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DOING (INCLUSIVE) BUSINESS IN GUINEA BISSAU: RE-ACTIVATING THE 1998 LAND LAW

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Abstract

This paper discusses the 1998 Land Law of Guinea Bissau and its relevance to address today's land administration issues. The law was developed to reconcile customary land rights with a surging demand for land by private investors. It recognizes customary land rights and introduces mechanisms to allow investors to acquire Rights of Private Use. However, implementation of the 1998 Land Law was stopped by years of civil war and political instability. Following the election of 2014, the Government of Guinea Bissau intends to implement the 1998 Land Law as part of its rural and agricultural investment strategy. Circumstances have changed however, with massive expansion of cashew production after years of weak regulatory control. Some query the continuing relevance of the Land Law, but the authors argue that the underlying structural conditions are not significantly different than in the mid-1990s and that the need for the negotiated land access model of the 1998 Land Law is perhaps even greater than when it was developed.

Key words

Guinea-Bissau, Customary Tenure, Local Communities, Land Law, Agriculture, Investments

INTRODUCTION

The 1998 Land Law of Guinea Bissau was crafted after extensive public consultation at the national and regional level. The law integrates customary and formal land rights within a single policy and legal framework designed, on the one hand, to recognize and protect customarily acquired rights over land and natural resources; and, on the other hand, to facilitate private investments. The law includes measures to allow for some form of real property rights market to develop through a system of 90-year renewable and transferable concessions of Right of Private Use. The law was conceived to promote an inclusive investment process that can contribute to economic growth goals, and also ensure that local communities not only retain enough land for their needs but can benefit from the investments through a process of negotiated access to local land and natural resources.

For sixteen years after the approval of the Land Law, civil war and political crises blocked effective implementation. The same history means that administrative capacity is extremely weak while land administration procedures are bureaucratic, long, expensive, and prone to corruption. The General Directorate of Geography and Cadastre is responsible for issuing land concessions in rural areas, while municipal administrations have this responsibility in urban areas. In practice, land is often acquired by various informal means, including 'official' channels that are not within the law. As a result, local communities, who remain largely uneducated and poor, are confronted by individuals who often have powerful connections and have sought to exploit weaknesses in a landscape where state land governance institutions have been non-existent for many years. Land rights acquired in this context are often legally insecure, and rest upon flimsy assertions of "local consultation" and paperwork that may not correspond to legal requirements.

The elections in 2014 have restored a degree of political stability, and the Government of Guinea Bissau is seeking to encourage investors and create a situation where acquiring land for projects is not a major hurdle. With the 1998 Land Law formally approved by the National Assembly and still on the statute books, it seems sensible not to start a politically challenging revision of the law, but to retain it as the basis for a new rural development and agricultural investment program. Therefore, in this paper, the authors consider whether or not the 1998 Land Law still offers the best way to do this, taking into account other social and economic factors. Prominent amongst these must be the rights of local people over land and their ability to engage in rural development and new economic opportunities as full stakeholders. Given the difficulties faced by investors looking for land, it also has to be asked how to modernize land administration services.

THE 1998 LAND LAW

The Guinea Bissau agrarian structure has long been characterized by a dualism between formal land concessions and indigenous customary tenure. Bruce et al. (1992) explain that this dualism originated in the colonial era and remained largely unaltered by legal changes since independence in 1973. In 1975, the government adopted Law 4 of 1975 that stipulates that "all the land of the national territory (…) is part of the public domain of the State and cannot be reduced to private property". However, the prohibition against private land ownership did not affect land concessions and customary land tenure as concessionaires, and customary landholders "would appear to enjoy roughly the same rights as they did at the end of the colonial period (with the exception of sub-soil resources)" (ibid.).

Citing the work of Alves and Napoco (1991), Bruce et al. (1992) observe a sharp increase in the number of land concessions after the mid-1980s. Thus 422 land concessions covering 103,500 hectares were granted prior to 1974 and 153 land concessions covering 7,130 hectares were issued during the following ten years. Then, the number of land concessions increased sharply with 162 concessions issued in 1985 and 376 concessions in 1986, with 1,497 land concessions covering approximately 9 percent of the territory being issued between 1985 and 1990. Bruce et al. attribute this increase in number of land concessions issued to the creations of joint-shareholding companies able to acquire larger areas and the fact that certificates of concession were required by the credit arm of the National Bank as proof of access to a secure production opportunities[1].

