OWNERSHIP INSECURITY IN NICARAGUA

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INTRODUCTION

We would like to cover a number of practical points regarding the current property rights crisis in Nicaragua. First, we will examine the meanings, origins and implications of legal insecurity of tenure to land. Second, we will explore the types and extent of legal insecurity of land tenure in Nicaragua. Third, we will present the issue of compensation. Fourth, we will discuss how many land disputes can be settled within the legal system. Fifth, we will discuss the legal basis of property rights and their enforcement. Finally, we will present some conclusions.

I. THE MEANINGS, ORIGINS AND IMPLICATIONS OF LEGAL INSECURITY OF TENURE TO LAND

The concept of tenure refers to the rules whereby a society defines the access people have to the land, the uses to which people put the land, and the economic benefits generated from those uses. Tenure includes such familiar concepts as a property title, a life estate title, a leasehold title, a usufruct title, etc. There are myriad ways of defining rights to and use of the land. They are all social creations, i.e., agreements among people involving what rights are held by whom and for what length of time. To provide some structure to such agreements in most societies, laws are passed stipulating what sort of tenure arrangements are supported by the force of the State. Claims to land which are not legally supported, but exist in the view of society, are defined as legally insecure tenures.

Tenure insecurity in such conditions is a combination of objective and subjective situations. Objectively, insecurity can arise from the absence of a legal document defining a right, or the existence of multiple documents describing the same rights for different people or entities over the same piece of land. Subjectively, insecurity can occur under conditions of a rising probability of losing rights to land; these conditions arise when society's rules of tenure change or when the power of one group to defend its rights wanes and the power of a competing group increases.

The complex histories of property legislation in most countries testify to the different manifestations of tenure insecurity and to the futility of
Insecurity of Negotiated Transfers

In Nicaragua, negotiated transfers may fail to provide secure rights to the "buyer" if the probability of the "seller" committing undetected fraud is relatively high. This happens when property registries do not contain accurate and accessible information on the registered holders rights to the land. The property registry in Matagalpa, for example, was burned in 1979, and efforts to reconstruct the information which it contained have been only partially successful, since some owners did not rerecord their rights. In other property registries, the documentation of rights is in poor physical condition; some information is missing and cadastral records have not been updated for several years. In other registries, there are no cadastral maps which makes locating properties and their boundaries difficult.

Finally, there is no title insurance to absorb the risk of not detecting fraud in Nicaragua. Nevertheless, even if there were such an industry, it would certainly become bankrupt in short order for other reasons.

B. Insecurity of "Forced" Transfers in Nicaragua

The problem of perceived illegitimacy of forced transfers can last a very long time. In the case of the Sutiava of Leon, annexation of Sutiava land in 1902 is still not recognized as legitimate by the indigenous community. Land invasions to recover these rights contribute to the tenure insecurity of the present holders of rights to these lands.

The Somoza's often not too subtle "negotiations" for land resulted in the displacement of many families from their lands in the Pacific region from the 1930's through the 1950's and 1960's. Depending on one's point of view, the degree of coercion in these transfers might be debated, but there was enough resentment generated to provide much of the energy for the overthrow of the Somoza government in 1979. This resulted in the displacement of the Somoza family and others from lands they claimed to have acquired legitimately.

Today the expropriation and confiscation of land throughout Nicaragua in the 1980's are still the subject of acrimonious debates and often, violence. The State's acquisitions of properties following the revolution of 1979 proceeded in stages, summarized in Table 1. The first stage was the confiscation of approximately 2000 properties of the Somoza family and "allegados" through the application of Decrees 3, 38 and 329. These decrees were issued by the new Junta in July and August of 1979, prior to the creation of a separate legislative body. In July of 1981, Decree 760, the Abandonment Law, was approved for the State's acquisition of properties abandoned by their owners. This resulted in the acquisition of 252 additional properties. Also in July of 1981, the Junta
approved the Agrarian Reform Law through Decree No. 782, authorizing the expropriation of abandoned or poorly managed properties. Under this law, the State acquired an estimated 1200 properties. During the 1980's, the State also purchased 1050 properties, including properties mortgaged to the State development bank where the debt had not been paid, and acquired another 860 properties through other mechanisms.

The acquisitions of at least 5362 agricultural properties (2,523,181 mzs.) by the previous government as well as de facto permanent occupations of lands which were to have been temporarily occupied (estimated to be about 300,000 mzs.) have been the subject of much conflict from the time of their acquisition to the present. The level of conflict dramatically increased following the present government's issuance of Decree 11-90, which established a Review Commission whose mandate was to review all property acquisitions by the previous government from private owners and to return properties which the Commission determined had been unjustly acquired by the State or illegally occupied by third parties. The present occupants and owners of those lands have been concerned about their loss of rights, while the previous owners have been concerned that their rights would not be respected.

