Indemnizations (OCI) to determine levels of compensation for prior owners whose land was legitimately occupied by others under agrarian and urban reform laws.

With the administrative process in place, conflicts over land and property turned from violent confrontations to more peaceful, legal means. By February 1995, the government could claim significant process: 87% of the 117,178 cases submitted to government agencies had been administratively reviewed and issued either approvals or denials of claims (although appeals were still pending). The government estimates completion of the entire review process by June 1996. But this review process is only the first step in resolving the larger problem. The titling



process for urban properties of approved occupants just began in early 1995, with some 600 titles issued by February 1995, while rural titling had yet to begin. Thirty percent of the claims by prior owners had been approved for compensation, but only fifteen percent had actually received bonds as indemnization 7. Even more troublesome, the court system was expecting up to 6,000 cases of denials and appeals to enter into litigation. Why, five years after the Sandinistas transferred power to the UNO government, was property still such a disputed topic in Nicaragua?

The answer is a mixture of political polarization, scarce economic and administrative resources, and the ravages of eight years of civil war. Resolving the problem will require resolving both fundamental philosophical debates over whose rights to property should take precedence, as well as administrative and legal impediments to sorting out multiple claims to individual pieces of property and modernizing the titling system. The issues include whether to return property or compensate former owners; whether current occupants of land and houses should pay for their property, and how much; how the government can raise revenues to finance the bonds used to compensate former owners; how to sort out the multiple title claims on individual pieces of property and provide greater legal security to occupants in the interim; and how to develop a capacity to survey, map and inscribe properties in registries of which one-fourth were destroyed during the civil war.

In addition, there is the complicating factor that property claims include claims by U.S. citizens, many of them naturalized Nicaraguan citizens. At the time of President Chamorro's inauguration, less than twenty citizens had filed property claims with the U.S. government; today the State Department has over 600 persons with 1,631 claims on file. 8 (Only 501, or 31%, of those properties were owned by U.S. citizens at the time of expropriation or confiscation; the remainder

were owned by Nicaraguans who subsequently became naturalized U.S. citizens). [9](#)

Although Nicaragua has recently resolved the seven high-profile cases of U.S. citizens claims involving high-level government officials' property, as well as 372 other U.S. citizen claims, the 1994 Helms-Gonzalez amendment (Section 527) to the Foreign Assistance Act requires that the US cut off bilateral aid and vote against loans by multilateral financial institutions and development banks unless the President certifies that a country has procedures in place to return or to promptly and adequately compensate confiscated property of U.S. citizens. In July 1994, the U.S. government did not argue that an adequate procedure for prompt resolution of property cases was in place in Nicaragua; instead President Clinton used a provision in the law to waive these restrictions for one year for Nicaragua based on national interest considerations. Certification will again be due in July 1995.

A functioning system for resolving the complex property disputes will include: [10](#)

- a legal framework governing property rights and the distribution, use sort out the multiple title claimand management of conflicted lands,
- a cadastre, titling and registration system for tracking property ownership and its transfer,
- a system for legally administering conflicted lands previously confiscated, expropriated or purchased, resulting in either the return of the land to the prior owner or the finalization of land transfer to the state and adequate compensation of prior land owners when justified,
- administrative and judicial structures for resolving individual cases, and
- alternative dispute resolution systems for promoting more efficient and effective dispute management where appropriate.

The Nicaraguan government and international agencies are working to make progress in many of the elements described above. The December 1994 expert team was asked to assess the progress made in resolving property disputes, and to recommend alternative systems for resolving disputes. This report addresses these concerns in the following manner:

- Section 2 describes the nature of the property disputes -- their causes and sources of possible resolution;
- Section 3 analyzes the existing administrative and legal structures, including progress to date, and existing capacity for implementing alternative dispute resolution systems;
- Section 4 discusses the political context of property dispute resolution;
- Section 5 assesses proposed legislative and judicial reforms aimed at resolving property disputes;
- Section 6 recommends development of an alternative dispute resolution system;
- Section 7 discusses implementation concerns; and
- Section 8 identifies the steps necessary to resolve property problems in Nicaragua in the short and long-term.

## 2. The Problem of Property Disputes in Nicaragua

Land tenure and property ownership disputes in Nicaragua have unique characteristics. In this section, we examine these characteristics as a basis for designing a dispute resolution system. The report discusses rural and urban land tenure disputes separately, as they pose somewhat different challenges for their resolution and operate under distinct laws and institutions.

**2.1 Rural Lands.** <sup>11</sup> During the Sandinista regime, the government acquired approximately 2.8 million manzanas <sup>12</sup> (or 4.9 million acres) from previously private land owners. These acquisitions were accomplished through confiscation of lands held by the Somoza family and their close associates <sup>13</sup>, expropriation of abandoned farms or as a result of agrarian reform <sup>14</sup>, purchases <sup>15</sup> and by other means. <sup>16</sup> These acquisitions constitute slightly over one-sixth of the entire land area of Nicaragua.

Of the 5,900 properties acquired, about 70 percent were never formalized as property of the State. Even when titles were transferred, the conditions of transfer (e.g. sales price or exchange of property) were frequently not recorded, leaving prior owners to claim that transfers occurred as a result of coercion and without adequate compensation. Further complicating the tracing of property claims is the fact that many Property Registries were partially or wholly destroyed by fire or other disasters during the civil war of the 1980s. Inscription of a title with the

appropriate Property Registry is the last step after surveys and mapping to complete legal ownership.

Upon acquisition, the state allocated properties to beneficiaries of agrarian reform. The Agrarian Reform Institute (INRA) distributed these properties under a number of different titling programs, including formal collectives, informal collectives, state enterprises and individuals <sup>17</sup>. In all, 43,000 families benefitted from cooperative-assigned land, 53,000 families benefitted from individual-assigned land, and an unknown number of families benefitted from land assigned to state enterprises. <sup>18</sup> Most of these beneficiaries of agrarian reform, however, received only provisional titles during the Sandinista regime, which did not provide full property rights. Instead, agrarian reform law allowed for the transfer or subdivision of property only with the authorization of INRA.

Between the elections of February 1990 and the inauguration of the new government in April 1990, the National Assembly passed Laws 85, 86 and 88 dealing with property transfers (Laws 85 and 85 are discussed in the next section). Law 88 provided definitive titles to those beneficiaries of agrarian reform with rural properties who had up to that date received only provisional titles. In addition, the law provided for full property rights to holders of those titles.

The law, however, did little to stop the re-emergence of claims from prior owners of the land in question. Claims placed by prior owners to the CNRC indicate the degree of dissension over disposition of the land taken for agrarian reform. Prior owners have presented the CNRC with claims for 7,185 properties constituting 12 percent of the land mass of Nicaragua and 66 percent of property acquired by the State for the agrarian reform. <sup>19</sup> The potential disruptiveness of these claims is accentuated by the geographic distribution of the claims. As shown in Figure 1, 72 percent of all claims are for properties located in districts that lie along the Pacific Ocean or in the central area of the country. Table 1 shows that 49 percent

of the land in these districts is claimed by a prior owner under the CNRC process. The Pacific coastal districts are also the location of most urban centers, and as such are the locus of conflict over urban property as well.

During 1990 and 1991, the CNRC ordered the return of 2,200 properties, frequently without determining the circumstances of any existing occupation of the land. Efforts to evict current occupiers from the land led to considerable conflict until the decree was declared unconstitutional in 1991. Currently, government officials and members of the Supreme Court expect approximately 40 percent of the claims to be pursued in court or through an alternative dispute resolution process.

**2.2 Urban Lands.** Urban properties -- both homes and raw land -- were also redistributed as part of the Sandinista land reform policies. Current occupiers of these properties include 11,244 occupants of urban homes and 90,260 occupiers on what was previously vacant land, much of it owned by the State. In the latter case, large numbers of families occupied each property.

Law 85, passed in March 1990, issued property rights to Nicaraguans who held any type of tenancy arrangement in houses belonging to the State, including private properties that the State administered as owner, as of 25 February 1990. No individual (family) could occupy more than one house under this law. Law 85 expropriated all private properties administered but not owned by the State, thus paving the way for eventual transfers of titles. Law 86 held similar provisions for the granting of title to occupants of urban land.

**NICARAGUA**

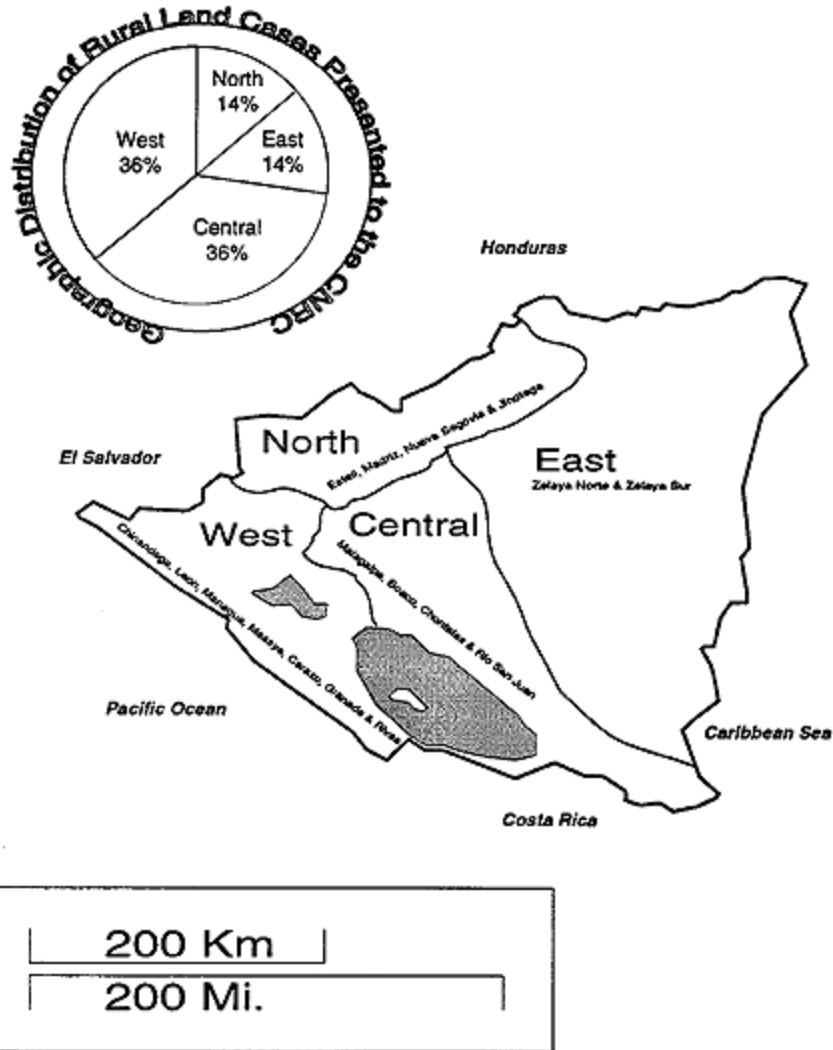


Table 1. Percent of Rural Land Area Claimed by Previous Owners Under the CNRC Process