According to Bruce et al. (1992) land concessions were generally awarded with little regard for indigenous customary land use arrangements, in part because of the weak capacity of the intuitions responsible for administrating them. For instance, the General Directorate of Geography and Cadastre, responsible for issuing land concessions in rural areas, was unable to oversee and regulate land occupation. As a result, investors (called *ponteiros* from the local term *ponta* for private farm) were often encroaching on areas used by the rural villages (*tabancas*) dotted across the landscape together with their fields and grazing land. The extensive *bolanha* areas of wetlands used for rice and seasonal grazing were particularly attractive to investors. During the same period, traditional livelihoods that included long-

[1] Most 'agricultural investors' were interested in using loans to fund trading in imported rice and essential goods. Very little conceded land was in fact used: studies showed that no more than 5-10 percent of conceded land was being used for agriculture. See Tanner 1991.

distance cattle grazing were being affected by demographic growth, and conflicts were appearing between different ethnic groups.

Field research in the early 1990s revealed also that the customary land occupation and management systems equated to *de facto* use rights over extensive areas of land; and that virtually any application for a new land concession would involve land already covered by some form of customary use right. The concept of '*terroir'* developed by other researchers working in the West African region could usefully be applied to this situation[2]. The implication was that any new land policy would have to end the dualist separation between 'customary' and 'concession' areas, and seek to foster a negotiated and mutually beneficial process of land access and land tenure by private investors (Tanner 1991).

It is in this context that the National Assembly appointed a Land Commission to review the land policy and legal framework and produce a new Land Law. A critical advance by the Commission was the acceptance of the '*terroir'* approach and its implications for a more devolved form of land management and governance. Commission teams took early drafts of the new law around the country for an extensive consultation process before finalizing it and sending it for parliamentary approval[3]. In its Preamble, the 1998 law mentions the socialist and pre-Independence land tenure models, but then presents a "new model" with three main objectives: 1) to guarantee land to Local Communities that they are able to make economic use of; 2) to incorporate the customary land regime into positive law, as well as the institutions that represent them; and 3) to stimulate investments in land through the creation of a market value for land.

CUSTOMARY AREAS AND LOCAL COMMUNITIES

If the 1961 colonial decree had already established the legitimacy of local land systems, the 1998 Land Law formally recognizes all customarily-acquired land use rights as well as the territorially-based units of customary land management. Land rights acquired by custom were given full legal equivalence to land rights formally granted by the State. This is put simply in Article 2.3 of the 1998 law, which stipulates that "the rights constituted on land and over natural resources enjoy equal protection whether they result from custom or from law".

[2] See for example early work by Gilles Sautter, « A propos de quelques terroirs d'Afrique Occidentale, essai comparatif », *Études Rurales*, n° 4, 1962, pp24-86; and later work from 1990 onwards by the French anthropologist Philippe Lavigne Delville.
[3] The lead author led international technical assistance to the Commission and participated in this process.

The 1998 Land Law also introduces the important concepts of "Customary Use" and "Local Community". Customary Use of land is "in accordance with the established and customary rules, customs and traditional practices of a specific Local Community, which defines and manages reciprocal rights and obligations [of the land users]"[4]. Land used in this way can be "already cultivated and inhabited" but can also include "areas and resources that are unexploited but are attributed to residents of the Local Community by their respective representatives"[5]. As for Local Community, it is a "customary, territorially-based entity, corresponding to the grouping formed by families and individual residents in a certain circumscribed area of the national territory (*tabancas* or a group of *tabancas*), for the pursuance of common historical, economic and social and cultural interests and which includes areas of habitation, agricultural and forest areas, grazing land and water sources, sites of cultural importance and the respective expansion areas"[6].

The 1998 Land Law recognizes that different Local Communities have different rules and customs, "using land in accordance with [their respective] traditional and constant rules, customs and practices". Article 6 of the law further specifies that they "exercise management powers in accordance with their respective uses and customs, over all the area situated within their historical and territorial limits, including residential areas, and areas that are cultivated, in fallow, for common use, grazing, water and maritime resources, sacred forests or reserved for other social, cultural and economic purposes, applying the present law when [customary law] is lacking"[7]. In other terms, within any given Local Community, the prevailing or locally recognized customary system applies, allowing for *all the different systems to be integrated into the formal legal framework without the need for any codification and system-specific legislation or regulation*[8]. This formulation gives legal recognition and protection to the complex bundles of different rights and customary practices of each community and its members, which defy classification in modern land administration systems. It is important to note how Customary Use is a category of land used within and managed by a Local Community.

The Land Law then goes on to discuss the Right of Private Use, or DUP in Portuguese, which is acquired either through having a right of customary use or through a request to the State for a new concession[9]. In

[4] Law 5/1998 of 23 April, Article 3, line (b) (henceforth Law 5/98; this and all later translations by the authors)
[5] Law 5/98, Article 17, number 1
[6] Law 5/98, Article 3, line (c)
[7] Law 5/98, Article 6, number 4
[8] UNDP Guinea Bissau has recently supported written versions of the main customary legal frameworks.
[9] Law 5/98, Article 4

the latter instance, as discussed below, the Local Community within which the requested land is located, also plays a key role in assessing and approving the request.

