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FINAL REPORT
**ESTABLISHING PRIORITIES
FOR LEGAL REFORM**
GUINEA-BISSAU

Submitted to:

USAID/Guinea-Bissau

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LIST OF ACRONYMS

ASDI	Agência Sueca para o Desenvolvimento Internacional
BAD	Banco Africano de Desenvolvimento
CNA	Conselho Nacional do Ambiente
CNT	Conselho Nacional do Turismo
FAO	Food and Agriculture Organization of the United Nations
GB	Guinea-Bissau
GELD	Gabinete de Estudos, Legislação e Documentação do Ministério da Justiça (Research, Legislation and Documentation Office of the Ministry of Justice)
GNP	Gross National Product
IUCN	International Union for the Conservation of Nature
NGO	Non-Governmental Organization
PAIGC	Partido Africano da Independência da Guiné e Cabo Verde
PG	Pesos Guineenses (Guinea Bissau Currency), US\$1=9,000PG
PIB	Produto Interno Bruto
T&I	Trade and Investment
TIPS	Trade and Investment Promotion Support Project
UN	United Nations
UNSO	United Nations Sahel Organization
USAID	United States Agency for International Development
WWF	World Wildlife Fund

EXECUTIVE SUMMARY

Laws and regulations, as acted upon by key economic and policy actors, form a critical part of any market economy's incentive structure. The legal and regulatory system of Guinea-Bissau is a composite of laws and regulations that have accumulated and altered over many generations and successive regimes. The legal system imposes a host of direct and indirect incentive (and disincentive) effects on the sectors of activity comprising the Guinean economy: the urban formal, urban informal, formal agricultural, agro-industrial, and traditional sectors. Any realistic attempt to foster growth in these sectors will have to grapple with the legal and regulatory framework. Therefore, a critical issue now confronting Guinean policymakers and USAID concerns the strategy for reform of this system, i.e. which of the laws, regulations, and institutions comprising the system should be considered as priority areas for reform.

The purpose of this report is to provide a preliminary roadmap, based on combined legal and economic analysis, for the reform process alluded to above. The analysis presented in this report aims to assist Guinea-Bissau and USAID in identifying and assessing laws and regulations affecting private economic activities in the critical growth sub-sectors considered in USAID's TIPS (Trade and Investment Promotion Support) Project. To this end, the report formulates a rationale, and outlines a plan and schedule, for addressing legal and regulatory reforms in Guinea-Bissau that support increased trade and investment. On the basis of the legal-economic analysis, and an assessment of factors affecting the feasibility of the types of reforms considered in the analysis, the report presents 23 prioritized recommendations for legal and regulatory reform in 12 areas.

This report is not intended to be an in-depth analysis of the economic laws and regulations of Guinea-Bissau. It rather reflects the use of a set of economic and legal criteria to:

- screen existing laws;
- identify those most in need of reform;
- describe the economic, behavioral, and other consequences of current laws and regulations, indicating whether or not these have been enforced; and
- justify proposed revisions and additions.

Significantly, this report is not entirely a work of external experts. It reflects not only the efforts of the contractor and its consultants, but also considerable input and insight on the part of Guinean attorneys and academics, and contributions from other members of the international development community in Bissau. In particular, Guinean legal experts were deeply involved in the analysis and recommendations presented in this report.

A. LEGAL ANALYSIS

The legal and regulatory system of Guinea-Bissau is a complex amalgam. Beginning with the traditional legal system, the Guinean legal structure experienced the parallel addition of the Portuguese legal system, which was introduced during the colonial period and which continued in force after independence in 1973. The legal structure continued to change with the additions and amendments of the socialist regime, and is again being transformed with laws more permissive of free market economics. Much of the amalgamated legal structure that has impeded free market involvement in the past is still very much in place.

Portuguese law, as of the date of independence of Guinea Bissau (September 24, 1973), remains in effect in the country, except to the extent that it is inconsistent with the constitution, or subsequently enacted legislation. The Portuguese -- and by inheritance, the Guinean -- legal system is based on neo-Roman law as reflected in the Napoleonic Codes of the early 19th Century and modified by later German thinking. The organization, terminology, and methodology used in neo-Roman civil law is quite different from that of the Anglo-American common law. These differences, particularly the much greater prominence of codes and legislation in the civilian system relative to court decisions, and the more abstract quality of legal texts in the civil law world as compared to the common law world, are important for USAID to bear in mind when working on legal reform issues with their Guinean counterparts.

