

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.

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<sup>30</sup> 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.

**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

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<sup>31</sup> The Team did not engage in a 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 effect the general design recommendations in this report, but the team strongly recommends a cultural assessment for implementation purposes.

<sup>32</sup> 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.

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:

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<sup>33</sup> 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.

<sup>34</sup> At this time the Team does not know whether administrative appeals are "documents only" or include any oral presentation.

- 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.<sup>35</sup>

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.<sup>36</sup> 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.

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<sup>35</sup> 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.

<sup>36</sup> "Department" refers to the political and geographical subdivisions of the country established for purposes of governance.

**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

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<sup>37</sup> 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.

<sup>38</sup> 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.

space created for the other agencies (the BANIC building), with the capacity to travel to regional offices.

The staff members or "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.<sup>39</sup>

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.<sup>40</sup>

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<sup>39</sup>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.

<sup>40</sup>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.

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.<sup>41</sup> 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-

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<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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)).