RIGHT OF PRIVATE USE

The 1998 Land Law introduces the Right of Private Use.[10] The Right of Private Use is a fundamental right of all citizens but these rights can also be allocated by the state to national or foreign entities, individual or collective, so long as it is in line with the superior national interest defined in the economic and social development plans and objectives.

The Right of Private Use can be acquired through customary use or concession. While rights acquired through customary use do not need to be documented, the terms of the rights constituted through concessions are defined in administrative contracts which then have to be registered with (the yet to be established) National Land Commission and the Property Registry, which is part of the General Directorate of Civil Identification, Registries and Notaries[11]. Concessions of a Right of Private Use can be allocated for a maximum of 90 years, and are automatically renewable if there is no protest or objection within three years preceding the renewal date.[12] Rights of Private Use confer on their beneficiaries the exclusive right to use, exploit and enjoy the land that is the object of the concession. The 1998 Land Law also allows beneficiaries of Rights of Private Use to mortgage the land and its improvements. Lastly, rights received through concessions can be transferred through contracts between third parties. This form of land access therefore offers investors ample security and time to carry out projects, secure a return, and gain from the capital improvement, while also ensuring that the communities that originally held the use right also benefit.

The 1998 Land Law distinguishes between rural and urban concessions. Rural concessions are issued by the General Directorate of Geography and Cadastre over land located outside the urban areas and for activities related to agriculture, livestock, agro-livestock, agro-industry, forestry and tourism. Urban concessions, also called *Concessão de Superfície*, are issued by municipalities over land located within the limits of cities and villages "to construct or maintain, perpetually or temporarily, a building for housing, commercial, industrial or cultural purposes, among others".

[10] *Direito de Uso Privativo*
[11] Law 5/98, Article 10. The Registry is the *Conservatoria do Registo Predial.*
[12] Law 5/98, Articles 22 and 23

Concessions of Rights of Private Use can be acquired over customary land, but the acquisition is supposed to be achieved through negotiation and agreement with the concerned Local Communities. By doing so, the 1998 Land Law intends to protect customary rights and the traditional subsistence strategies of Local Communities; in development terms however, a more important goal is to ensure that local people benefit directly from incoming investment, thus avoiding the economic marginalization that is inherent in the dualist model. If a Local Community or a member of a Local Community wants to enter into an agreement to transfer a customary Right of Private Use to a third party, they have "the right to negotiate freely and directly, the transmission of the Rights of Private Use of which they are title holders" (*titulares*)[13]. During this negotiation, the third parties must inform the Local Community about the activities they intend to carry out on the land, which cannot be altered without the consent of the same community, under penalty of extinction of the Private Right of Use[14]. The implication of their already being 'titleholders' by law is that Local Communities and their members with these customarily-acquired Rights of Private Use do not have to first convert their rights into a concession (having 'titled' rights is a condition for subsequent transmission under the later Article 23). Thus, the investor acquiring rights over land under customary use is in effect the first *concessionario.*

Through the combination of the idea of customary use, Local Community management, and mandatory consultation with Local Communities, and the principle that concession of Rights of Private Use can be transmitted, the 1998 Land Law provides a clear mechanism for a) protecting local rights and ensuring that the negative impacts of dualism are ended; and b) allowing a *de facto* land rights market to develop. This should promote investment by all concerned, local people and investors, in an inclusive and equitable manner.

LAND COMMISSIONS

An important innovation in the 1998 Land Law is the establishment of a system of land commissions at national, regional, sectoral and section levels – the main administrative subdivisions of Guinea Bissau – responsible for implementing the law and coordinating the different levels of intervention in land use[15]. The law stipulates that a National Land Commission should coordinate and oversee the actions of the

[13] Law 5/98, Article 19 (2)
[14] Law 5/98, Article 19 (2), (3)
[15] Law 5/98, Preamble

regional, sectoral, and section commissions.[16] The law further specifies that the commissions shall work in close liaison and cooperation with local authorities, always respecting the competences of the Local Communities[17].

Other articles throughout the Land Law indicate that the land commissions should act as repositories of documents produced as a result of the *work of the land administration* entities; and that they should play an oversight and supportive role when required. They also have a quasi-judicial function, 'giving opinions on questions submitted to [them] by citizens and official bodies"[18].

Looking carefully at how the Land Law describes the work of the land commissions in different contexts, it is clear that their structure and function at each level changes; and that as they go down to local level, they become the focus of a process of devolved land management. In this context the oversight role of the National Land Commission becomes clearer, with much of the day-to-day work being concentrated at Sector level and below. Critically, through Article 6 paragraphs 3 and 4 of the Land Law, Local Communities are integrated into the land management structure, and should be taken into account in the workings of the land commission network.