Through their own experience of the incentive effects of different legal regimes on business growth, and in the course of their research in Guinea-Bissau, the consultants developed the following set of economic effect criteria to guide the selection of legal fields for study and to inform the analysis of the economic effects of reforms in those fields:

1. New business entry and competition resulting from the lowering of entry barriers.

2. More efficient resource allocation as a result of rules providing for efficient use, imposition of true costs, and greater access to factors of production.
3. Reduction of transaction costs, removing a drag on business activities.
4. Increased certainty and improved risk management, leading to more business risk-taking.
5. Increased business activity, leading to greater employment and/or employee income.
6. Improved access to international markets through rules making trade less costly and offering greater certainty of quality and profitability.
7. Increased tax revenue, allowing for greater public consumption and improved implementation of laws and regulations.

Several categories of existing laws have a direct impact on economic activity, including constitutional provisions affecting private enterprise and land tenure, commercial laws, tax law, labor law, the law of obligations, and environmental law. The relationship of customary law to the state legal system also has economic effects.

Constitutional law in Guinea-Bissau is already in the process of changing, and several amendments have been enacted to allow a multiparty system and a market economy. In this report, constitutional law issues center on private ownership of land. The 1973 and 1984 Constitutions contained a ban on private ownership of the soil; subsoil; waters; mineral, forest and energy resources; industrial production; infrastructure; transportation; and information, communication, banking and insurance companies (article 12). These resources could be developed and the services performed by the private sector under government concession, provided this advanced the public good and social welfare. The constitutional limitations have been disregarded by the government and the private sector alike. In recent years, many land concessions have been granted to individuals and companies. Private businesses have boomed in all sectors of the economy, principally in the export/import area, as the government has increasingly promoted the growth of a free market economy.

The constitutional revision of 1991 removed many of these constitutional constraints to the private sector, primarily by changing, among other provisions, articles 11 through 13 of the 1984 Constitution. Nevertheless, land, which includes the soil, subsoil, and its mineral and forestry resources, was kept under the ownership of the state, which can continue to grant concessions for its use. The drafting of a new land law has already taken place, providing for improved use rights that resemble private ownership. This process of reform should be supported.

The existing Commercial Code is Portuguese, and has been applied to Guinea-Bissau since the last century. It is the consensus of the legal community and of government representatives met by the consultants that a new Commercial Code is needed. In the area of company law, the six basic forms that Guinean law provides for business associations do not address current business needs, and some have fallen into disuse. For example, there is currently no way for a one-person business to limit its liability. In light of the large number of small businesses in Guinea-Bissau, the one-person corporation would seem a particularly appropriate addition to make. Moreover, while some of the existing rules on corporations are desirable for larger, public companies, they are unnecessary for small, closely held firms. Thus, consideration should be given to creating a special provision for a closed corporation with less onerous membership and procedural requirements. Provisions should also be added for simplified corporate formalities for micro-businesses, for minority shareholder protection, and for corporate dissolution procedures.

Other important areas for reform under the Commercial Code are business registration and licensing, bankruptcy, and unfair business practices. With regard to the first of these, in order to operate a new company legally in Guinea-Bissau, the organizers must undergo a complex process of notarization, registration, and licensing. These approval procedures are quite cumbersome, and may prompt businesses to stay outside the formal sector because of the time and expense involved. Registration in the Commercial Registry serves to place third parties on notice where the liability of company members has been limited, and should be retained in simplified form. However, the other notarization, publication, and registration requirements should be eliminated unless a review shows they are essential to some important public purpose. Bankruptcy law, at present severely underutilized, would benefit from changes such as the elimination of certain restrictions on former bankrupts. Consideration should also be given to the development of a law on unfair business practices.