Districts	Total Land Area (in manzanas)	Total Rural Land Claimed Through CNRC (in manzanas)	Percent of Land Area Claimed in District
North	2,400,000	288,000	12%
East	8,250,000	188,000	2%
Central	3,500,000	774,000	22%
West	2,800,000	767,000	27%
Lake Managua and Lake Nicaragua	1,250,000	0	—
<b>Totals</b>	<b>18,200,000</b>	<b>2,017,000</b>	<b>12%</b>

On the other hand, 1,800 prior owners claimed 5,207 properties. The vast majority of these claims were for urban houses, although claims for occupied land were also made. Efforts by some owners to reclaim occupied land through

eviction have led to both direct conflict and the passage of laws creating moratoria on such eviction for specific periods of time. <sup>20</sup> Government officials and members of the Supreme Court expect approximately half of the claimed properties to require judicial review or some alternative form of dispute resolution in the event that the prior owner does not accept the bonds offered as compensation or a negative administrative ruling.

### **3. Current Legal and Administrative Structure for Resolving Property Conflicts**

Since 1990, the government has developed an extensive administrative structure for resolving property conflicts. This structure has produced official administrative review (with approvals and denials) of large numbers of claims for both occupants and prior owners. However, it has done little to provide clear and uncontested titles to property occupiers. To date, only about 600 urban properties have been fully titled. The procedures have been only somewhat more successful at resolving claims by prior owners. Although 35 percent have passed through the review process, only about fifteen percent of the properties claimed have been fully settled through the compensation system to date <sup>21</sup>. Recent improvements in the process led the Office of Indemnity Quantification (OCI) to estimate that 200-300 cases can now be processed per month, allowing completion of the process by July 1996. Relatively few property claims have been resolved through the courts so far.

Although some public officials suggest that many owners are refusing to accept bonds because the value of such bonds is highly uncertain, the OCI estimates that less than ten percent of property owners who have received a resolution in favor of compensation will reject the bonds. Informal soundings with claimants suggest, however, that the current value of bonds would need to rise to 40 percent of face value to be acceptable as compensation. More analysis is

needed to determine whether, and how many, claimants are refusing to accept bonds in compensation and appealing instead to the court system.

**3.1. System for Resolving Rural Land Disputes.** The system for resolving rural property disputes is shown in Figure 2. The legitimacy of current occupants under Law 88 is reviewed by the Rural Land Committee, (Comité de Tierras Rústicas) composed of both the Office of Territorial Ordering (OOT) and the INRA. Unlike urban houses, occupants are not required to file claims for *solvencias* -- an administrative certificate indicating conformance with Law 88 requirements, but currently offering unclear legal protection against eviction. Instead, the Committee identified from INRA records all beneficiaries of agrarian reform who received titles under Law 88 between February 25 1990 and April 25 1990. Once identified, the district level offices determine whether occupants meet the conditions of Law 88. Documentation is needed to show occupancy by 25 February 1990 and to determine the number of families occupying a property, since properties are frequently not delineated clearly by family unit. On-site inspections have proven problematic due to INRA's lack of vehicles and personnel.

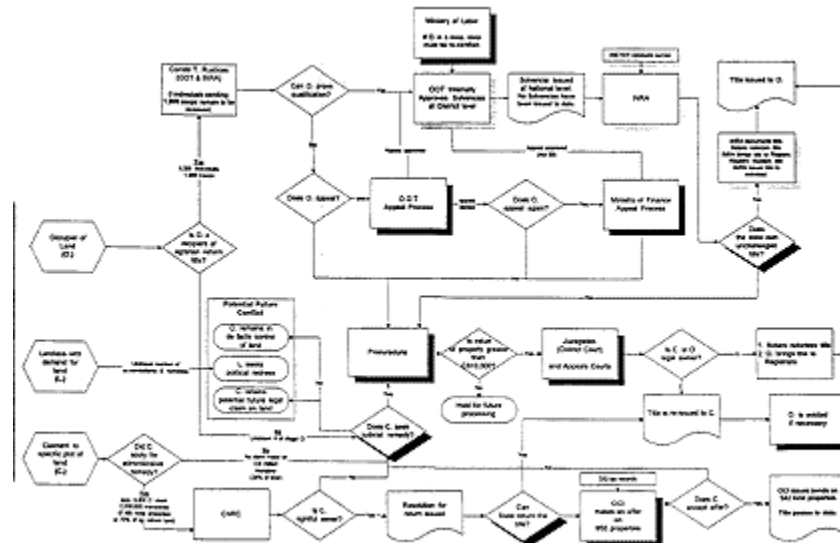
As Figure 2 shows, the district level INRA offices have reviewed all of the 8,300 individuals, but none of the 2,000 cooperatives. At the time of our December 1994 visit, no individual or cooperative had been explicitly denied. Issuance of *solvencias* were to occur once the cases reach the national level, but this had not commenced as of December 1994. Only 100 had been identified as likely cases of fraud, with about 2000 cases lacking sufficient data to make a determination. Cooperatives will require more extensive assessment, since changes in membership of the cooperatives must be certified by the Ministry of Labor. Once *solvencias* are issued, considerable problems are expected in the granting of titles. As mentioned above, 70 percent of the titles were not registered to the State, and cannot therefore be easily transferred. Law 180, approved in July



1994, helps to resolve that problem by transferring ownership to the State when prior owners receive compensation bonds. If prior owners press claims to the courts rather than accept the bonds offered, however, full resolution could take a decade. Even if the title is held by the state, the process of surveying lands to develop consistent cadastral maps and inscribing the titles in the Property Registries could be painstakingly slow. The Ministry of Finance estimates it will take at least three years to properly title legitimate occupants.

### Rural Properties

Figure 2. Information as of February 28, 1995



Resolving Rural Land Disputes: The process for resolving rural land disputes works from primarily two perspectives, that of the occupier of land (O) and that of the claimant (C). Occupier - The administrative process begins at the district level Comite de Tierras Rusticas, which reviews the cases of occupiers to determine if they meet the requirements for Law 88. If no, then the occupier is subject to prosecution by the Attorney General's office. The occupier is able to appeal the Comite's decision. If yes, the occupier must go through several steps: 1) issuance of solvencia at national level; 2) determination of whether the state owns title; 3a) if no, case if referred to Attorney General's office; 3b) if yes, occupier is issued a property title.

*Claimant* - A claimant has primarily two options: judicial or administrative remedy. Judicial remedy involves first, the Attorney General's office, and perhaps then, the district and appeals courts. The administrative process is concentrated in the CNRC and OCL, and involves several steps: 1) decision of whether claimant is rightful owner; 2a) if no, case is referred to courts; 2b) if yes claimant is issued a resolution for return of property; 3) if property is to be returned, a determination of whether property is legitimately occupied; 4a) if no, title is re-issued; 4b) if yes an offer is made on value of property by the OCL; 5a) if claimant accepts offer, the OCL issues bonds for the value of the property to claimant; 5b) if no, the case can be appealed to the courts.

Individuals and coops denied *solvencias* (for not meeting eligibility requirements such as occupancy by 25 February 1990 and owning no more than one property) are to be prosecuted by the Attorney General (Procuraduria). As of December 1994, no case had been transferred to the Attorney General under Law 88, but government officials expect up to 3,000 cases to be transferred ultimately. The Attorney General's office has little capacity to handle these cases, especially when combined with urban cases generated under Laws 85 and 86.

The inability of the courts to handle the load was frequently cited as a significant barrier to resolution. The number of cases is a substantial increase over an already full load. Rural beneficiaries of agrarian reform may find legal proceedings difficult, both logistically and in terms of the resources required to effectively represent their interests in court. In addition, the laws do not provide clear guidance to the courts concerning the resolution of cases when both parties have a legitimate claim to ownership of the property.

In addition to submitting claims to the courts, prior owners of rural lands can also submit claims to the CNRC process. As Figure 2 shows, approximately 3,400 prior owners have made such claims for 7,185 properties, equalling 66 percent of

all the land originally taken for agrarian reform. The CNRC determines the legitimacy of the claim based on whether the land was originally legally obtained by the State. If the CNCR recognizes the prior owner's claim, it then determines whether the land can be returned or whether compensation is appropriate. If the land is legitimately occupied (i.e., by beneficiaries who meet the legal requirements as determined by INRA inspections), then the claims are forwarded to the OCI, which in conjunction with the tax assessors office, determines appropriate compensation. One complaint we heard was that INRA was not inspecting the properties effectively. As of 28 February 1995 the OCI had emitted 950 resolutions for compensation to prior owners and issued bonds for 542 properties valued at 915 million cordobas (US\$130 million). <sup>22</sup> No information was available on the number of claims denied by the CNRC (and open to pursuit in the court system), or the number of properties returned to the prior owner.

**3.2. System for Resolving Urban Property Disputes.** The system for resolving urban property disputes is somewhat more clear cut. The OOT has sole responsibility for determining conformance of occupants to the requirements of Laws 85 and 86. As shown in Figure 3, as of 28 February 1995, the OOT had successfully reviewed all of the 10,229 Law 85 cases (homes) and 90 percent of the 90,264 Law 86 cases (vacant land). About 80 percent of the Law 85 cases were approved to receive a *solvenca*, while about 20 percent were denied for not meeting the criteria to remain in the home. Of those denials, 1100 are appealing through the Ministry of Finance, and 1200 have been remitted to the Attorney General's office, presumably for eviction. For Law 86 cases, 56,000 (about 60 percent) have already been issued *solvencias*. Although no Law 86 applicant has been rejected per se, at least 9,000 have lacked documentation to prove qualification (because of missing birth certificate or lack of proof of occupancy). These cases require further work by the OOT.