The legal status of many of the properties acquired in one way or another is complicated by the fact that about seventy percent of the properties acquired by the previous government from private owners (about 3750 properties) were not legalized as the property of the State, i.e., the properties were occupied by the State or the beneficiaries of the agrarian reform without the State having completing the chain of actions required by existing law to acquire legal ownership. This acquisition of rights of ownership is legally finalized by registering the State as the owner in the property registries, extinguishing and physically crossing out the previous owners' rights as noted in the registries.

In many of the other 1600 properties which had been legally acquired by the State and so recorded in the registries, some of the previous owners are now claiming that the State acquired rights to their land by duress and that they had not received adequate compensation or were forced against their will to agree to the transfer of ownership. With the control of the State's administrative apparatus passing to the new government, which is more responsive to the interests of the previous owners, these previous owners feel empowered to reverse the previous transfers or at least appeal for a review of their cases.

These questions about the legitimacy of governmental acquisitions and allocations of land, through the review and reversal of past acquisitions by the State, leaves the present occupants of the land in substantial doubt about the security of their claims to the land. The past claimants of the land likewise have little assurance that they will recover the land, or if they forcibly do so, what the consequences will be over the coming years. The present occupants of the land often react to the threat of eviction in violent ways, and the presenters of reversal claims often attempt to forcibly re-occupy the land, a situation which does not contribute to tranquility in the countryside.

**TABLE 1: ACQUISITION OF LAND FOR THE AGRARIAN REFORM**

<table>
<thead>
<tr>
<th>Means of Acquisition</th>
<th>No. of Properties</th>
<th>Area (mzs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decrees 3, 38 and 329</td>
<td>2,000</td>
<td>1,400,000</td>
</tr>
<tr>
<td>Agrarian Reform Law (1981)</td>
<td>1,200</td>
<td>820,000</td>
</tr>
<tr>
<td>Abandonment Law</td>
<td>252</td>
<td>18,230</td>
</tr>
<tr>
<td>Purchases by Sandinista Govt.</td>
<td>1,050</td>
<td>196,000</td>
</tr>
<tr>
<td>Other means</td>
<td>860</td>
<td>88,951</td>
</tr>
<tr>
<td>Purchases by Present Govt.</td>
<td>250</td>
<td>250,000</td>
</tr>
<tr>
<td>De facto occupations during Sandinista Government</td>
<td>***</td>
<td>300,000</td>
</tr>
<tr>
<td>Total</td>
<td>5,362***</td>
<td>3,073,181</td>
</tr>
</tbody>
</table>

*** Data not available.

1. Source for data on Sandinista government is Molina, Sept. 1992. This data is current through January 1992 and does not include land acquired but returned to previous owners, and thereby not available to campesinos (peasants). Area is measured under the Spanish unit manzana which is equivalent to 1.75 acres.

2. Estimates of purchases and de facto occupations are estimates of various functionaries and require more time and effort to verify. In general, the data in the table are estimates only, since many of the acquisitions of land were not adequately documented and since the files of INRA (Instituto Nicaragüense de Reforma Agraria), the agency responsible for applying the agrarian reform law and other laws and decrees dealing with rural properties, are being organized and have proven difficult to tabulate in their present state. Moreover, different estimates exist for the same parameter, such as the data managed by the Ministerio de Finanzas, which estimates that 817,000 mzs. of land were confiscated under Decrees 3 and 38. Nuevo Diario 8 (Oct. 20, 1992). As one researcher advised me "If the data on the agrarian reform from any source are consistent, be suspicious."
C. Insecurity Associated with State's Assignment of Land by the State to "Beneficiaries" of Land Programs

The allocation of rights to land through the agrarian reform also has contributed to insecurity of tenure. This titling of land occurred in five ways during the previous government:

1. Titling to groups of people who were expected to form cooperatives that would manage farms collectively (the Cooperativas Agrícolas Sandinistas or C.A.S.);
2. Titling to smaller groups called work collectives (or Colectivos de Trabajo, C.T.), which were also known as family collectives since the members of the groups were often members of the same family, with undefined rules for the collective or individual management of the assigned lands;
3. Titling to groups who from the beginning were permitted to farm the land individually. Physical boundaries between these parcels were not allowed, only a dead furrow (plowing the land in both directions producing a small ditch), thereby giving these groups the name Cooperativas de Surco Muerto (C.S.M). In some cases titles were issued to groups of farmers organized into Cooperatives of Credit and Service (C.C.S.), with the understanding that the parcels so assigned would be farmed individually by the members of the group;
4. Titling to individuals of two sub-types, which occurred more frequently in the late 1980's and with different importance in the various regions: a) titles of land that involved extinguishing previous rights, and b) titling in special regions where the land was already occupied, but not legally recorded; and
5. Collective titles to indigenous communities in the Atlantic regions.

The approximate estimates of land assigned in each category are shown in Table 2.