Tax law is in need of reform as well, in order to support Guinea-Bissau's current market orientation. The direct tax system provides four main types of taxes (among others): (a) personal (labor) income tax, (b) business profit tax, (c) rental income tax, and (d) capital income tax (on interest income and dividends). Besides the complexity of the existing system, it is plagued by inequity, with comparable income often taxed at different rates. Guinea-Bissau should consider the World Bank recommendation of a uniform system of income taxation based on a company profits tax and personal income tax. Such a system would be much simpler to administer and would not be discriminatory, since it would treat all income equally irrespective of its sources, and taxpayers would contribute according to their total economic capacity. In the past several years, the government has mentioned the intention to reform the tax system, but the issue is politically sensitive and attempts at reform have not met with success. As for indirect taxation, the consultants support the World Bank recommendation that taxes on imports and domestic goods, the tourism tax, and other specific taxes be unified under a broad-based consumption (sales) tax on goods and services, which would be applied to all imported and domestically produced goods and to selected services -- but not to exports. The coordination of currently fragmented tax administration is also recommended. All of these changes would require the drafting of a new Tax Code.

In the area of the environment, Guinea-Bissau still needs to implement major legislation to protect its natural resources. If environmental protection is not addressed in a timely manner, Guinea-Bissau could jeopardize its present development drive through unsustainable use of its resources. Much needs to be done in this area, from making the National Environmental Council fully operational, to passing a series of basic environmental laws. The legal and institutional basis for protection in the areas of water, forestry, and fisheries needs to be improved, although some work has been done in this regard. Environmental legislation should be implemented and enforced along with new land laws and regulations. Environmental law reform will be highly political, but its importance to the sustainability of the country, as well as donors' support and interest, should ensure its feasibility.

Reform of legislation on labor and consumer practices also offers potential economic benefits. The 1986 Labor Code is very restrictive to business practices but it is largely not enforced. Consumer protection legislation would also have potential economic benefits. Such legislation has been suggested by numerous officials, but more often related to imports rather than to the

quality and safety of domestic products. There is some question as to how enforcement of consumer laws would take place.

Procedural rules concerning the interface between civil law and customary law, and promoting their coexistence, interested everyone interviewed by the consultants. Informally, such rules already exist in practice, with the formal legal system of Portuguese origin operating at a different level from the customary system -- without overtly attempting to regulate or enforce disputes that can be settled within ethnic groups according to traditional customary laws. Guinea-Bissau would do well to consider changes in current practices governing the applicability of customary law that would legalize certain informal business activities and bring disputes involving such activities under customary jurisdiction.

B. ECONOMIC ANALYSIS

The economic analysis section of the report reviews the structure of the Guinean economy, and on this basis develops a scheme for evaluating the economic impacts of legal and regulatory reforms. The bases for this economic evaluation are:

- (1) translation of changes in legal variables into economic variables (e.g., elimination of licensing fees eases market entry) and evaluation of the direct economic consequences of these changes;
- (2) development of an intersectoral analytic framework to assess the indirect impacts of legal and regulatory reforms (largely incident to the formal sector); and
- (3) provision of ordinal-scale weights for the assessment of the overall economic impacts of legal and regulatory reforms.

1. Economic Structure

The economy of Guinea-Bissau can be characterized in terms of three broad sectors: (i) a formal sector (classified according to urban, agricultural and agro-industrial), (ii) an informal sector -- both part of the modern economy -- and (iii) a traditional sector. The modern economy contains approximately 15 percent of the labor force, and whether an individual or firm belongs to the

formal rather than the informal sector depends upon the costs and benefits of complying with the laws and regulations required for formal sector status, and upon the wealth and occupational skills of the migrants who seek absorption into the modern economy. The traditional sector comprises 75 percent of the population, resides in tabancas or villages, produces primary goods for subsistence and for cash sales to both informal and modern sectors, and is extremely poor. The traditional sector creates very difficult challenges for externally offered or imposed public policy that is intended to raise its per capita income. Information gathered by the consultants suggests that rules operative in the traditional sector tend not to conform with market-based economic relations.