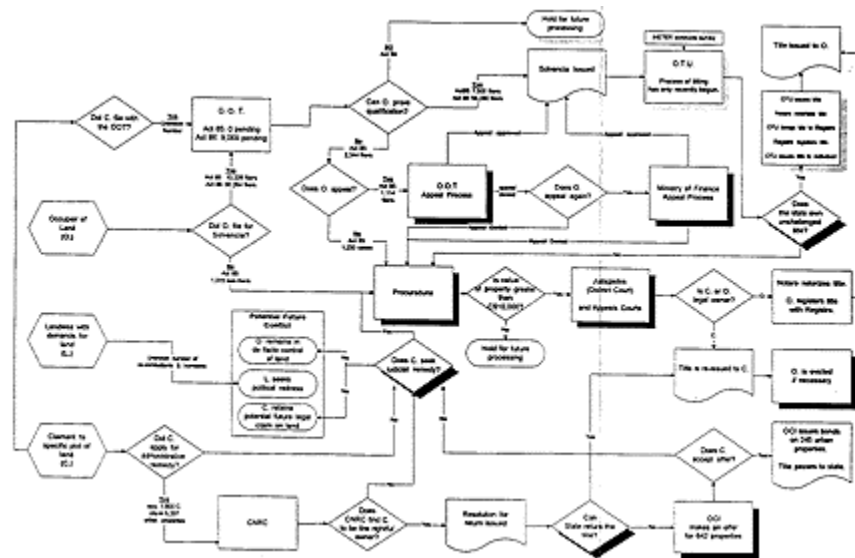
At the same time, the urban process is complicated by the fact that Law 85 beneficiaries are required to file with the OOT. Over 1,000 occupants failed to file with the OOT, thereby opening themselves up to prosecution and potential eviction. These cases have also been sent to the Attorney General's office. Although the administrative review procedures have made substantial progress, they leave many questions unresolved, and as a result, there are numerous potential sources of conflict in the urban property cases. First, *solvensias* offer only tenuous legal protection against eviction (see below), and the OTU (Urban Titling Office) has only just begun to issue formal titles needed for credit, loans, and selling and transferring property. Second, the approximately 3,350 cases under Law 85 (OOT denials and non-filers) referred to the Attorney General by the end of December 1994 when the review process was completed are well beyond the capacity of that office or the courts to manage in any efficient manner. Third, to date, the OOT process has not confronted the issue of whether a prior owner still claims the property. If the State does not own clear title, then the case would go to the Attorney General's office. For the OTU to issue titles, then, all conflicting title claims will first have to be resolved.

As with rural property, the CNCR process has proceeded parallel to the OOT process. Approximately 1,800 prior owners applied for administrative remedy with the CNCR. Over 5,200 properties are claimed. This number, while more manageable than the claims made for rural lands, nevertheless represents a sizable problem. As of 28 February 1995, resolutions had been emitted in favor of compensation for 642 properties, and bonds had been issued and accepted for 245 properties worth 200 million cordobas (US\$28.5 million). Again, no information was available on the number of cases denied, or of properties returned. In a separate process, CORNAP -- the administrative agency in charge of privatization of state properties -- has returned 482 state-owned properties to prior owners.

Legal remedies by prior owners against occupants seems to be limited to attempts to regain vacant properties. Eviction orders have proven very difficult to enforce.

### Urban Properties

Figure 3. Information as of February 28, 1995



Resolving Urban Property Disputes: The process for resolving urban land disputes works from primarily two perspectives, that of the occupier of the land (O) and that of the claimant (C).

*Occupier* - The process begins with the filing for solvencia with the OOT by Law 85 beneficiaries, which is required by the law. Several steps follow: 1a) if the occupier has not filed, their case is referred to the Attorney General's office for prosecution; 1b) if the occupier has filed, they are reviewed by the OOT in order to determine if they meet the necessary requirements; 2a) if no, the occupier can appeal, or have their case go to the Attorney General's office for prosecution (for Law 85), or their case is held for future processing (Law 86); 2b) if yes, a solvencia is issued; 3) if solvencia is issued, the OTU determines whether the state owns land; 4a) if no, the matter is referred to the courts; 4b) if yes, a title is issued.

*Claimant* - The claimant has three options: deciding the case in the courts, filing for review with the OOT, filing for review with the CNRC. The judicial process involves primarily the Attorney General's office, district and appeal courts. The OOT process was described above. The CNRC process involves several steps: 1) The CNRC decides if the claimant is the rightful owner; 2a) if no, the case can be tried in the courts; 2b) if yes, the claimant is issued a resolution for the return of the property, 3) the CNRC determines if the state can return the title; 4a) if yes, a title is issued; 4b) if no, the OCI makes an offer for the value of the property to the claimant; 5a) if the claimant accepts the compensation, the OCI issues a bond worth the value of the property; 5b) if the claimant refuses compensation, the case can be appealed to the courts.

**3.3. Barriers to Effective Conflict Resolution.** A number of significant barriers to resolving property disputes exist in Nicaragua. We discuss below both structural barriers and administrative/legal barriers.

**3.3.1. Structural Barriers.** The design of a dispute resolution system must overcome numerous difficulties associated with the cultural, political and legal context of property disputes in Nicaragua. These include:

- ***Perceived legitimacy and legality of various claims:*** A fundamental philosophical tension exists between proponents of land reform and strict proponents of property rights. Further, the existing legal basis for claims to ownership are problematic, since civil code and reform laws provide for multiple claims to the same property. Theoretically, claims by current occupants and prior owners could both be approved by the parallel administrative and judicial systems. The CNCR should take into account the status of current occupancy when deciding whether to return the property or to compensate the owner, but it is dependent on other agencies to verify current occupancy. Anecdotal evidence was provided to the team of cases in which both priors and currents were actually awarded the same property.
- ***Lack of documents impedes objective assessment of property claims:*** Poor recordkeeping under the Sandinista regime accentuated an already problematic ownership record system. Properties were frequently confiscated or expropriated without exchanging titles and without recording compensation when such compensation was provided. The conditions under which properties were purchased were not recorded. Cadastral records are weak and large portions of

- some registries are missing. For poor beneficiaries of land reform, even simple records, such as a birth certificate to prove citizenship in Nicaragua or an electric bill to prove occupation of property on 25 February 1990, are difficult to provide.
- ***Unequal distribution of resources among claimants and occupants:*** The vast majority of beneficiaries of land reform (current occupants) have significantly fewer resources than prior owners. Resources more readily available to prior owners generally include education, money, professional (legal) advice and representation, and greater familiarity with the legal system. Beneficiaries will likely be at considerable disadvantage in representing their interests in any dispute resolution system. A relatively small number of beneficiaries, typically associated with the larger (and more controversial) properties, may have the same access to resources as do the prior owners.
  - ***Absence of trust in existing institutions:*** Nicaraguan society is highly polarized. Virtually every political, civic and administrative institution is perceived as captured by either the FSLN or by more conservative elites. This is particularly true of national and district level institutions.
  - ***Absence of trust and institutional capacity for alternative dispute resolution:*** While the country does have a legal basis for both arbitration and mediation, the use of such techniques is infrequent. Arbitration is specifically allowed in the civil code dating to the early 1900s. However, it appears to have devolved into disuse since before the Somoza regime. Mediation is also specifically authorized <sup>23</sup>. While applied sporadically to civil disputes, however, mediation has not been widely used. Equally significant, few institutions exist within the country that are perceived as neutral and impartial, thereby increasing the difficulty of initiating mediation processes. At the same time, however, there appears to be a widespread sense that mediation has resolved a number of important disputes. Moreover, a number of nascent efforts exist within the country to build institutional capacity to resolve disputes through mediation.

**3.3.2. Administrative/legal Barriers.** A number of significant administrative and legal barriers to resolving property disputes exist. Figures 2 and 3 (showing the system for resolving rural and urban disputes) highlight areas where barriers are most pronounced. Barriers requiring administrative reform are shown with a light shadow, while barriers requiring more intensive dispute resolution are shown with a black shadow. More generally, barriers include:

- ***Inadequate administrative and judicial resources:*** The scale of the problem is accentuated by decentralized administrative resources and a relative paucity of opportunities for judicial review. The total number of cases being handled, both administratively and judicially, represents a huge increase over traditionally handled civil conflicts. Greater efficiency, while necessary, is not likely to provide the capacity to handle the large number of cases.

On January 12, 1995, the Nicaraguan government and the UNDP signed an agreement whereby the UNDP would provide \$3.7 million to speed up the solution of property ownership problems. The plan includes centralization of agencies dealing with property issues into one building which occurred in February 1995. The government also created a new post of Vice Minister of Property within the Ministry of Finance to coordinate these agencies.

- ***Lack of incentives among administrative personnel to resolve conflicts outside of their domain:*** The property dispute is highly segmented, with different agencies and agency personnel responsible for specific pieces of the process. The result is a highly differentiated bureaucracy, with little capacity for creative problem solving. Further, the differentiation leads to inertia in the handling of cases with unusual problems. This includes many of the more complex cases.
- ***Use of high level agency personnel to resolve conflicts:*** As a direct consequence of the above condition, high level agency personnel have become involved in resolving the more complex cases. In particular, the Minister of Finance has personally mediated a number of cases, and he also rules on the second appeal in the OOT review process. While the task they seek to accomplish is extremely important, high-level managers need to focus on problems of coordinating all the agencies involved. Such high-level to the property process is important to maintain momentum in reviewing and resolving the overall problem, but the task of shepherding specific cases through the process should reside with other personnel.

**3.4. Principles for the Design of a Dispute Resolution System.** To overcome the barriers discussed above, the design of a dispute resolution system in Nicaragua should be based on the following principles:

- where possible, strengthening of existing administrative capacity through streamlining of the process is essential;
- information concerning titles, potential conflicts, and cadastral accuracy must be more efficiently managed, since it is in short supply and duplicative;
- cases where there exists a social consensus as to their resolution should be administratively reviewed only as absolutely necessary in order to conserve resources;
- dispute resolution procedures need to be designed to resolve issues from within agencies as they are discovered, and to create a more neutral alternative for resolving disputes;
- independent of government, a neutral institution needs to be created at the national level to mediate complex disputes;



- dispute resolution should be strengthened at the municipal level for resolving more localized disputes.

#### **4. Political Context**

In 1989-1990, Nicaraguans took an historic step by agreeing to end a decade of civil war and hold elections leading to the first peaceful transfer of power from one political party to another in Nicaraguan history. Simply holding the elections was a feat in a society deeply polarized by war and mutual distrust. Since the elections, Nicaraguans have taken additional momentous steps including a massive reduction in the army from 96,000 to less than 15,000 troops, demobilizing the Nicaraguan Resistance, and taming hyperinflation. These accomplishments required new forms of dialogue, compromise, and cooperation in a society more accustomed to confrontation.

