- *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[23]. 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

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[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.

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).[24] 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 *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. According to the Supreme Court and a non-profit group, IDEAS, there are cases of occupants with *solvencia*s 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,

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[24]Reportedly, the Liberal parties are also presenting a draft property law, but the team has been unable to secure a copy of it.

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[25]. 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.[26]

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[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.

[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)

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 filed 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

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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.

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 if 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.[27] 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

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[27] Unlike in the United States where many judges may serve in the same court and are assigned cases filed at that court.

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[28] 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, they 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 bought 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.[29] 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.

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[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.

[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.