This innovative structure of land commissions provides a mechanism to address the chaotic state of land management and its impact on rural development and investments. As the commissions are established and begin feeding empirically-sourced information upwards to the policy and oversight level, they can contribute to the peaceful and consensual resolution not only of conflicts between Local Communities and external interests, but also conflicts among members of Local Communities and issues arising from changes in customary norms and practices.

RELEVANCE OF THE 1998 LAND LAW TODAY

When the Land Law was approved on March 23, 1998, it was expected that regulations would be issued within 180 days. However, soon after the Law was adopted, the country was plunged into a civil war followed by years of political instability. In 2004, the government attempted prepare regulations under the law but this effort was interrupted the following year and it is only after the 2014 elections that the drafting of the regulations was reinitiated.

[16] Ibid. Article 6 (2)
[17] Ibid. Article 6 (3); and (4), also quoted above on page 9 with regard to the LC management role.
[18] Ibid. Article 45 (1/d)

Nearly 20 years after the adoption of the 1998 Land Law, Guinea Bissau remains largely an agrarian country in which most of the land under customary use by Local Communities has not been delimited. However, land tenure has also been affected by the country's rapid demographic growth as well as the dramatic expansion of the cashew production[19]. Guinea Bissau offers excellent conditions for this valuable cash crop and, with world prices climbing and holding firm since 2000, there has been a massive expansion of plantations, especially across the northern half of the country. Cashew nut production is now estimated to cover around 50 percent of the country's cultivated land and has become a major source of income for farmers, including in Local Communities where many individuals have converted more traditional crops to cash cropping. Anecdotal evidence reveals a decline in the diverse agricultural base of the *tabancas,* as local farmers have switched to cashew nut production. Traditional rice-fields (*bolanhas*) are more and more abandoned, since labor is preferably invested in cashew nut cultivation.

The expansion of cashew nut production has been achieved not only by new private sector penetration of the rural economy, but also through an expansion of trends already visible in the mid-1990s. While this information is only anecdotal, there are signs that urban elites with access to bank credits, and with customary ties to certain areas, have exercised those ties to occupy and exploit new land in these areas, and begin producing for the export market. There are many parallels here with the boom-and-bust credit financed cycle visible in the 1990s, with a new banking crisis in the country as credit funded by donor programmes has been disbursed and many loans are now non-performing. Rather than a 'revolution' it would seem that much of the expansion of the cashew nut production has been achieved through a largely unregulated expansion of 'business as usual'.

The expansion of the cashew nut production has impacted customary land tenure. The planting of trees has traditionally been used to prove occupation and define the areas that cannot be claimed by others. This phenomenon dates back to the 1990s and before into the realms of traditional forms of marking and securing tenure. The idea of occupation trees (*arvores de ocupação*) was already widely practised in the early 1990s, and with the growth even then of cashew nut production, represented an evolved form of a long-standing cultural practice to mark and establish occupation

[19] In 1970 just 1,200 tons of cashews were exported; production rose steadily through the 1990s in response to internal market reforms and the availability of credits for agriculture, and reached some 100,000 tons in 2005. Production continued to climb as weak regulation allowed networks of informal foreign traders to penetrate the local agrarian economy to buy direct from local producers. Exports rose to 135,500 tons in 2009, 122,500 tons in 2010 and close to 300,000 tons in 2014 (FAO Bissau).

of a given space and territory. The cycle observed at that time was: slash and burn clearing of natural forest to plant subsistence crops; as the soil declined, plant occupation trees, often cashew nut, to demonstrate and secure tenure over the cleared area; move on to another forest area (Bruce et al. 1992).

Another element that has changed considerably since 1998 is the nature and content of local customary norms related to land governance. While customary systems are still in place, many observers note that they have been weakened and changed by the wave of unregulated land conversions into cashew nut plantations, and by demographic pressures that work against the older inheritance systems, especially in matrilineal areas[20]. This process was already underway in the mid-1990s as cash crops substituted for traditional crops and as new forms of production were considered to be outside the scope of customary norms. Field evidence at the time showed that this was particularly prejudicial to women using land for subsistence crops, who lost their use of this land to men who wanted it for commercial production[21]. From what was learned during a recent in-country mission, these changes have accelerated and are now causing significant levels of tension between different groups of people at village level, and even within families.