Table 2: Titling of Land by the Sandinista Government

<table>
<thead>
<tr>
<th>Category</th>
<th>Area (mzs.)</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.A.S.</td>
<td>591,000</td>
<td>18</td>
</tr>
<tr>
<td>C.T.</td>
<td>129,000</td>
<td>4</td>
</tr>
<tr>
<td>C.S.M. &amp; C.C.S</td>
<td>175,000</td>
<td>5</td>
</tr>
<tr>
<td>Individuals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Reform land</td>
<td>830,000</td>
<td>25</td>
</tr>
<tr>
<td>b) Precaristas</td>
<td>1,460,000</td>
<td>43</td>
</tr>
<tr>
<td>Indigenous Communities</td>
<td>170,000</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>3,355,000</td>
<td>100%</td>
</tr>
</tbody>
</table>

Most of the titles, other than those for the "precaristas" and indigenous communities, were issued as "provisional" since the State did not have legalized possession of the land. Such provisional titles could not legally be recorded in the property registries until the State acquired recorded ownership. However, with the passage of Law 88 by the National Assembly in 1990, provisional titles were transformed into full property titles capable of being recorded in the property registries, regardless of whether the affected properties were recorded as being the property of the State in the pertinent registries.

However, most of the provisional titles so transformed still cannot be recorded in the registries without further documentation, since the boundaries and areas of such properties were not described with sufficient precision. Even the definitive titles issued by the previous government did not contain accurate descriptions of parcel boundaries nor accurate estimates of parcel areas, both requisites for the recording of such titles in the property registries. An additional complication of the provisional titles is that some titles were recorded in the property registries, not in the "real rights" section as is done for private property, but in a special agrarian registry book. This practice continued even following the passage of Law 88 by the National Assembly on January 13, 1990 (before the February elections).

3. Almen y Espinoza, 1992 Cuadros 6 y 7, y Molina, 1992, Cuadro No. 1 and estimations of the author. A serious study and documentation of this titling process would be useful to understand what actually happened in different regions of the country.
As if these complications were not sufficient, the facilities offered by Law 88 for legalizing provisional titles expired with the derogation of the law under somewhat confused circumstances. Since Law 88 was passed as a special category of legislation ("orden publico") in which the rights and benefits are unchangeable ("irrenunciables"), the subsequent probable derogation of the law (by Law 133 and by the suggestion in the Presidential veto of Law 133, which was upheld by the Assembly) does not affect the rights bestowed by Law 88 prior to its probable derogation on July 31, 1992.

It should be noted, however, that any titles issued by INRA (Instituto Nicaragüense de la Reforma Agraria) after July 31, 1992, are governed by the Agrarian Reform Law (No. 14 of 1986), which is still in effect. In particular, while Law 88 bestowed full property rights, i.e., the right to sell, give, transfer, inherit and effect any other type of alienation of the property, the Agrarian Reform Law states that only with the expressed authorization of INRA can titled property rights be transferred or subdivisions of properties be carried out. Without INRA's authorizations for these operations, no property registrar should record them should they occur.

Yet another complication is that many of the titles were issued to groups of people (cooperatives or work collectives) and the names of the individual members of these groups were placed on the provisional titles which provided the approximate land area and the names of the adjoining properties or owners. However, with the passing of time and the turnover of group members, the present membership of these groups is substantially different from the names on the provisional titles. Before the land can be titled definitively, the group has to be re-certified by the Ministry of Labor and a legal entity must be formed.

Following its election loss, the previous government awarded rights to some people who did not fit even the previous government's criteria for recipients of land, leading to yet another dispute over the legitimacy of past land allocations. Due to the lack of formal titling of land by the previous government prior to the 1990 elections, many allocations which had been made prior to that time had no documented basis. The majority of the allocations in the transition period were formalization of past de facto allocations of rights. Table 3 shows the extent of the transition of the titling of land, including assignments made under the present government, as of March 1992.

### TABLE 3: TITLING OF LAND BY THE STATE, JULY 1981 - MARCH 1992

<table>
<thead>
<tr>
<th>Form / Period</th>
<th>No. of Titles</th>
<th>Area</th>
<th>Families</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/81 - 12/89</td>
<td>849</td>
<td>248,886</td>
<td>16,813** (Est.)</td>
</tr>
<tr>
<td>3/90 - 4/90</td>
<td>1,936</td>
<td>546,144*</td>
<td>26,308** (Est.)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>2,786</td>
<td>795,000*</td>
<td>43,121</td>
</tr>
<tr>
<td><strong>Individual</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7/81 - 12/89</td>
<td>20,354*</td>
<td>430,151</td>
<td>20,554</td>
</tr>
<tr>
<td>3/90 - 4/90</td>
<td>5,853*</td>
<td>399,846</td>
<td>5,583</td>
</tr>
<tr>
<td>5/90 - 3/92*</td>
<td>24,038*</td>
<td>701,500*</td>
<td>24,038</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,531,497</td>
<td>53,175</td>
<td></td>
</tr>
<tr>
<td><strong>State Acquired Land Titled to Beneficiaries:</strong></td>
<td>2,326,497</td>
<td>96,296</td>
<td></td>
</tr>
<tr>
<td><strong>State Acquired Land in State Enterprises (APP):</strong></td>
<td>750,000*</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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5. Estimate of the number of cooperatives which had a title of some sort prior to February 1990 and were not re-titled in the interim period following the election in February 1990. Data for entire table is indicative only.