Nevertheless, an incomplete political reconciliation has impeded solutions to the country's severe economic and social problems. Competing groups pressed their demands through sometimes confrontational means during the first part of the Chamorro administration, including debilitating strikes, roadblocks, land squatting, and court evictions. Boycotts in the National Assembly prevented that body from working effectively several times between 1991 and 1993, and conflicting interpretations over constitutional powers at times soured relations between the executive and legislative branches.

Changes in the two major political forces - the FSLN and the UNO - however, have brought about a new constellation of political forces in Nicaragua. In 1992-93 the UNO lost the Center Group, the Christian Democrats, and the Unity and Reconciliation Bloc. Growing tensions within the FSLN led to a divisive party congress in May 1994 and an eventual split in February 1995. By the fall of 1993, the Christian Democrats were helping forge a new majority in the Assembly around the issue of constitutional reform, and elected Luis Humberto Guzman as the new Assembly President in January 1994 (re-elected in 1995).

The break-up of the two main political forces may actually reduce the polarization of the society and allow for the creation of new political coalitions with large majorities. This was the case with the National Assembly's approval of a package of far-reaching constitutional reforms in November 1994 and a second vote in February 1995, with 75-80% of the deputies voting for individual provisions. The reforms significantly strengthened the legislative branch vis-a-vis the executive branch, and caused a constitutional crisis when the President declined to publish them, a step required to make legislative decisions official. Instead, Assembly President Guzman published the reforms, which the executive branch refused to recognize. The constitutional impasse was still not resolved as of 15 March 1995. Property issues took a back seat in the context of the debates over the constitutional reform. While the administrative review process continued, legislation to increase the value of the compensatory bonds and to provide security to beneficiaries of urban and agrarian reform was considerably delayed and may be tied up in the constitutional debate. In July 1994, Law 180 was approved improving the attractiveness of bonds by increasing the interest rate and shortening the maturity of the bonds. At the time, legislation was expected to immediately follow to authorize the partial privatization of the telephone company Telcor, thus raising funds necessary to increase the value of the bonds. (Options for the use of the funds included paying the short-term interest on the bonds, and purchasing zero-coupon bonds in the U.S. that would guarantee the value of the bonds upon maturity in 20 years.) The bill was not introduced by the executive branch until September 1994, however, and then it was put behind the military and constitutional reforms on the legislative agenda.

By March 1995, however, it appeared that property would once again be on the forefront of the legislative agenda. In mid-month, the first piece of legislation needed to privatize Telcor -- the telecommunications regulatory framework -- was reported favorably out of committee to the full plenary for discussion. The second

piece of legislation specifying the nature of the privatization process and use of the proceeds is expected to produce considerable debate over the use of the revenues and what proportion to allocate to strengthening the property bonds. Also in March, a newly-formed Property Commission began to examine draft comprehensive property laws presented by the FSLN and the Conservatives, as well as the previously vetoed Law 133 (Cesar Law). <sup>24</sup> The task of the Commission, headed by Luis Humberto Guzman, is to draft a single piece of legislation that can gain a majority support in the Assembly. The draft proposals are analyzed below.

## **5. Legislative and Judicial Reform**

This section examines proposed legislation and recommended reforms to the judicial system to improve property dispute resolution. Under the terms of reference, the team analyzed existing legislative proposals in the Nicaraguan National Assembly on property conflicts and assessed progress on recommendations made by an August 1994 Carter Center team for judicial reform.

**5.1. Nicaraguan Proposals for Legislation.** Under the administrative review process, current occupants who meet the legal criteria (such as owning only one property) receive a *solvenca* -- an administrative document certifying conformance with the law as a prior step to titling. But because the *solvencias*, as administrative certificates, carry less legal weight than formal titles, they do not necessarily protect the occupant from eviction by the courts if a prior owner successfully presses his claim. According to the Supreme Court and a non-profit group, IDEAS, there are cases of occupants with *solvencias* who have been evicted when former owners have presented claims to the courts, or when the claims of current occupants were otherwise challenged in court.

Neither do the *solvencias* contain a geographic or cadastral description of property boundaries, necessary for inscribing titles at the Property Registry. Consequently, they do not provide a secure legal basis to mortgage, buy, sell, or rent the property. In this sense, they are similar to the old "provisional titles" Venezuela and other countries used to give out which allowed for occupation, but could not be inscribed.

In Nicaragua, to get a title, the beneficiary must go through another process, once the *solvencia* is in hand. The title will have the information necessary to locate the parcel. The title will also function as the operative document which passes ownership from the state to the beneficiary. Only then can the beneficiary take his new "title" to the Property Registry for inscription. Only upon inscription does the title have legal force for third parties.

A broad social consensus exists to protect Nicaraguans who legitimately occupy small pieces of urban and rural property (about 90% of the 112,000 claims by current occupants). However, there is not a universal agreement that new legislation is required to provide greater legal security <sup>25</sup>. A new law could protect the large "block" of smallholders while the complicated problem of titling is resolved (which may take years), and give them security on their land. Such a law would, theoretically, bring a legal conclusion to a large block of cases, thus freeing up the court system to deal with the more complex cases. Draft proposals by the FSLN and the Conservatives, as well as the UNO Law 133 (passed and vetoed in 1991), all would reinforce the administrative review process and recognize the rights of smallholders, providing they meet the conditions for agrarian and urban reform. <sup>26</sup> The draft laws call for the State to expropriate the land in those cases, compensate the prior owner, and transfer formal title, first to the State and subsequently to the occupant. (Time limits on the review process or titling procedures, such as the FSLN draft requirement that titles must be

issued within one year of receiving the *solvencia*, are probably unrealistic, however.)

Another example of a "block" solution that has been suggested in Nicaragua would be to shift the burden of proof for occupants filing under Law 86. Thus, occupants who field under Law 86 would have a presumptive right of approval for a *solvencia*. Although approximately 50,000 of over 90,000 claims by such occupants have been reviewed and approved, almost 10,000 have been held back for insufficient documentation and this number could double. This option would reduce pressure on agency resources while not being disruptive to current agency processing. OOT could then conduct its review only in cases with evidence of illegal occupation, thereby freeing its resources for other cases. The current draft proposals of the FSLN and the Conservatives represent opposite extremes on this issue. The Conservatives assume a presumptive right of approval for prior owners, and would grant them many opportunities to appeal through the courts. The FSLN assumes a presumptive right of approval for current occupants and protects them from suit in the courts.

The biggest problem remains the larger houses covered under Law 85 (approximately 2000 houses larger than 100 square meters). Disagreement exists over (1) how much to compensate prior owners, (2) the payment required by the current occupants, and (3) the value of the compensatory bonds.

Nevertheless, a negotiated compromise is feasible on each of the issues.

On the first issue, the debate is over whether prior owners should be compensated according to current "fair market value" or cadastral (tax) value at the time of expropriation/confiscation. Law 133, the Sandinista proposals and the OCI use cadastral value at the time of confiscation; the Conservative proposal argues for current cadastral value; some prior owners, the U.S. Embassy, and Managua Mayor Arnoldo Aleman argued for fair market value.

The second issue is whether current occupants should pay to receive their title, and how much. There was a general consensus that small landholders (with houses or lots under a certain dollar value to be negotiated) should get free titles, but that those with larger houses should pay. Again, the debate lies in the *de minimis* cut-off point, and how much the occupant should pay -- tax value or fair market value. The various proposals suggest different thresholds to qualify for a free title. The FSLN proposals would grant free titles for any house less than 100 square meters. Law 133 would grant titles for farms less than 50 manzanas, houses less than 58,000 cordobas (about \$8,000), and urban lots worth less than 12,500 cordobas (nearly \$2,000) in Managua. The Conservative proposal would grant titles to homes less than 100 square meters and with tax values under 30,000 cordobas (roughly \$4,000), and lots less than 12,500 cordobas (almost \$2,000).

On the issue of payment by current occupants for larger properties, one of the Sandinista proposals called for a payment of 20 percent of the current tax value of the house or urban lot, while Alfredo Cesar (principal sponsor of Law 133) suggested to the team that occupants should pay cadastral value under conditions and credit negotiated by the government. Managua Mayor Arnoldo Aleman argued that occupants with large houses should pay fair market value, while middle class occupants could pay cadastral value, both under long-term payment plans. The Conservative proposal calls for current occupants to pay fair market value of they wish to keep the property; if the state retains ownership, the property should be returned or indemnified and all previous mortgages or debts of the prior owner be forgiven.

Finally, the value of the bonds remains a key problem. According to current laws, only after the prior owners accept the bonds as compensation for property that cannot be returned, can property titles be transferred to the state and then to

beneficiaries. To a large extent, then, the whole titling program depends on the acceptance of the bonds.

Bond values rose after Law 180 was approved in July 1994, providing for more frequent interest payments and early bond maturity. But the delay in approving the privatization of Telcor, and the emission of additional bonds, led to another drop in the market so that during our visit bonds were trading at 17% of face value.

**5.2. Judicial System.** The "Ley Organica de Poder Judicial" governs and limits judicial power and control. Each District has at least one District Court, with jurisdiction for the entire District, which resolve cases of greater than 10,000 cordobas. At the appellate level, three to five districts join together to form a Region with a single Court of Appeals hearing cases as a three-judge panel. Final recourse is to the national Supreme Court.

The District Courts have general jurisdiction and are based on the concept of one judge to one court. <sup>27</sup> As a result, courts cannot manage their own dockets by limiting the kinds of cases accepted or by referring certain kinds of cases, i.e. property claims, to particular judges. With or without legislative and administrative reforms, many property disputes will eventually make their way into the judicial system. Currently, these courts are incapable of promptly resolving the anticipated flood of property litigation. Under the terms of reference, the team was asked to review progress in implementing previous recommendations to improve judicial capacity.

**5.2.1. Status of August Team Recommendations.** The August Carter Center Team suggested the creation of specialized property courts or the use of a central receiving mechanism to route property cases to particular courts. Currently, there is no judicial power to create specialized courts <sup>28</sup> or to route

certain cases to certain judges. There is broad consensus to leave disputes under ordinary, civil courts rather than creating new courts of special jurisdiction. The Attorney General and the Supreme Court seem to support the central receiving window concept and told the August Team they were willing to draft the legislation; however, the now express reluctance to push for such legislation due to the crowded legislative agenda and uncertainties as to what the Assembly would actually do.