Borges (2014) argues that the changes that have occurred since 1998 would justify a new land law. In her words , "the legal framework no longer follows the new trends in the rural world. There is a need to better understand the social dynamics that have taken place in the rural world and the new trends in the expansion of cashew cultivation, and to take notice of the dichotomy and differentiation between new practices in the rural world and ancestral customs". However, the main structural challenges are still very similar to those that led to the form and content of the 1998 Land Law, exacerbated by even greater investor demand for land while customarily-acquired land use rights still predominate over most of the country. In this context it is difficult to imagine an alternative solution to a law that devolves management functions and considerable decision-making power to the local level. In addition, the idea of recognizing the dichotomy between "new practices" and "ancestral customs" in effect takes things back to the old dualist view of the African economy where precedence is given to export-focused cash crop farming

[20] A study conducted by the Word Bank in 2006 refers to the weakening of local traditional authorities in certain Local Communities. Specifically, the study suggests a "decrease of political power and disrespect of traditional authorities with regard to the younger generation" (World Bank 2016, p.29).
[21] Galli, R. and Funk, U. 1995. Structural Adjustment and Gender in Guinea Bissau. In Emeagwali, G.T (ed) 1995: *Women pay the price: structural adjustment and gender in Africa and the Caribbean.* Trenton, New Jersey, Africa World Press

above all else[22]. Indeed, setting aside the 1998 Land Law in search of a legal formulation that responds to the needs of the private sector, which is in fact exploiting and is rooted in the customary land occupation and use systems, would be highly questionable.

Rather than adopting a new land law, it is important to look at the underlying inclusive and unifying philosophy of the 1998 Land Law, which retains its legitimacy and relevance perhaps even more today that it did in 1998. Through the measures and concepts it contains – notably the Local Community, the transmissible Right of Private Use, and the Land Commissions – some order can be restored to a chaotic situation and some real benefits from the new export focus can begin finding their way back to *tabanca* level and the most vulnerable populations. As the authors have already underlined, the essential feature of the Local Communities is that they are *local level land management entities.* In this context, changes to the customs and practices that they oversee and regulated are irrelevant. Indeed, one of their key roles, working with higher level, more formal institutions, is precisely to mediate and promote consensus over how these changes are to be integrated peacefully into the surrounding socio-economic system in a way that contributes to wider social justice objectives.

Given the suitability of the law still in terms of the deeper structural issues facing the country, and considering the likelihood of political turmoil if the whole land law project were revisited, the prevailing view in Guinea Bissau is that it is far better to advance with what is currently on the statute books and use it to restore some sense of order to the countryside, with a view to revising the law at some later date. If the strategic approach of the 1998 Land Law is taken fully into account, it will establish a devolved land management structure in which local evolving customary entities play a legally recognized role. This is an advance that should not be lightly set aside. A similar point can be made about the land commission structure and its mediation and conflict-resolution role.

CONCESSION OF PRIVATE RIGHT OF USE IN RURAL AREAS

Irrespective of discussions about the relevance or otherwise of the 1998 Land Law, public services dealing with land management and administration in Guinea Bissau are weak and characterized by arcane

[22] Borges also criticizes the law for failures in the way it treats gender and the rights of women, and in the wider human rights context. While the law does not explicitly address gender issues, recent interviews with the Government and other stakeholders suggest that these are issues which the new Special Commission created by the National Assembly will integrate into the final draft of the new Land Law Regulations.

and unreformed procedures, most of which date back to colonial times. This is true for both the rural and urban administrations, which have long been starved of any kind of reform and investment support.

According to the 2017 *Doing Business* report, a company buying a parcel of real property of XOF 17 million in the capital city of Bissau has to complete 8 processes, wait 51 days and pay 5.5 percent of the value of the property to register its rights in the Land Registry. In the index measuring the quality of land administration, Guinea Bissau scores only 3 points out of 30. With these indicators, the country ranks 149 out of the 190 countries covered by the report (World Bank 2017).

While the results of the *Doing Business* report suggest that there is a need for improving real property rights registration services in Bissau, the report looks at the procedure followed to formally transfer a concession of Right of Private Use that has already been issued. Considering that most of the real property rights in the country have are not formalized under the form of concessions, acquiring a concession of Right of Private Use is in fact far more complex and expensive.

According to the General Directorate of Geography and Cadastre (GDGC), and based on the provisions in the 1998 Land Law, those who intend to obtain a concession of Right of Private Use over rural land have to go through the following steps:

1. Identify the area and reach agreement with the traditional authorities;
2. File a request at the Sector Committee or directly at the GDGC;
3. Field visit by a technician of the GDGC;
4. Preparation of the technical documents for the concession request by the GDGC;
5. Request approval by the director of the GDGC;
6. Request approval by Minister of Public Work;
7. Pay the Legalization Tax;
8. Review by the Cabinet for Agricultural Planning (GAPLA), for areas larger than five hectares;
9. Field work by GAPLA technical staff, for areas larger than five hectares;
10. Issuance of an opinion by GAPLA, if the area is larger than five hectares;
11. Instruction of the Process by the GDGC;
12. Submission to the request to the Regional Committee;
13. Payment of the Occupancy tax;
14. Publication of concession request in the official gazette and posting in public areas and at community level (written and by radio transmission in local languages);

15. Appraisal and decision over any objections, hearing all sides;
16. Submission of the notarized demarcation request to the GDGC;
17. Demarcation of the area by the GDGC;
18. Preparation of a technical report with "final real map" by the GDGC staff;
19. Payment of Definitive Demarcation tax;
20. Publication in the official gazette of the notices of definitive demarcation and concession;
21. Issuance of the concession;
22. Registration of the concession.