6. DIRECCION GENERAL DE POLITICA AGRARIA INRA (1992). Area titled includes land titled to C.C.S. cooperatives, i.e. land farmed individually but assigned to the cooperatives. This figure also assumes that 100,000 mzs. which were titled to the cooperatives at one point in time have been occupied and claimed by the Resistance and have been transferred to the area assigned by the present government.

7. Molina, supra note 1, at 5, Table No. 1 (less the 100,000 occupied by the Resistance).

8. DIRECCION GENERAL DE POLITICA AGRARIA INRA (1991), as tabulated in Amador et al., 1991, Table 3.

9. Dirección de Tenencia de la Tierra, INRA, April 1992, tabulated by Amador & Ribbink, 1992, Table 3, at 34.

10. Molina, supra note 1, at 51, Table 1 (area in possession of the Agrarian Reform Enterprises as of April 25, 1990).

11. Estimate includes 300,000 mzs. of national lands or privately claimed land, although not necessarily privately titled and recorded in a property registry, and 100,000 mzs. of land previously assigned to cooperatives and still in dispute. This figure also includes 300,000 mzs. of land purchased by the government.

12. Molina, supra note 1, who estimates that the total number of individual titles issued by the previous government was 29,137. This estimate may be high.
Other titling of land already in possession of recipients of titles

Indigenous Communities
(1981-1990)13  

n/a  

170,0004  

600

Special Zones  
(Precaristas)

52,900  

1,459,9565  

52,900

After the election, but before the new government took over, the outgoing officials awarded land to people who were not eligible as agrarian reform beneficiaries or as beneficiaries of urban property distribution programs. These latter cases, viewed as illegitimate by most political groups, are being identified, reviewed and will receive some adjustment, including the eviction of the recipients of the land. Estimates of illegitimate allocations of agricultural land involve about 650 titles, totaling approximately 110,000 mzs.6

Following the election of the present government, three new complications to the tenure situation were introduced:

13. Titles issued during the period 1981-April 1990 were of two types: definitive, for land to which the government had legal and recorded title, and provisional, for land to which the government had not completed the transaction and did not have legal and recorded title. In both types of titles, the land was identified by naming neighbors holding land to the north, east, south and west of the titled parcel included and only an approximate estimate of the area of the parcel.

14. Data include land originally titled to beneficiaries, but do not reflect land returned to previous owners by the Commission of Review (created by Decree 11-90). In some regions, such as Region VI (Matagalpa and Jinotega), several hundred properties were returned to their previous owners who have actually entered into possession of the land they previously owned. In other regions, the Commission of Review has issued orders to return properties, but the owners have not entered into possession of the land because the land is effectively occupied by people with a provisional title who are unwilling to recognize the claims of the previous owners. Most of the effectively returned land has been from the APP.

15. These allocations were made through a "Constancia de Asignacion," a certificate issued by INRA which named the individual being granted the land and an estimate of the area assigned. The bordering properties were not identified, nor was a plan of the property prepared or the "Constancia" recorded in any book of the property registries.

16. These numbers were estimated by assuming there to be 527 "suspicious" titles averaging 82 mzs. of land, 91 such titles averaging 293 mzs. of land and 32 titles averaging 1217 mzs.

17. Approximately 4000 of these requests were for agricultural land.
Several decrees issued in September 1992 were aimed at clarifying the procedures for reviewing claims of previous owners,补偿ing those who can prove that they were the owners of the claimed properties, and determining if the properties can be returned. Once the Commission has determined the claimant to have been the registered owner of the property at the time it was seized by the agrarian reform (or, in the case of urban properties, by some other agency or occupant), and once it has determined that the property cannot be returned, the case moves to the Office of Quantification for Indemnification ("OCI"). The OCI determines the value of the indemnification to be awarded, if any, or the owner's debt with the bank in cases of unpaid loans and interest on those loans and taxes. The valuation of the properties is the cadastral value as of September 1992, not the cadastral value at the time of expropriation. This is presumably also the value used to guarantee mortgages. The value at the time of expropriation, if market value is used, would probably be substantially less, even in dollar equivalent terms, than the market value now, since property owners are leaving the country and the supply of properties on the market are large. This question of how valuation will be handled influences the overall cost of indemnification as well as outstanding debts which the previous owners will have to repay.

An important issue is whether the claimant had a loan secured by the property which went unpaid and how to value that loan and accumulated interest, as well as how to interpret foreclosures on those loans which deprived the previous owner of the property. Apparently, the government is willing to admit all claims of people who presented their claims under Decree 11-9 and who can prove they were owners of property which they lost through confiscation, expropriation or simply occupation during the previous government. The government is also willing to review claims from those people whose property was confiscated because of their relationship with Somoza or members of his political group, although there is no automatic judgment in their favor, as is the case in other acquisitions.