**5.2.2. Status of August Team Alternative Recommendation.** In lieu of special legislation, the August team suggested creating more courts. The current UNDP project provides funds for the creation of two additional civil courts and judges in Managua and three additional civil courts and judges outside of Managua, the first of which are scheduled to begin operation on May 1, 1995.

Unless the new courts' dockets are "stuffed" with property cases on the first day of business, they would have to deal with any other civil matters brought by Nicaraguan citizens. In order to dedicate these courts to the resolution of property claims as much as possible, the Attorney General plans to hire more attorneys to prepare numerous property claims cases to file in these courts on the day of opening. Currently, the AG is holding back a large number of cases in anticipation of filing in the new courts.

**5.2.3. Additional Recommendation: Quasi-Judicial Officers.** The December team further recommended the use of quasi-judicial officers to facilitate case processing in the courts. Judges in federal trial courts in the United States often refer cases to magistrates or experienced attorneys specially empowered by the court to help resolve a particular case. <sup>29</sup> These quasi-judicial officers could conduct many of the preliminary or pre-trial proceedings. This would free judges from having to personally manage the pleadings and other preparatory documents in advance of review for final determination.



If properly trained, these quasi-judicial officers could provide mediation, case evaluation, or even binding arbitration when mutually requested by the parties. This is a common practice to preserve scarce judicial resources in U.S. courts. Under Nicaragua arbitration law, arbitration "at law" proceeds in imitation of court process and the award can be appealed to higher courts. As such, it bears many similarities to "trial by reference" or "official referee" in many U.S. jurisdictions. Essentially, the parties can agree to create a private subordinate court to hear their case while remaining in the purview of the public judicial system. If the courts have a list of qualified, credible "private referees" from whom parties can appeal to the courts, they may be more successful in persuading parties to use those services to resolve their dispute.

## **6. Alternative Dispute Resolution System.**

Under the terms of reference and in response to the August Team's recommendations, the December team was asked to propose mechanisms to mediate property disputes before they entered the court system.

The Team examined the possibility of using mediation and other alternative dispute resolution ("ADR") processes, before or after entry into the judicial system. <sup>30</sup> The Team contemplated using ADR to achieve both short-term and long-term goals. In the short-term, ADR would be focused on resolving current post-revolutionary property disputes and thereby alleviate pressures on administrative and judicial institutions. Over the long-term, the ADR mechanisms would mature to inculcate Nicaraguan society with more collaborative and constructive problem-solving techniques.

**6.1. Design Assessment.** With respect to the design of a dispute resolution system, the team looked at the following:

1. components of Nicaraguan culture that either support or impede the use of ADR;
2. existing laws that allow for ADR;
3. other efforts to develop ADR and the possibility of coordinating efforts; and

4. the existing capacity for dispute resolution training in Nicaragua.

**6.1.1. Society / Culture / Institutions.** Historically and currently, Nicaraguan society appears to have no institutionalized forms of ADR. <sup>31</sup> Although several interviewees believed that there is a tradition of "amiable composition" in Nicaraguan society, there appears to be no current institutionalized practice of conciliatory intervention by third parties. Like many Latin American countries, there are no public or private arbitral institutions even in the commercial sector. Considering the current absence of recognizable ADR practices, to what degree is Nicaraguan society amenable to ADR institutionalization? The Team found both impediments and opportunities. With respect to impediments, the past decade of civil war has undermined whatever traditional social and political institutions, if any, were capable of providing nonadversarial modes of dispute resolution. Institutions and Nicaraguan society as a whole are highly polarized. This condition inhibits the use of ADR since few individuals or institutions are perceived as neutral or impartial enough to deliver unbiased ADR processes. <sup>32</sup> Despite these impediments, interviewees insisted that Nicaraguans are receptive to using ADR. Many recognize the important role that mediation played in ending the civil war. They also believe that Nicaraguan society is ripe for more consensual approaches to problem solving particularly in response to the now recognized cost of adversarial approaches. With respect to the property disputes, interviewees reported that many property issues are being resolved through negotiation or through the ad hoc mediating efforts of various parties. The Finance Minister has mediated large property cases of political importance. Molina (1994) credits INRA with mediating many agricultural property disputes. Mayors and other politicians on the municipal level appear to be informally mediating property disputes. Virtually all the Nicaraguan leaders that we interviewed expressed support for some form of mediation. <sup>33</sup>

**6.1.2. Existing Laws that provide for ADR.** There are no legal requirements to engage in either mediation, negotiation, conciliation, or arbitration to resolve

property (or other) disputes. Existing laws and legal institutions, however, provide some opportunities for ADR development.

Law 87 specifically condones the use of mediation or conciliation to resolve property disputes. Under that law, any party reaching a conciliation agreement can terminate related legal actions by presenting the agreement to the judge. Reportedly, such an agreement also closes off recourse to appeal.

The Civil Code of Nicaragua contains provisions that allow courts to enforce arbitration agreements and awards, which although dated (1905), appear serviceable. Nicaraguan law recognizes an archaic distinction between arbitration "at law" and arbitration "ex aequo et bono." The former must be conducted by an attorney/arbitrator in formal imitation of a court of law, and the award is subject to appeal like a trial court decision. The latter can be less formal and conducted by whomever the parties choose. By proceeding ex aequo et bono, the parties grant to the arbitrators broader powers to make a final determination from which they have more limited right to appeal.

The current administrative system, including OOT, CNRC, and OCI, contain only the formal adjudicative mechanisms for decision making.<sup>34</sup> There appear to be no limitations, however, on the institutionalization of informal conciliatory mechanisms for dispute resolution within the administrative system.

The courts proceed in the formal civil tradition without the aid of nonadjudicative, court-annexed mechanisms. Although some judges may engage in informal conciliatory practices, there is no tradition of doing so nor is there any training to do so. The creation of court-annexed ADR mechanisms, administered and managed by the courts, would probably require legislation.

**6.1.3. Survey of ADR Development Efforts.** The Team identified at least three independent efforts to institutionalize alternative dispute resolution mechanisms:

- USAID's Administration of Justice Project;
- a National Endowment for Democracy ("NED") project; and
- the Leon Mediation Center.

USAID's Administration of Justice Project includes a small ADR component for teaching mediation in the primary and secondary schools and developing pilot community mediation centers. The National Endowment for Democracy ("NED") project could have a significant ADR training and institutionalization component. One proposal to NED would train mediators in cooperation with the two municipal associations. Another would build mediating institutions through the universities. Both organizations were considering proposals and had not made grants at the time of our visit.

Only the law school at the National University in (UNAN-Leon) is active currently in ADR. The law school has an operating mediation center started with initial help from Capitol University in Columbus, Ohio. This is the most significant effort at developing mediating institutions. In addition, various members of Capitol University's dispute resolution center have been in Nicaragua meeting with social and political leaders to encourage the use of ADR generally. [35](#)

The team has only anecdotal evidence of other ADR efforts. The local representative of NED reports that an NGO named the "Center for International Studies" is working in mediation and proposes the establishment of dispute resolution groups in each department. [36](#) Reportedly, some Moravian priests and representatives of other churches are engaged in mediation and conciliation and have attended some training from an organization hereto unknown, possibly the Quakers or Mennonites. In rural areas, two producer's organizations, UPANIC and UNAG, have offered to mediate property disputes, facilitated by the UNDP. The mediation teams may be comprised of representatives of both parties in the conflict. (In most cases, UPANIC represents the prior owners, and UNAG represents current occupants). The UNDP has also developed a program

involving youth and women, a portion of which may involve dispute resolution training.

**6.1.4. Existing Capacity for Training.** In Nicaragua, the mediation center in Leon is the only institutionalized source of training. The Team feels that this center is doing a good job locally and would be overextended if made responsible for national training; however, judicious use of experienced mediators from the Leon center will be very useful in initial training efforts.

**6.2 Design Recommendations.** The Team suggests a two-track institutionalization of ADR to both handle property disputes and stimulate the growth of peaceful, collaborative dispute resolution in Nicaraguan society. The first track is the establishment of a government ombudsman office. The second track is the establishment of independent, non-governmental organizations that provide ADR services. <sup>37</sup>

**6.2.1. Ombudsman Office.** The Team recommends the development of an Ombudsman Office to resolve property disputes while in the administrative and titling process, and before they enter the courts. <sup>38</sup> The office would serve as a general complaint handler and problem solver for the clientele of CNRC, OCI, OOT, INRA, and OTU; however, it would be independent from the administrative agencies handling property matters and report directly to the Finance Minister with courtesy reports to the Attorney General for Property. The Ombudsman Office would be located in the same centralized space created for the other agencies (the BANIC building), with the capacity to travel to regional offices. The staff members of "ombudsmen" of the Ombudsman Office would help complainants work through problems with the agencies. They would be trained in a variety of dispute resolution techniques and provide a range of functions including simply serving as a sounding board for complaints, giving and receiving information on a one-on-one basis, counseling and problem solving to help the

complainants help themselves, conducting shuttle diplomacy between the complainant and the agency, and making referrals to mediation services. By simply providing information, the ombudsmen serve a two-fold purpose. First, they take the pressure off agency staff so that agency staff no longer have to respond directly to numerous questions or complaints. Second, they will improve perceptions of fairness and transparency of process by providing explanations of the agency mechanisms. [39](#)

In addition to providing all the functions of a complaint handler and being the first point of contact between the agency and the complainant (while legitimizing the authority of the agency), the Ombudsman Office would be an agent of change by providing upward feedback in the system with respect to particular problems and suggesting generic, systematic responses and improvements in the administrative process.

Although the ombudsmen will be responsive to complainants, ombudsmen should be very proactive. They should try to identify potential conflicts early in the process, seek possible candidates for ADR, engage in educational outreach, and actively encourage parties to resolve conflicts outside of the administrative and judicial processes. [40](#)

Each of five ombudsmen would specialize or focus on one of the five agencies but be available to work on overflow or on demand with other agencies. [41](#) One or more general ombudsmen would serve to handle general complaints or problems that defy agency designation. An intake receptionist would be required.

The Ombudsman Office could be supplemented by neutral go-betweens (law students and other graduate student volunteers) that communicate with the Ombud's office as advocates for those who have less resources to approach the office.

The Team believes that by using ombudsmen, the Nicaraguan government can put in place a few well-trained problem-solvers that will identify and solve many disputes before they clear the administrative process and enter the courts. Ombudsmen give the agencies a flexible dispute resolution capacity while taking pressure off agency staff. Ombudsmen can help intermediate disputes between the government and occupiers. Finally, ombudsmen can help parties agree to refer their cases out to external ADR resources (see below).