The process of acquiring a new concession of Right of Private Use in rural areas is obviously long, and it is evident that it could be simplified and made more efficient. The key element of Local Community consultation is likely to complicate this even further until clear procedures and the required skills to conduct consultations have been developed (see how delimitation can contribute to this in Annex 1). This process is however at the heart of the inclusive and integrating philosophy underlying the 1998 Land Law, and should not be undermined by measures that weaken or 'fast-track' the consultation process. It is better to develop a corps of Non-Governmental Organizations (NGOs) and field staff well trained in this approach, who can facilitate contacts and negotiations on behalf of Local Communities and the investor community.

While reforms can and should be sought, one of the most constraining issue is the lack of capacity and resources of the GDGC and other key stakeholders involved in the land administration sector. The GDGC has its headquarters in Bissau and few staff located in the regional representations of the Ministry of Public Works in Gabu, Bissora and Buba. It has only 23 staff, including four surveyors and one geodetic expert. Requests are processes in analog format. There are a few computers but they are used to produce analog documents such as forms and maps that are joined to processes. Thus, the GDGC currently does not have the capacity to quickly process a large number of concessions or even a small number of large concessions.

Acquiring a concession of Right of Private Use is also expensive, in particular over small areas. Applicants have to pay a legalization tax of XOF 50,000 for lots of up to 10 hectares, increased by XOF 350 for each additional hectare up to a maximum of 50 hectares. Applicants also have to pay a one-time occupancy tax equal to XOF 300/m2 for urban land and XOF 25/m2 for rural land. In addition to these tax, applicants have to pay for stamps, authentication of documents, as well as per diems and transportation for the staff of the GDGC, Sector Committee and GAPLA who conduct field work. The

GDGC sends its staff twice on site, and staff from GAPLA have to visit the site once if the area is larger than five hectares. In addition to transportation, applicants have to pay XOF 20,000 per day for GDGC staff, XOF 15,000 per day for staff from the Sector Committee staff, and XOF 35,000 for GALPA staff. While demarcating small areas takes one or a few days, it takes weeks to demarcate larger concessions.

In view of the complexity and cost of the concession process, many applicants do not complete it. The GDGC estimates that it has between 1,000 and 1,500 processes that were initiated but never formally instructed. Anecdotal evidence gathered by the authors during a field visit in the province of Bafatá also suggest that some investors simply do not follow the process defined by the GDGC. Specifically, the authors were informed that the Committee of the Region Bafatá had issued three Certificates of Concessions whereby it declared that the company had received a 99-year emphyteutic lease over three areas covering a total of 6,000 hectares. The company had entered into an agreement with the Ministry of Agriculture and the Committee of the Region Bafatá had issued these certificates, apparently without consulting the GDGC and demarcating these areas. The company presented the relevant documents as being proof of the legality of their occupation, and probably with good reason given that they dealt with regional administrations with apparent competence in this area. However, in strictly legal terms, their acquired land rights appear to have little basis in law. Moreover, while the investors declared that they had consulted the Local Communities, tensions had emerged and members of the Local Communities had occupied 70 hectares prepared to produce rice.

THE WAY FORWARD

With the conclusion that the 1998 Land Law still offers an effective response to the principal land management challenges facing Guinea Bissau, it is important to look forwards to how best to support the law's implementation.

A lot of work and consensus building has gone into up-dating and improving the draft Regulations of the 1998 Land Law. Yet, they remain weak in key areas, merely re-state in different terms certain elements of the law, and introduce concepts that are not in the law while regulations should not introduce new concepts and even rights that do not appear in the superior legislation. There are also gaps that need to be addressed, and the treatment of land commissions merits a full rethink. The draft Regulations also fail to provide an adequate level of detail and guidance for the more innovative measures, for which there are no

established procedures or experience to fall back. Recommendations for improvement to the Regulations include:

1. *Land Commissions* – The structure and function of the different land commissions should be reconsidered, as the draft Regulations create an extremely heavy structure at all levels while the role of each level appear to be very similar. The draft Regulations also mix land administration and land management functions. Although the Land Law gives powers the land commissions to ensure that certain land administration functions, land administration is and should remain the sole preserve and responsibility of the public land administration services. Confusion over roles will create parallel structures and lines of responsibility, and weaken the authority of the land commissions as oversight and quasi-judicial entities (see annex 2 for further recommendations);