The recent decrees create a compensation procedure for awarding claims of previous owners with twenty year bonds, at three percent interest, with bond value tied to the official rate of exchange for the U.S. dollar and the interest capitalized. These bonds are freely transferable and can be used to purchase shares in State properties which are sold to the public. At present, the bonds cannot be used for the payment of other debts to the State, such as taxes.

Reactivating the Review Commissions should satisfy the compensation demands of the previous owners and thereby lead them to withdraw pressures on the present occupants of the land. This would facilitate the legalization of the rights of the present occupants. However, the decisions of the Commissions to recognize the property rights of the previous owners will complicate the efforts to legalize present occupants until the determination is made that the properties either were not owned by the claimants or cannot be returned. It remains to be seen how the various commissions and offices will operate in practice.

D. De Facto Titling and Tenure Insecurity

De facto allocations are also common in Nicaragua, with its tradition of absorbing unemployed people by encouraging or allowing them to extend the agricultural frontier, converting forested land to agricultural uses. Such people demonstrate their possession of the land working it, typically by clearing forests.

The Agrarian Reform Law as amended in 1986 permitted the definitive titling of such individuals and over 50,000 people received such titles. In the past there has been little controversy or insecurity in these allotments of land rights. However, with the rising concern about the continued deforestation of the country and the creation of protected areas such as the BOSAWAS and SIAPAZ reserves, there are growing questions about the security of existing claims within these areas and the nature of rights which people are attempting to establish by migrating into such areas. Also, as the agricultural frontier moves farther east and south, there are growing conflicts between the "colonists" and indigenous groups which claim large portions of the territory in the Atlantic coastal regions.

De facto allocations also occurred on publicly owned land in urban areas as people migrated to the cities during the period of war and simply occupied such lands and built some sort of housing. Some of these allocations have been provided subsequent documentation while others have not. As municipal governments adjust to the new legislation which provides them with direct administrative responsibilities over ejidal lands (lands owned by municipalities)—land assigned to them during the colonial era to provide for future urban growth—and as the financial crunch on such municipalities grows, pressures will increase to sell such lands rather than simply legalize spontaneous occupations. Political criteria used for assigning and legalizing such claims add to the complications and tenure insecurity for many urban residents.

E. Distribution of State Enterprise Lands: Another Source of Tenure Conflicts

State owned lands other than those under the administration of INRA are also being re-assigned in a program of "privatization." The
main ones are those formerly in the State's Agrarian Reform Enterprises. According to CORNAP, the redistribution of lands in the State's Agrarian Reform Enterprises by early 1992 had affected AGROEXCO (35,398 mzs. of mostly cotton land and processing facilities in 114 properties in Leon and Chinandega), HATONIC (309,427 mzs. used for livestock in 193 properties), CAPENIC (76,624 mzs. of mostly coffee land and processing facilities in 133 properties) and CHILTEPE (15,355 mzs. of land for livestock and dairy production in 154 properties).

Of the 436,804 mzs. of land in the 594 properties that were part of these four enterprises, 30.6% of the land has been directed to be returned to the "private sector," who were mostly ex-owners, although in some cases this land has been occupied by third parties. The ex-owners are to pay for any infrastructure improvements which the State had made on the land. For the rest of the land, 17.3% has been assigned to ex-soldiers, 20.2% to demobilized members of the Resistencia Nicaragüense, and 31.9% to workers from these enterprises.

The workers are organizing themselves into incorporated enterprises (Sociedades Anonimas Laborales) in order to have legal standing, and to create an ownership structure which will provide incentives to the worker-owners. This will encourage investment and improve land productivity.

These Sociedades are corporate entities where the employees are also the owners of the enterprise. There are four classes of members in these Sociedades Laborales:

1. The ex-workers from AGROEXCO who are not presently employed by the new enterprise received six shares each (with a nominal value of $5 per share);
2. The 180 ex-workers of AGROEXCO who are employed by the new enterprises received ten shares each;
3. Of these present employees, a few received an additional ten shares for having been workers longer and for their past contributions to the enterprise;
4. Of the 346 ex-workers who are not presently employed, a few received ten additional shares for the length of time they had been employed and for their past contributions to the enterprise.

CORNAP is providing a certificate for the Administracion y Guarda de Bienes to these groups, but retains ownership for the time being. These titles are not recorded in the property register. In addition, CORNAP has contracts through which the recipients of the land are obliged to pay rent to CORNAP for the use of the land and infrastructure. These contracts also are not being recorded in the registries. The financial arrangements in some cases are still in dispute. The State retains ownership of the land until the sales are completed.

F. Land Claims of Indigenous Communities in the Pacific and Central Regions

Indigenous communities in the Pacific and Central regions of the country have historical claims to extensive pieces of often highly productive and valuable land. The claims of these communities derive from colonial times as modified by the actions to privatize land taken by the liberal government of Zelaya in the early 1900's which delineated indigenous from non-indigenous lands.