**6.2.2. Independent ADR Organization.** The Team recommends that UNDP and the government of Nicaragua support the development of an independent, nonprofit NGO dedicated to conflict resolution. <sup>42</sup> There are many models for such a dedicated organization, such as the American Arbitration Association or the Western Network in the United States, or the British Columbia Dispute Resolution Center in Vancouver, Canada. This Nicaraguan NGO would focus initially on the property problems and develop an appropriate panel of mediators, neutral fact finders, <sup>43</sup> and arbitrators for resolving these problems. Panel members would not be employees of the NGO and would serve on a case-by-case basis as volunteers or for a fixed per diem. <sup>44</sup> The organization would provide administration of voluntary consensual alternative dispute resolution processes at any location in Nicaragua.

We recommend a voluntary, as opposed to mandated, ADR system. With respect to arbitration, parties should not be coerced into binding submissions. Such coercion would undermine the important principle of open access to the courts and quickly erode the legitimacy of a nascent arbitration system. With respect to mediation, mandated or coerced participation in a mediated negotiation is not as objectionable as long as the parties are not mandated to settle; however, the Team does not recommend mandated participation for a number of reasons. <sup>45</sup>

In addition to handling any voluntary referral, the ADR NGO would have staff that monitor court dockets and actively encourage disputants to refer the case to mediation or other ADR. Full or part-time staff members would be assigned each district court. [46](#)

The organization would also provide training and support for both neutrals and users of ADR. Both the board of directors and the panel of neutrals should be representative of the diverse factions of Nicaraguan society. The formation of such an NGO would require no legislation and be perceived as more impartial because of its nongovernmental status.

The formation of this NGO addresses several problems. Ombudsmen cannot resolve property disputes that are not in the administrative system. If the disputants distrust ombudsmen because they are within a governmental agency, they can access an independent resource for dispute resolution. Property disputes in the judicial system, which will take perhaps a decade to resolve, can be referred to this resource. The NGO provides the necessary organization to efficiently manage dispute resolution activity and focus training efforts. A single entity providing geographically disbursed services can be started faster than several geographically disbursed centers, yet provide the training resources for subsequent centers if necessary.

The most significant impediment to the formation and success of such an organization in Nicaragua is the perception that there are no impartial institutions or individuals. This makes it difficult to engage the support of existing institutions and to find mutually-acceptable neutrals. This problem is discussed in Section 6 below.

**6.2.3. Other Independent ADR Resources.** As part of the second track, the team also recommends the development of community dispute resolution centers



along the model of the National University's Law School Mediation Center in Leon. This is more of a long term goal since it is doubtful that such centers could be operative in time to meet much of the short term property dispute resolution needed.

USAID's Administration of Justice Project anticipates the creation of such centers. In addition, all NGO activities in developing mediation and peaceful dispute resolution training in Nicaragua should be encouraged and allowed to flourish. Of particular interest is the NED project. At this time, however, the Team does not recommend joint or coordinated activities. [47](#)

For the long term, the team also recommends broad-based conflict management training and dispute system implementation through schools, large co-ops, factories, and other institutions. The dedicated NGO and community dispute resolution centers could provide the training resources necessary for this long term goal.

One final consideration is the voluntary use of the proposed NGO or ADR providers in the United States for mediation or arbitration of US citizen claims. ADR is a more established concept in the United States, and many lawyers, particularly in Florida, are well-acquainted with the processes. If US citizens are seeking to expedite definitive adjudicated decisions, this may be an option. [48](#)

## **7. Implementation Issues.**

Efforts to implement the above recommendations will require concerted effort and financial resources. The steps needed include the following.

**7.1.Improving Judicial Capacity.** Recommendations for the appointment of special referees as quasi-judicial officers may require legislation if the judges have no inherent power to delegate powers. As an alternative, we would suggest

the use of law clerks and lawyers to prepare cases for quick determination. These professionals would work for the judge but exercise no judicial powers. As such, no additional authority should be required for implementation by the courts. We recommend that such support be provided especially to the new district courts established by UNDP funding.

**7.2. Institutionalizing Alternative Dispute Resolution.** Since use of the proposed ADR system is voluntary, there is considerable risk that not enough disputants will opt for ADR to establish its use and to provide significant relief to the administrative and judicial systems. Generally, five factors affect the degree to which some procedures are used and not others:

- the degree to which the services are easily available;
- the extent to which disputants are motivated to use the alternatives;
- whether disputants or their representatives have the requisite skills and competence to participate in the alternative processes;
- whether the disputants are given enough information to understand the availability and nature of the alternatives; and
- whether the processes are perceived as effective in the resolution of disputes.

The following sections address these factors.

**7.2.1. Availability: law.** Attempts to sponsor specific legislation to create ADR systems or mandate their use are risky. In addition to the possibility of unacceptable delay, there is little assurance that the National Assembly would pass a law in the form proposed. The Team's recommendations for ADR require no changes in the law or legal system. <sup>49</sup> Negotiation and mediation can take place at anytime without special legal authorization. The use of non-adjudicative processes should conform with any existing legal standards. The Team notes that there are legal requirements for the enforceability of settlement agreements and special conditions may exist for settlements reached under Law 87. <sup>50</sup> The current arbitration law appears sufficient, though further assessment is desirable. Any organization providing arbitration services should have a

recommended form of arbitration submission agreement that incorporates procedural rules sensitive to the law's particularities.

**7.2.2. Availability: impartial neutrals and institutions.** For ADR to be credible, the mediators, arbitrators, and administering organization must be perceived as neutral. As noted, it is difficult to find persons or institutions in Nicaragua that are accepted as impartial. Several possibilities exist. First, let the neutrals and organizations establish their credibility in the face of preconceptions by delivering impartial, fair ADR services. Second, let the parties choose neutrals according to their perceived bias. After appointment for example, an advocate of agricultural reform might be co-mediating with a large agricultural land owner. (The recent efforts by UPANIC and UNAG to mediate farm disputes is an example of this.) Third, merge the efforts of two politically different institutions in the formation of the ADR organization, two institutions of higher learning, for example, the law school at UNAN-Leon and the graduate business school (INCAE) in Managua. For a number of reasons, <sup>51</sup> the Team recommends creation of a national center of alternative dispute resolution. We do not believe that a single non-governmental institution exists that can serve as a widely accepted, neutral institution that could house the mediation activities. We believe the most viable strategy is to work with two existing institutions that have broad legitimacy and that complement each other such that a combined center would be perceived as neutral. We would look for creating a joint center that builds on the strengths of these institutions.

The identification of the appropriate institutions is an important next step. We believe that the universities provide the best opportunity for hosting such a center. Considerable care must be given not only to the choice of institutions, but also to the creation of an appropriate board of advisors. Creation of such a dispute resolution center will require outside financial resources, since we believe

that the conditions do not exist for making such a center self-supporting. Identification of outside financial resources is essential.

Should the identification of two appropriate institutions prove infeasible, then creation of a completely new and independent non-government center would be required. Such a center would need broad sponsorship and a board of directors that consisted of clearly recognized civic leaders that represent the diversity of political and interest-based stakeholder groups found in Nicaragua. The center could also be created out of a single institution, although considerable care would be needed to ensure the neutrality of the center.

On the local government level, the government decentralized entity, INIFOM, and the independent association of mayors, AMUNIC, could provide some support for mediation training in a decentralized fashion. Such organizations may be perceived as less politicized than many other initiatives.

**7.2.3. Availability: training.** Currently, there are not enough trained neutrals in Nicaragua to provide the proposed ADR services. The initial training should be general and large enough to include as many ombudsmen, independent mediators and arbitrators, and ADR administrators as possible. Without delay, ombudsmen, independent neutrals, and ADR administrators should each receive training that is specific to their roles. Ongoing training should be available for new and additional ombudsmen and independent neutrals as needed.

As noted, Nicaragua has very limited capacity to provide ADR training. As soon as practicable, Nicaragua should expand its own capacity to train neutrals. In the interim, external training resources must be engaged. Although such services are often expensive, there are opportunities to offset these expenses by collaborating with NGOs. Capital University indicates it received a grant to continue training in

Nicaragua. The USAID and NED projects may provide a training source. The Leon Mediation Center will be of significant help in the initial training.

Training programs and materials must be in Spanish and complementary to Nicaraguan culture. Capital University indicates it has such materials. Experienced bilingual ADR trainers are available, e.g., Western Network, though scheduling in the short term may present problems. The law schools in Puerto Rico are developing a national ADR center this year and may be helpful. Additional resources for specialized training include the Ombudsman Association and the American Arbitration Association.

**7.2.4. Availability: lack of commercial market in ADR services.** A commercial market for ADR services has not been established in Nicaragua. An ADR provider requires donor support or fee-based services or a combination of both to cover the cost of operation. In addition, one cannot expect unpaid volunteers to mediate a substantial portion of their time. Assuming ADR services will not find a way to be self-sustaining in the short and mid-term, monies must be allocated to maintain operations and pay neutrals.

**7.2.5. Motivations: incentives and disincentives.** Currently, there appear to be many barriers for the use of ADR. Before parties will use ADR, they must be able to perceive a real advantage associated with the use of mediation and arbitration. As long as one side feels that delay is both possible and in their interest, the court system (and its lengthy process) will prove more attractive than ADR. Occupants who have the greatest need to transfer property (through sale or direct transfer) or who need clear title for financing may have the greatest incentive to negotiate. The absence of a fully functioning financial and land market, however, limits this incentive. At the same time, prior property owners may feel that they possess an advantage (in financial resources and legal

representation) in the courts. They therefore may prefer to take their case to court.

Current incentives remain untested and unclear. To date, the courts have not created precedents upon which litigants can judge the likelihood of success. As the courts resolve a body of decisions, the parties to these disputes will become more effective at evaluating their cases. In the face of this uncertainty, many occupants of houses and agricultural properties may find it advantageous to delay a final resolution.

These conditions argue both for an activist ADR process and the careful inclusion of incentives to negotiate. Government agencies involved in the property disputes may frequently need to be parties to the negotiation to help create these incentives.