2. *Local community consultations* – Draw upon the experience of Mozambique, where a very similar land law was approved in 1997 and where the implementing Regulations passed in 1998 and subsequently have sought to clarify *how to carry out* a community consultation; and develop Regulations for the 1998 Land Law that provide a clear set of rules and guiding principles for consulting Local Communities as this is a key step to safeguard local rights and promote an inclusive, negotiated sharing of land between Local Communities and outsiders;

3. *Community land delimitation* – While the delimitation of Local Community land is not an explicit requirement of the 1998 Land Law, it is implicitly required[23]. Experience from Mozambique shows that it should preferably be done prior to the concession process[24]. The draft Regulations include a full section on delimitation of Local Communities land that is based on the Mozambican legislation, but this could be improved by taking into account the more recent implementation experience of Mozambique (please refer to annex 1 for further details). The real location for this pre-concession process is in the realm of government programming, as part of a wider reform and upgrading of land governance and management structures: a campaign (at least in high land demand areas) of 'prior delimitation', so that when investors do come in to seek land, they can already be shown a map of where the land of the Local Communities are, and be told by the land administration services which local land committees or *tabanca* leadership they have to

[23] This is clear throughout the text of Law 5/98, and Article 32 (3)c refers to 'demarcated areas' of the communities.
[24] The relevant Technical Annex in Mozambique in fact says that delimitation should be a priority in areas where new projects are proposed.

talk to. On the other side, the *tabancas* themselves will be far better prepared and able to engage in any negotiation to identify and hand over local land to investors;

4. *Rural land tax* – The rural land tax proposed in the draft Regulations could be further improved as it currently does not allow for the real value of specific kinds of land or land in specific locations to be captured and reflected in the level of tax applied. If implemented as proposed, the tax could result in the State losing substantial revenues in areas, for example, close to urban markets, main roads, beaches, and other high tourism potential areas;

5. *Allocation of the rural land tax share to local communities* – Per the draft Regulations, 20 percent of the rural land tax revenues should be transferred to the Local Communities. The Regulations should further detail how this transfer will be done, including how to establish the legal entities that can open bank accounts to receive the payments as well as what rules and procedures govern how the funds are to be used. It would be important to ensure that the Local Community includes all its members when it comes to making decisions about the use of these funds;

6. *Transferring rural concessions of Real Rights of Use* – The 1998 Land Law allows for a *de facto* Real Rights of Use market to develop. The Land Law is also significant in providing a way for Local Communities to formalize and transfer customary Rights of Private Use. The basic steps are well laid out in the Land Law itself but would require additional detailing in the final version of the Regulations.

In spite of these weak points, the draft Regulations could serve the purpose of getting the 1998 Land Law out into the real world and implemented in practice. There appears to be a view in Bissau that the law cannot be implemented without the Regulations being approved. However, while it would clearly be better if the draft Regulations could be improved and adopted quickly, this is not in fact a precondition for moving ahead with Land Law implementation. The approval of the Regulations in *not a reason for holding up the implementation of the 1998 Land Law,* which has been formally approved and entered into force 60 days after its publication. Guinea Bissau therefore already has a legal instrument that offers a blueprint for inclusive and equitable rural and economic development that can already guide the formulation of a social and economic development program with land at its core.

CONCLUSION

While the political-economy of land in Guinea Bissau remains complex, the analysis above and interviews and other information gathered during recent fieldwork suggest that the 1998 Land Law is 'fit for purpose' when set against the sociology of the rural landscape and the structural challenges faced by the Government of Guinea Bissau. The 1998 Land Law is essentially intended to address the dualist inheritance that characterizes most African countries and protect the land of Local Communities while encouraging private investments. It aims to foster a positive and mutually-beneficial relationship between Local Communities and outsiders. It respects indigenous custom and practice and integrates them into a modern and unifying legal framework. What is essential is that the opportunity to construct an integrated and unified rural economy on these foundations is not lost amidst concerns about details, and the risk of reactivating a debate that is likely to be destabilising at a fragile time for Guinean democracy and institution building.

The authors observe that the 1998 Land Law has some weaknesses, but they could be addressed through the Regulations or during an initial implementation program provided that appropriate measures are built into the program to address these weaknesses. Emphasis should also be put on alignment with modern standards regarding gender equity and the principles of the Voluntary Guidelines on the Responsible Governance of Land Tenure (FAO 2012); and special care should be taken to ensure that the land commissions do not duplicate existing land administration and management functions. It will also be important at the outset to have a clear goal in sight for a review process, to assess the continuing currency of the 1998 Land Law, develop full and permanent regulations, and adjust the functioning of the land commissions. A project financed by the FAO and European Union (EU) is expected to support the setting up of the Land Commissions and will fund a series of Local Community delimitations in selected pilot areas. This is a good starting point and provides the basis for planning a review in a few years.