The titles for these lands indicate that they are not accessible to the normal land market, i.e., they cannot be bought or sold. The communities do have the right to rent their land, as exemplified in the Sebaco area, where ten year rental contracts exist to provide non-indigenous people access to community land. In Sebaco, the renters pay a differential rent depending on the quality and use of the land. In practice, these rental arrangements are more often theoretical in that the rent is only nominal, not paid (as in the Matagalpa community) or not even charged, as in the case of the Sutiava of Leon. Members of the indigenous communities can have usufruct rights to pieces of land, as allocated to them by the governing bodies of the communities.

Since 1953, the Alcaldias of the Municipios of these land bearing communities have the right to oversee and certify elections of the Boards of Directors of the indigenous communities. Competing interests of political parties have contributed to the splitting of communities and conflicts over which is the legitimate governing body. This question becomes of greater significance as the communities begin to re-assert their rights to the land and act legally and politically to recover control over lands which have been in non-indigenous hands for a long time or which have greatly increased in value.

The resurgence of indigenous communities as cohesive ethnic groups with specific land claims and the existence of documented titles to land by these communities adds another layer of tenure rights to the already complex situation. In Leon, there are constant maneuvers by the Sutiava to recover lands they considered to have been usurped illegally by non-Sutiava. In Sebaco, very productive land within the titled area of the indigenous community is claimed by private owners and by cooperatives assigned land by the previous government. In some cases, in the case of the Empresa del Valle de Sebaco, which occupies about 400 mzs. of highly productive land, rental agreements exist and payment is made to one of two Junta Directivas. In the case of the cooperatives, some
recognize and pay the rent, but others claim to be the legitimate owners of the land that was titled to them by the previous government. Some private owners can also produce recorded titles showing them to be the legitimate owners of the land.

II. THE TYPES AND EXTENT OF LEGAL INSECURITY OF LAND TENURE IN NICARAGUA

Following the election of 1990, the new government immediately moved to stop the war, re-settle the ex-combatants and return land which had been "unjustly" taken from its previous owners. Through the various procedures described above, and due to the forms of State acquisition of land and titling to cooperatives and individuals, it is common for several people to claim the same rights to the same piece of land. This superimposition of rights is the core of the problem of tenure insecurity.

Even if reliable statistics were available, which is not the case in Nicaragua, the extent and seriousness of legal insecurity of land tenure with its strong social and psychological overtones can only be approximately described. Some data exist which give an approximate estimate of the extent of tenure insecurity, which is inordinately high whatever index one uses. Data does not exist to include the potential and actual conflicts that arise from the claims of indigenous communities. For the time being, and for purposes of estimating the post-indigenous tenure superimpositions, we present Tables 4, 5 and 6 to show the different types of tenure in security as estimated from existing data. This data also does not take into account the recording of definitive titles that has been occurring sporadically in some registries. UNAG estimates that 1,500 cooperatives have legally incorporated themselves and have recorded definitive agrarian reform titles. This effort would somewhat reduce the seriousness of legal tenure insecurity. However, the subdivision of land and subsequent sales as well as continued uncertainty about possible return of land to previous owners introduce elements of doubt even for the definitive, cooperative agrarian reform titles. The extent of tenure insecurity in such cases deserves some additional analysis.

### Table 4: Land Tenure Insecurity on Agricultural Land Titled Pre-1990

<table>
<thead>
<tr>
<th>Number of Households Involved</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4,855</td>
<td>Cooperatives, potential conflict with previous owners</td>
</tr>
<tr>
<td>7,623</td>
<td>Individuals, potential conflict with previous owners</td>
</tr>
<tr>
<td>52,900</td>
<td>Individuals on previously national lands or lands claimed by some public agency, potential conflict with agency or other untitled claimant</td>
</tr>
<tr>
<td>600</td>
<td>Indigenous communities, on national lands, potential conflict with other groups</td>
</tr>
<tr>
<td>11,769</td>
<td>Cooperatives, potential conflict with previous owners</td>
</tr>
<tr>
<td>14,358</td>
<td>Individuals, potential conflict with previous owners</td>
</tr>
<tr>
<td>14,180</td>
<td>Families in possession of previously private land, with some documents, but not a provisional or definitive title</td>
</tr>
<tr>
<td>750</td>
<td>Families in possession of previously private land, with no documents</td>
</tr>
<tr>
<td>107,035</td>
<td>Total pre-1990 agricultural land holding households with some title defect</td>
</tr>
</tbody>
</table>
TABLE 5: AGRICULTURAL LAND TITLED AFTER FEBRUARY 1990

1. Titles Issued during the transition with errors in area and boundaries

<table>
<thead>
<tr>
<th>Number of Households Involved</th>
<th>Properties titled through Law 85, previously publicly owned: 3,850</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals in possession of land prior to 2/90, on previously private property:</td>
<td>7,963</td>
</tr>
<tr>
<td>Cooperatives in possession of land prior to 2/90, on previously private property:</td>
<td>24,448</td>
</tr>
<tr>
<td>New assignment of land during transition, previously private property, with less than 50 mzs. per person:</td>
<td>1,830</td>
</tr>
<tr>
<td>New assignments with more than 50 mzs. per person:</td>
<td>650</td>
</tr>
</tbody>
</table>