**7.2.6. Skills and Competence: power disparities.** Some of the more mediable situations, e.g., agricultural properties, etc., also involve some of the greatest power disparities. As such, an important next step will be the design of a system for facilitating more effective negotiation between stakeholders with widely divergent resources and power. Options that should be considered include the involvement of advocacy groups in support of individual stakeholders, training by the third party neutral to help promote a more effective understanding of constraints and opportunities, and party-appointed negotiators by proxy. This latter option appears unwieldy for large number of cases, but may be helpful in some particularly complex disputes. The mediation center will need to develop explicit approaches to managing these problems.

**7.2.7. Information: promotion and education.** No one will use ADR if they do not know the options or if they are misinformed. Very few people in Nicaragua are aware of ADR processes. Since the proposed system is voluntary, judges, lawyers, religious leaders, community organizers, politicians, and governmental

staff must be well educated on the ADR options available. Pamphlets and other educational materials should be produced and distributed to these groups so they in turn can distribute to the disputants. A television, radio, and billboard campaign may be helpful.

Both the ombudsman office and the mediation center will need to be central in this outreach effort.

**7.2.8. Ombudsman Office: specific implementation problems.** There are several problems raised in the creation of an Ombudsman Office. The first challenge is in finding qualified personnel. The ombudsmen must be intelligent, apolitical, and credible to all classes. Unless the office evolves into a permanent institution, the jobs would be temporary and less attractive to the applicant.

The various agencies involved must accept the ombudsmen as helpful rather than an additional burden or bureaucratic busybody. In particular, actions of the ombudsmen should not serve as an excuse to unduly delay the administrative process. Specialized training of ombudsmen will be necessary.

## **8. Next Steps**

Further progress in resolving the complex property issues in Nicaragua require both short-term and long-term efforts. We suggest the following steps, in order of time urgency. Existing international programs to support these efforts are noted; however, additional international support will improve the prospects for successful completion of the program.

1. **Raise the bond values.** It is essential to provide adequate compensation to prior owners. Pending legislation to privatize Telcor and use a substantial portion of the revenues to back the bonds is currently the most promising means to increase the incentives for prior owners to accept indemnity and transfer title to the state, thus clearing the way for titling of current occupants.
2. **Establish ombudsman's office.** An ombudsman's office, as described in this report, should be opened very quickly to facilitate the work of the administrative review agencies and titling offices, and to reduce frustrations of claimants.

3. **Improve legal security for small property holders.** Greater legal security to holders of *solvencias* needs to be explored to protect legitimate occupants from eviction while awaiting formal titles. Current proposals for new property legislation offer greater protection for legitimate beneficiaries of agrarian and urban reform.
4. **Completion of administrative review process.** The current rate of review needs to be sustained to complete it by mid-1996. The UNDP project has supported the consolidation of the various property agencies into a single building, and the government created a new post, the Vice Minister of Property, within the Ministry of Finance to coordinate these efforts. Improved coordination, physical proximity, and greater access to resources is already speeding up the review process.
5. **Address grievances of ex-combatants.** Both demobilized Sandinista army and Nicaraguan Resistance soldiers expected to receive land and assistance from the government to start a new life. Delays in such assistance have led to violent confrontation in the countryside. These grievances need to be addressed.
6. **Open new courts and improve judicial capacity.** The proposed five additional courts with appropriate staff need to be opened immediately to begin dealing with the expected 6,000 litigation cases. The UNDP project provides support for staffing of the new courts. This would be complimented by a U.S. AID Administration of Justice program which aims to modernize and professionalize the judicial system, including introducing a Public Defender's Office and training NGO's and Ministry personnel in community mediation techniques.
7. **Identify and train mediators.** An alternative dispute resolution mechanism, as described in this report, could potentially remove hundreds of cases from the laborious litigation process and help reduce political and social tensions in the country.
8. **Improve titling process.** Currently, the institutions responsible for titling -- the physical and fiscal cadasters and the property registries -- are dispersed among three separate Ministries as well as the mayors' offices. These need to be integrated and modernized. Two existing programs take the first steps. The World Bank is supporting a program to provide clear titles to agrarian reform beneficiaries by modernizing the physical cadastral survey and mapping capacities, and computerizing the Property Registry system. The UNDP project supports the new Office of Urban Titling (OTU) which issues titles for urban reform properties. These and other projects need to be well-coordinated. This is a long-term process that will take years to complete, but which is essential for secure property rights in Nicaragua.
9. **Improve access to land markets.** Small farmers with inadequate access to credit, supplies, and markets for their goods are forced to sell their land in an unfavorable land market. There are some indications of a reconcentration of land ownership in the 1990s. In order for agrarian reform beneficiaries and ex-combatants to gain access to land markets, programs should be explored such as mortgage guarantees, land banks, mortgage lending directed to the poor and disadvantaged groups, and agriculture credit programs. One example is a European Union project which supports a credit delivery program using farmer organizations rather than banks.



## LIST OF MEETINGS

Dr. Jennifer McCoy, Dr. David Carroll, Dr. Michael Elliott Dr. Doug Yarn, Dr.

Steve Hendrix

Mission to Nicaragua, November 29 - December 3, 1994

Arnoldo Aleman, Mayor of Managua.

Ernesto Leal, Foreign Minister of Nicaragua.

Emilio Pereira, Minister of Finance.

Carlos Jose Hernandez, Attorney General of Nicaragua.

Miguel Robelo, Attorney General for Property.

Hortesia Aldana, director of OOT.

Orlando Trejos, Supreme Court Justice, President of Court.

Enrique Villagra Morelos, Supreme Court Justice.

Rafael Chamorro Mora, Supreme Court Justice.

Guillermo Vargas Sandino, Supreme Court Justice.

Dr. Luis Humberto Guzman, President of the National Assembly.

Sergio Ramirez, former Vice-President, leader of Movimiento Renovación Sandinista.

Alfredo Cesar, UNO legislator.

Mireya Molina, Nicaraguan lawyer, specialist in property issues.

Xiomara Paguaga, Mediation Center, UNAN-Leon Law School.

Salvador Centeno Rivas, Mediation Center, UNAN-Leon Law School.

Ruth Selma Herrera, president of IDEAS.

Rene Vivas, FSLN member of National Directorate.

John Maisto, U.S. Ambassador to Nicaragua.

Paul Trivelli, U.S. Embassy

Carlos Garcia, U.S. Embassy

Mark Silverman, USAID.

Joe Ryan, USAID.

Susan Merrill, USAID.

Victor Rojas, the National Endowment for Democracy

Francesco Vincenti, representative of the UNDP in Nicaragua.22

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## Notes

**Note 1:** These claims include land and houses, as well as vehicles, machinery, factories, stocks and certificates of deposit. The vast majority of claims are for land and houses (12,415) which are the causes discussed in this report. [Back.](#)

**Note 2:** The 40% estimate is provided in David Stanfield, "Analysis of the Current Situation Regarding Land Tenure in Nicaragua," Report prepared for the Swedish International Development Authority (ASDI), The Land Tenure Center, University of Wisconsin, 21 October 1994. [Back.](#)

**Note 3:** Nicaraguan agency statistics refer sometimes to number of cases resolved (which may include more than one property claimed by a single individual), and sometimes to numbers of properties involved. Therefore, it is difficult to make definitive assessments of progress to date. [Back.](#)

**Note 4:** Although international law stipulates that a government may espouse only those properties owned by persons who were citizens at the time of expropriation/confiscation, the United States chose not to use the espousal principle, but instead to support all of those claims of newly-naturalized citizens even after the confiscation. [Back.](#)

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**Note 6:** David Stanfield, "Analysis of the Current Situation Regarding Land Tenure in Nicaragua," unpublished manuscript, The Land Tenure Center, University of Wisconsin, 21 October 1994. [Back.](#)

**Note 7:** Nicaraguan agency statistics refer sometimes to number of cases resolved (which may include more than one property claimed by a single individual), and sometimes to numbers of properties involved. Therefore, it is difficult to make definitive assessments of progress to date. [Back.](#)

**Note 8:** Only 506 of those individuals submitted 1,487 claims with the CNCR by the December 1990 deadline, however, and are thus eligible for the

administrative claims procedure. The remainder must press their claims through the court system. [Back.](#)

**Note 9:** Although international law stipulates that a government may espouse only those properties owned by persons who were citizens at the time of expropriation/confiscation, the United States chose not to use the espousal principle, but instead to support all of those claims of newly-naturalized citizens even after the confiscation. [Back.](#)

**Note 10:** For more detailed analysis and recommendations of some of these elements, including bonds, property legislation, titling problems, and scope of the land problem in Nicaragua, see the following reports prepared for the Swedish International Development Authority (ASDI) study of land tenure and rural property in Nicaragua: David Stanfield, "An Analysis of the Current Situation Regarding Land Tenure and Rural Property in Nicaragua," October 1994; Mireya Molina, "Situacion actual de la Propiedad y Posesion sobre la Tierra en nicaragua," September 1994; and Ricardo Guevara, "El Sistema de Bonos en Nicaragua," September 1994. See also, John Strasma and Javier Molina, "Accelerating the Resolution of Property Cases in Nicaragua, 1994," May 1994, Land-Tenure Center, University of Wisconsin. [Back.](#)

**Note 11:** Unless otherwise noted, data in this section comes from Molina (1994) and Standfield (1994). [Back.](#)

**Note 12:** A manzana is a measure of area equivalent to 1.75 acres. [Back.](#)

**Note 13:** Confiscations were authorized under decrees 3, 38 and 329 in July and August of 1979. These decrees confiscated approximately 2,000 properties constituting 1.4 million manzanas. Properties here refers to farming units, not separately registered ownership units. [Back.](#)

**Note 14:** Decrees 760 (Abandonment Law) and 782 (Agrarian Reform Law) allowed for the expropriation of abandoned or poorly managed farm properties. These decrees were authorized in 1981 and led to expropriation of 1,450 properties totaling 838,000 manzanas. [Back.](#)

**Note 15:** Government purchases of 1,050 properties totaled 196,000 manzanas. These purchases include properties acquired through foreclosures on mortgages made by the State bank, as well as purchases made under what the prior owner now claims to be duress. [Back.](#)

**Note 16:** Including approximately 500 properties (300,000 manzanas) through de facto occupation without support of law and 860 properties (89,000 manzanas) through means such as confiscation of property held by people convicted of rebelling against the government. [Back.](#)

**Note 17:** Land problems of indigenous communities, concentrated on the Atlantic Coast, must be assessed separately since they were not distributed titles from the INRA. Instead, they claim the validity of their ownership from colonial times. [Back.](#)

**Note 18:** David Standfield and Steve Hendrix, "Ownership Insecurity in Nicaragua," *Capital University Law Review*, 22:4 (Fall 1993): 945 and 947. [Back.](#)