Lastly, it is also evident that many of the immediate constraints on effective land administration, and especially those that are making the process of acquiring land concessions complex and ultimately insecure, are matters of institutional and procedural reform that do not require the Regulations to be adopted. The General Directorate of Geography and Cadastre is in deep need of reform and investments, as are key land administration institutions such as the Bissau City Hall and the General Directorate of Civil Identification, Registries and Notaries. A project for the modernization of these institutions would be an essential element of any program developed in the coming medium term. The project could also combine other activities such as the delimitation of Local Community land and the establishment of the

land commission that is expected to be piloted under the aforementioned project supported by the FAO and EU.

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Annex 1 – Delimitation of Local Community Land

The delimitation of a Local Community can be a complex task that places a lot of (most) investors in the very unfamiliar position of negotiating with people in a totally unknown cultural and organizational framework. If the Land Law is understood as a development instrument with socio-economic as well as land administration purposes, this is one step that cannot be changed or left out if the objective is to simplify the procedural pathway. In Mozambique specialized NGOs have emerged over the years that provide 'brokering' services in this area of work, and the FAO/EU project and others are advised to take note of this and incorporate lessons learned. Fortunately, in Guinea Bissau there are already strong NGOs that have been quietly incorporating the 1998 Land Law approach into their work and have strong experience in community level territorial natural resources management[25].

The main elements of the delimitation methodology in technical and procedural terms are laid by Tanner et al. (2009), and involve the following:

1. Community awareness (preparation, organizing a local land committee, etc.);
2. Participatory rural diagnosis of land use, local land management structures, livelihoods strategies (this determines the 'use right' over the extensive territory);
3. Participatory mapping (hand drawn maps detailing know boundaries like rivers and trails that for decades have separated *tabancas* or groups of them);
4. Visits with residents to points that cannot be identified on remote images to take GPS reading;
5. Preparing a formal map of the Local Community with geographical and GPS points indicated
6. Transferring this information onto formal topographical maps;
7. Presenting the final version to the community and its neighbors (who should be involved from the outset to verify the common borders, etc.);
8. Recording of the maps and accompanying paperwork (minutes of meetings, details of field visits, etc.) in a file in the Cadastral Service and emission of a Certificate of Delimitation.

This methodology, which was extensively tested in Mozambique to identify and delimit Local Communities, was in fact developed initially in Guinea Bissau. It is now to be formally brought back into Guinea Bissau. However, it is important to mention that this approach is being developed further in Mozambique and it would be wise to track this process and incorporate some of the new proposals. These

[25] The NGO Tiniguena is an excellent example. IUCN in Bissau is also a strong supporter of this approach.

do not however change the basic participatory diagnosis and mapping approach, which achieves far more than just a formally recorded map and a register of customary land rights, are:

1. Local communities and their leaders are fully informed of the Land Law and their rights;
2. Local communities are appraised of the 'why to do it' aspects in the context of demand for their land and wider developmental issues;
3. The process requires a new level of organization (electing a land and resources management committee) to represent the community in this and subsequent land affairs;
4. If a Community Land Use Plan is included (one of the new features now being integrated into community delimitation in Mozambique), it facilitates the investment process by pre-identifying land that is available and can speed up the negotiation (community consultation) process.

Other innovations developed in Mozambique are essentially preparatory (a strong focus on 'social preparation' including constructing a community development agenda), and technical (incorporating the huge advances in GPS and remote imagery that have taken place since the early 1990s).

Annex 2 – Recommendations to improve the Land Law Regulation

It is recommended to revise the structure and function of the different Land Commission levels in the Land Law as follow:

1. Create a separate article for each level of the Land Commission within a chapter on Land Commissions. For each article, create separate paragraphs dealing with its structure and function (*competência*);
2. Accord to the National Land Commission the character of an oversight body supervising the functioning of the other levels, with a mandate for once- or twice-yearly meetings and extraordinary sessions when required;
3. Grant a policy review role to the National Land Commission at times indicated by the Government of Guinea Bissau and/or the National Assembly, via the mechanism of the Land Forum;
4. Define the Regional Land Commissions as the point at which different intervening entities can meet to oversee and coordinate institutional issues;
5. Define the Sector Land Commissions as mediating and conflict resolution mechanisms as well as responsible to ensure that the Land Law is being implemented as it should be on the ground (reporting back to the higher level and government and judicial structures as appropriate)
6. Define the Sector Land Commissions as effectively little more than a collective of representatives from each Local Community in each Section, in line with Article 6, paragraphs 3 and 4 of the Land Law.
7. As for budget and operational issues.
8. Aggregate and manage at central level the 10 percent of land taxes allocation to the Commission system. A Secretariat responsible for supporting the entire structure, including disbursing funding in response to annual plans and extraordinary funding needs, could perhaps be established at national level and report to the National Commission President.