Subtotal: 34,891

2. New Titles, from 4/90-7/92

| Properties titled through Law 85, previously privately owned: 21,250 |
| Urban lots titled through Law 86, on publicly owned land: 90,000 |
| Urban lots titled through Law 86, on previously private land: 10,000 |

Total agricultural households with title defects after February 1990: 58,929

19. Molina, supra note 3, at 1-3; DGPA—INRA 1992 data (Annex 1); and Table 3.
20. Id.
21. Id.

TABLE 6: TITLING OF URBAN LAND AND PROPERTY CONFLICTS

| Properties titled through Law 85, previously publicly owned: | 3,850 |
| Properties titled through Law 85, previously privately owned: | 21,250 |
| Urban lots titled through Law 86, on publicly owned land: | 90,000 |
| Urban lots titled through Law 86, on previously private land: | 10,000 |
| Total urban households, urban land with title defect: | 125,100 |

TABLE 7: SUMMARY OF LEGAL INSECURITY OF TENURE SITUATION

1. Total Number of households with agricultural land assigned before May 1990 with some title defect: 107,035

2. New Titles, from 4/90-7/92

| Constancias de Asignacion, on previously State, cooperative, or private lands: 24,038 |

Sub-total of households with agricultural land with some defect in title: 165,964

3. Total number of households with urban land with some title defect: 125,100

Sub-total of households with title defects: 291,064 (Agricultural and urban properties)

4. Previous owners with claims for properties: 28,000

Total number of households with actual or potential conflict over land: 319,064

23. Declaration of a functionary of the OOT (Oficina de Ordenamiento Territorial) which is responsible for the review of titles to urban properties assigned under Laws 85 and 86 of 1990, as reported in Nuevo Diario, Oct. 20, 1992.
A. The Issue of Compensation

Everyone seems to agree that, in the best of all possible worlds, at least non-Somoza property owners should have received compensation for their properties that were taken under the Sandinista government. Yet Nicaragua cannot afford to pay for the lands. Further, former property owners do not want to accept government bonds as compensation and therefore insist on the return of the original property.

At present, the Sandinistas have put a proposal on the table which appears reasonable. It enjoys the support of all participants in the "concertacion" except COSEP,24 a business group which advocates the return of all property or alternatively, compensation to all former owners. First, rural property below a certain size limit will not be reviewed—it will remain with its current occupant. Similarly, urban property below a certain value will not be reviewed. Only rural property above a certain size and urban property with a value above a certain amount will be reviewed. Second, if the property was "confiscated" from a Somocista under appropriate legislation, the government will not compensate the former owner. If the property was "expropriated" in accordance with the law and compensation was paid, the land will remain with the current occupant. If the property was "expropriated" not in accordance with the law or compensation was not paid, then the case will be reviewed, presumably within the formal legal structure. In such cases, the government will be required either to return the land or compensate the former owner.

There are several problems with this approach. One is the determination of the de minimis value or size for property. The right wing of the UNO party says all property should be reviewed. The left wing would like to see a relatively high de minimis amount. Fortunately, there is no "extreme left" within the Sandinista party claiming that no payments should be made for property.

Second is the issue of how to compensate the parties. This second question has led to suggestions that current occupants be made to pay for their lands over time, with credit provided by the government. This would assist the government in paying off claims by former owners. Former owners would receive bonds which could be held or used to purchase companies being privatized by the government.

In focusing on the adequacy of compensation, there are a number of avenues we could discuss. Compensation does not always mean cash—it can mean payment in kind, like bonds, other land, and so on. Thus the form of compensation is important.

In any event, Nicaragua is unable to pay the compensation outright. Prior to the last elections, to gain political support, the Sandinistas forgave a great deal of debt owed by cooperatives and individuals to the government of Nicaragua. The government even went out and purchased new taxi cabs for taxi drivers! After the elections, the government gave pay increases to government employees. These actions depleted the little funds left to the government after financing a costly civil war.

At present, the two sides appear far apart and need to find common ground; yet the parties understand the urgency of the matter and are working toward a solution, probably along the lines proposed by the Sandinista party as explained above. They will need to agree quickly, since this issue continues to threaten the young democracy, discourage rural development and investment, and prevent a free market in land.

B. Dispute Settlement

The judicial system is the normal system for settling disputes. In this case, the parties may prefer a special tribunal to settle land disputes rather than the normal judicial process. There are at least 6,000 claims filed with the administration, each requiring urgent attention. The normal court system could take years to decide these cases. If investment, democratization, the disadvantaged and the environment are to be protected, alternatives may have to be considered.

Certainly the claimants (former landowners) have an interest in seeing an alternative mechanism established. They already are barred by law in many cases from challenging confiscations on constitutional grounds in all but the most complex and lengthy litigation because they did not bring timely causes of action. An alternative mechanism might give them immediate, cost-free compensation, whereas the legal system offers little but delay, frustration and an expensive legal tab.