**Note 19:** Standfield (1994). Claims are based on ownership parcels, not farming units. Hence, the number of properties claimed exceeds the number of properties reportedly acquired by the state. [Back.](#)

**Note 20:** Law 174 suspended evictions for a six month period. Originally passed for a six month period in April of 1994, the law was extended the following October. [Back.](#)

**Note 21:** Nicaraguan agency statistics refer sometimes to number of cases resolved (which may include more than one property claimed by a single individual), and sometimes to numbers of properties involved. Therefore, it is difficult to make definitive assessments of progress to date. [Back.](#)

**Note 22:** The remainder of the cases with resolutions were still in process for issuing the bonds. A bottleneck in the notary's office was apparently resolved in February 1995 when the OCI got its own notaries, which should shorten the time to receive bonds. [Back.](#)

**Note 23:** Law 87, Article 5, governs conciliation for rural property disputes. It allows a judge to close a court case upon successful completion of an agreement

between the parties. It is stronger than a sentence by the judge since it is not appealable. [Back.](#)

**Note 24:** Reportedly, the Liberal parties are also presenting a draft property law, but the team has been unable to secure a copy of it. [Back.](#)

**Note 25:** Neither the Finance Minister nor the Mayor of Managua believed that new legislation would be necessary, telling the team in December 1994 that the existing administrative procedures already provide legal security. More recently, the government has indicated support for legislation that would reinforce the administrative review process, its principal fear apparently being that legislation could disrupt or delay that process which is scheduled for completion by mid 1996. For example, Minister of the Presidency Antonio Lacayo was quoted as saying in January 1995 that "it is necessary to obtain a consensus between the executive and the legislature so that a proposal can be passed into law taking into consideration the progress achieved so far by the government and Laws 85, 86 and 88. The laws should give strength to the administrative mechanisms" (Radio Nicaragua Network, 13 January 1995, cited in Foreign Broadcast Information Service, 19 January 1995, p.33. [Back.](#)

**Note 26:** Law 133, also known as the Cesar Law, was passed by the UNO members of the National Assembly on August 23, 1991, only four days after Decree 35-91 created the OOT via administrative order, and therefore did not refer specifically to the OOT. It does, however, reaffirm the Consejo Nacional de Revision, and Alfredo Cesar told the team in an interview December 1, 1994, that a new law should recognize and give legal backing to the OOT solvencia process.

Nevertheless, the UNO and the Sandinista proposals differ on recognizing the transition legislation (Laws 85, 86, and 88). President Chamorro vetoed the heart of Law 133, but not the beginning and the end which abrogated the transition laws (85, 86, and 88) for the future. (The Nicaraguan Constitution does not permit retroactive legislation, so those who had already legally benefitted from

the laws would not be affected. Only abuses of the law could be undone retroactively). The draft Sandinista proposals keep the transition legislation.

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**Note 27:** Unlike in the United States where many judges may serve in the same court and are assigned cases filed at that court. [Back.](#)

**Note 28:** There is precedent for courts of special jurisdiction in Nicaragua, e.g., special labor courts; however, such courts are perceived as subjective and open to manipulation. In Costa Rica and Venezuela, courts handling agrarian matters proceed under less formal rules of evidence and make more flexible rulings.

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**Note 29:** Judges in Nicaragua are referred to as "magistrates;" however, in the United States, U.S. Magistrates are subordinate judges appointed by the judges of the district courts, having some but not all the powers of a judge. [Back.](#)

**Note 30:** ADR processes include any extra-judicial, peaceful methods of conflict resolution such as negotiation, mediation, and arbitration. Defined broadly, mediation refers to actions by an impartial third party that help disputants fashion their own agreement or settlement. In contrast, arbitration involves using an impartial third party to make a usually binding determination or award to resolve the controversy. [Back.](#)

**Note 31:** The Team did not engage in an anthropological or sociological study, but merely makes these observations from the briefing material and interviews. The Team has little information about the historical and cultural backgrounds of the indigenous peoples on the Atlantic coast. Cultural issues probably would not affect the general design recommendations in this report, but the team strongly recommends a cultural assessment for implementation purposes. [Back.](#)

**Note 32:** Central governmental agencies are perceived as either supporting the political faction in charge of the executive branch or remaining dominated by other factions [e.g., INRA by FSLN]. At the decentralized or local government level, the municipalities are represented by two associations, INIFOM and AMUNIC. Although the membership of these organizations is necessarily

politically partisan, they were continually cited as among the few credible institutions. Institutions of higher education have reputations for political affiliation. Opinion appears mixed on whether the religious institutions are impartial. The Catholic church dominates the Pacific side of the country while Moravian and Protestant churches dominant the Atlantic side. [Back.](#)

**Note 33:** A group from Capital University in the United States has also discussed the virtues of mediation with many influential Nicaraguans. Capital University was instrumental in the formation of a mediation center based in the law school at Leon and discussed infra. [Back.](#)

**Note 34:** At this time the Team does not know whether administrative appeals are "documents only" or include any oral presentation. [Back.](#)

**Note 35:** In a telephone interview, the director of the Capitol dispute resolution center reports that they have received a grant to conduct more training activity in Nicaragua. They have developed training materials in Spanish including videotapes as well as written materials. They believe that videotapes are considerably more effective training tools in Nicaragua culture. [Back.](#)

**Note 36:** "Department" refers to the political and geographical subdivisions of the country established for purposes of governance. [Back.](#)

**Note 37:** The Team used the following design principles in making these recommendations:

1. ADR processes should be available at any point in the administrative or judicial process at the choice of the users.
2. The design should require no new legislation nor substantial structural changes to existing administrative or judicial institutions in order to implement the ADR system.
3. The ADR system should legitimate and complement the existing dispute resolution processes in use, including the courts and the government agencies, and the normative formation central to those systems.
4. The system must provide credible neutrals (mediators, arbitrators, fact finders). For the system to be taken seriously, it must be perceived as fair and transparent and accessible.

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**Note 38:** An official or semi-official office or person to which people may come with grievances connected with the government. The ombudsman stands between, and represents, the citizen before the government. (Black's Law Dictionary, 6th ed. 1992). The ombudsman is available to receive issues or grievances from individuals, public agencies, or organizations and in turn brings such issues to the attention of the public agency with whom the public has a dispute. The ombudsperson also provides advice regarding available resources and options, proposes a resolution, or proposes a systematic change related to the issues. Such recommendations are not binding in any way. [Back.](#)

**Note 39:** Apparently, Nicaraguans perceive higher rewards when they press their complaints immediately to the "top," if they have the resources to do so. Unfortunately, the finance minister has other things to do. The Team believes everyone will benefit if this trend is discouraged and the use of the ombudsmen is encouraged.

To avoid the perception that agency staff are biased in their functions and hence, susceptible to graft and bribes, the Ombudsmen office could also have responsibility for internal investigation. The Team recommends, however, that this function be performed by a separate "inspector general" because this function could undermine the ability of the ombudsmen to get cooperation and facilitate problem solving within the agency. [Back.](#)

**Note 40:** Ombudsmen in the United States frequently do not engage in pro-active outreach and dispute resolution activities. In Nicaragua, however, the absence of a tradition of alternative dispute resolution means that responsibilities for initiating dispute resolution must be more widely dispersed amongst government and non-government agents. [Back.](#)

**Note 41:** Alternatively, different ombudsmen could specialize in a particular problem area, e.g., agricultural coops claimed under Law 88 or small houses under Law 85. Whatever designation adopted, the office should adapt to deal with the areas of greatest concern. [Back.](#)



**Note 42:** The Team considered and rejected the delivery of ADR services through the government or annexed to the judicial system. The former could be perceived as too partisan, while the latter would tax judicial resources and be engaged only after suit is filed. The court-annexed model, in which courts develop their own ADR delivery mechanisms for judges to refer cases, requires sufficient resources to establish in each of the courts. In addition, this model may require legislation, and the courts appear hesitant to initiate any structural changes that could require legislation. The best alternative would be for the judges to refer cases to the independent, conflict resolution NGO. [Back.](#)

**Note 43:** A "fact-finding" processing entails the appointment of a person or a group with technical expertise in the subject matter to evaluate the matter, present it and file a report establishing the "facts." The fact-finder is not authorized to resolve policy issues. Following the findings, parties may then negotiate a settlement, hold further proceedings, or conduct more research. (1 C.F.R. § 305.86-3 App. (1993)). [Back.](#)

**Note 44:** We estimate an initial national panel of about 20 members distributed around the country. [Back.](#)

**Note 45:** In the United States, for example, many courts have the power to order parties to attend a mediation session before the judge considers the law suit. However, we believe that the absence of a functioning mediation system in Nicaragua precludes mandatory participation. Mandatory participation would likely be perceived as illegitimate in a culture unfamiliar with mediation, and would greatly tax the capacity of the mediation system. Such implementation could require additional legislation, which would slow the process of implementation. [Back.](#)

**Note 46:** This is in lieu of a court-annexed system that may require legislation. Since there are no private market incentives for ADR in Nicaragua currently, this function must be filled by paid employees. More than one staff member may need to monitor the new courts funded under the UNDP plan. [Back.](#)

**Note 47:** No other program is in a position to coordinate constructively. The Leon Mediation Center is regionally focused and would be overtaxed by too many demands. It is doubtful that NED's program will be started fast enough. Ongoing communication between all organizations conducting ADR activities could result in fruitful mid-or long-term collaborations, however. [Back.](#)

**Note 48:** More legal analysis would be required to determine the enforceability of such awards in Nicaragua. [Back.](#)

**Note 49:** The Team assumes that the creation of an ombudsman function in the administrative system can be accomplished under the existing authority of the agencies and will not require any special legislation or executive order or action other than arrangements for UNDP funding. [Back.](#)

**Note 50:** Settlement agreements reached through negotiation or mediation require official notarization in order to be enforceable. Although agreements reached through consensus are compliance-prone, any organization providing ADR services should be prepared to offer formal notarization services. A change in the law here would make this easier, but it appears unnecessary and the Team is avoiding additional legislative proposals. The Team would like the specific legal requirements clarified. [Back.](#)

**Note 51:** Given the political volatility of the property disputes, the team believes that a strong mediation system is needed, one that can actively pursue opportunities for the application of alternative dispute resolution, can conduct outreach efforts, and can command a fair degree of respect at the national level. While we favor a dispersed (local) capacity for dispute resolution generally, many of the most complex property disputes will require a more national presence. [Back.](#)