Would the present occupants be willing to forego traditional legal structures and safeguards and submit to an alternate dispute resolution process? Only if they can see a benefit. And this will be the challenge for drafters of the new legislation. So far the main benefit proposed has been the right to remain on occupied land. Without this benefit, it is very doubtful the peasantry would support such a law.

Another issue we should address is who should judge the cases? Until a new property law emerges, we will not know who will judge the reviews. My own idea would be a three judge system, composed of a "confiscado," an environmentalist (aware of land use potential) and a unionist (or current occupant). These three ombudsmen could use objective criteria to decide cases. When the three do not unanimously agree, the case could go on to an "appeals" level for decision. Expected legislation will probably use some sort of panel to decide cases.

Finally, property law (or other legislation) will need to determine who should represent the parties. For example, should original landowners represent themselves, or should they be represented through the Confiscado union? Should current possessors participate directly, or through a cooperative or union? In each case, we should examine how well the representative represents their interest. If the link is weak, it may be preferable for the parties to represent themselves. It is doubtful that the legislation approved will address this issue, leaving the parties to fend for themselves.

It will be unfortunate if the legislation does not guarantee adequate representation. There is a wide body of literature supporting the notion that the wealthier the litigant, the more representation the litigant can afford. The historically disadvantaged may become under-represented in the dispute resolution process. Therefore, there should be some assistance provided to the campesinos (peasants) to insure that the outcome is based on full and equal representation. In the United States, the indigent often are appointed free legal counsel for such purposes. Colombia and Venezuela also have free legal assistance programs. None exist in Nicaragua. It is doubtful that the new legislation will contain such a provision for legal services.

Finally, the government should be aware that simple passage of legislation will not make the problem go away. These cases will be difficult to decide because of a lack of documentation. In many cases the former owners were compensated. Unfortunately, the government has no record of its own payments. Further, in some cases, compensation was made in kind by handing over other properties, or in some cases, machinery. Again, no record was kept.

With the debt crisis of the 1980's, many businessmen acquired property under less than legal circumstances by paying off foreign banks in local (devaluated) currency. Due to the chaos of the registration system in Nicaragua immediately after the debt crisis broke in Latin America, the foreign banks were unable to verify on which properties they held a mortgage or for what amount. This forced banks in extreme cases to accept whatever payments they could—in some cases payments were a few cents on the dollar of debt. Should these owners of property now be compensated at a current value and be allowed to keep the windfall profits they received by abusing foreign banks?

In other cases, some owners held heavily mortgaged property—sometimes in excess of the value of the property. During the 1980s, these owners abandoned their property. Subsequent owners came in, occupied the land and paid off the mortgages. This change in ownership was not registered in the registry. Now some "original" owners are returning to demand their property—mortgage free, of course.

It will likewise be difficult to judge whether property was expropriated properly under the agrarian reform. Often that legislation
was applied very subjectively. How can we now objectively review a subjective decision? In short, resolving disputes of this nature without access to adequate and reliable records will be problematic at best.

When we discuss dispute resolution, we implicitly assume that the dispute can be solved. This in turn assumes that there is some middle ground for deciding disputes. In our case, it means that some expropriations were perfectly legitimate, while others are suspect, or that some expropriations may be partially good and partially bad. To separate the "good" from the "bad," we will need objectives standards for deciding disputes. Standards assist the decisionmaker. Therefore, the standards should specify how to make decisions, what overall principals are involved, and what facts to consider.

Setting the standards for adjudication may be a difficult task. Conservatives will not want to use Sandinista law to determine the outcome—they assert that it was Sandinista law that took away their property. Similarly, Sandinista followers may feel that the formal legal structure allowed the rich to dominate the campesinos and consolidate their holdings. They may feel that the Sandinista movement gave them their only real opening to participation in the economy. A return to the formal legal structure means returning to a feudalistic economy, they may assert. Thus both sides will approach the choice of standards with great caution. Underlying this is the fact that both parties treat each other as blood enemies. Without a history of democratic transition of power and the role of a loyal opposition, Nicaragua will have to struggle to get these standards established.

If standards are to be viewed as "fair," they must represent the views of the majority of people. If the majority feels that the rules are not objective or "fair," the rules will be, in a sense, "anti-democratic" and will lack legitimacy. Therefore, the standards for adjudication must have the support of the majority of people. They should be viewed as objective and fair. How is this achieved?

To gain objectivity and popular support, the standards should be developed from the grass-roots level. This is the essence of democracy! Unfortunately, getting all sides to agree on the standards will be a challenge. It is, however, important that the rules be generated by popular support, rather than being imposed from the top down—that would leave most of the people outside of the democratic process.

C. Property Law and the Enforcement of Property Rights

To date, the police have been reluctant at best to enforce court-ordered property reallocations. Land invasions have been disruptive and have created property insecurity. In other words, having title or getting a court order still does not mean you get the property.