The market structure of Guinea-Bissau is based upon the characteristics of, and returns to, the major factors of production: land, labor, and capital. In the modern sector, lands for commercial agriculture (pontas) have been awarded to private commercial interests, called "ponteiros" via a concessions procedure. In the traditional sector, common lands are allocated to moranca (extended family) heads, usually by the tabanca head (called the "homem grande") whose authority stems from his clan lineage. Land cannot be sold, although in the modern economy, physical improvements on land can be sold and concessionary rights transferred. Consequently, although users of land in all sectors are motivated to allocate land to the most rewarding use under the circumstances, the sectors lack the discipline of competitive land markets to assure that land will be put to its "highest and best use." Moreover, the large extent of government control and the lack of a market for land in Guinea-Bissau tend to create a disincentive to conservation of forests and other land resources. With respect to labor, current labor laws appear to depress formal sector labor demand even though they are generally not enforced. In addition, the practice of free labor contribution within morancas tends to prevent traditional sector labor from developing its most productive use. With regard to capital, the supply of credit is very limited, in part due to the uncertainty surrounding collateral.

The characteristics of intersectoral factor movements, and of markets for goods and services, are the key variables affecting this report's findings with respect to the income effects of legal reforms. Factor flows take the form of migration and investment. With respect to rural-to-urban migration, policies that create jobs in the modern economy and cause a widening of urban-rural wage differentials can be expected to bring traditional sector populations to the cities in search of jobs. These shifts could improve welfare for the migrants. But if job access and urban infrastructure are inadequate for the tabanca migrants, then a decline in social welfare is possible.

Inter-regional investment can compensate for some of the problems associated with migration. Seeing higher profits in low wage regions, entrepreneurs -- and public policy-makers -- may invest in the rural areas either in the modern or the traditional sector, thereby bringing jobs to people. This has been happening in rural Guinea-Bissau with government providing land concessions to the *puntas*, which include both registered (formal sector) and non-registered (informal sector) farms. Also, there have been modern sector investments in agro-industry in the rural regions. The possibility of drawing modern sector financial resources into the *tabanca* economy itself is very small, however, due to limitations on finance and collateral.

Markets for goods and services exist in the formal, informal, traditional, and public sectors. The major points of entry for the public policy objective of raising the per capita income of Guinea-Bissau are the export-oriented primary goods and associated agro-industry sub-sectors (the critical growth sub-sectors). Expansion of these activities naturally centers on the formal sector, since the attraction of financing requires dependability of contracts as well as enforceable liens against capital as collateral. This would be especially important for agro-industry growth, which may have substantial capital requirements. However, government policy and the legal/regulatory framework in many cases restrain the formal sector rather than promote it. The other major point of impact for economic policy consists of informal sector markets. The informal sector's greater ease of entry allows it to play a major role in retailing and to provide various services that are important to both formal and traditional sectors, such as equipment repair and maintenance. The modification of laws to reduce transaction costs and ease formal sector entry would be desirable. The informal sector also assists the gradual absorption of rural migrants into the modern economy, and policies should strengthen this process. However, informal sector development policy needs to be part of a balanced multisectoral economic policy. Rapid growth concentrated in the urban formal sector tends to accelerate rural in-migration, often with deleterious effects on overall welfare.

The above considerations of factor flows and market structure indicate the pathways of direct and indirect benefits from legal reforms. Positive impacts of legal/regulatory changes on the modern (formal, informal, and public) sector include the following:

- replacement of formerly government-run sectors with private sector markets that can set prices in relation to long-term opportunity costs, thereby promoting more efficient resource allocation;

- reduction of uncertainty concerning quality, prices, and profits, thereby promoting credit, investment and trade;
- reduction of barriers to entry;
- reduction of transaction costs;
- incentives toward greater production and employment;
- increased access to international markets; and
- greater tax revenue.

These impacts can also lead to indirect or multiplier effects. Indirect effects on the traditional sector include:

Migration from traditional sector to urban informal sector, itself a function of formal sector investment in the urban economy;

Formal sector investment in rural regions (e.g., plantations and agro-industry) bringing jobs to tabanca labor and slowing the rate of rural to urban migration; and

Sales of traditional sector cash crops to the modern economy.

These three impacts in part determine traditional sector employment and per capita income. Additionally, indirect effects flow between the formal and informal sectors of the modern economy as follows:

Economic growth of the formal sector and, as a result, of the total income of the informal sector (together with the population of the informal sector as affected by rural-urban migration, this determines informal sector per capita income); and

New business formation in the informal sector and informal business transition to the formal sector.

There are also direct economic impacts of laws and regulations upon the informal and traditional sectors. Certain laws impinge on the informal sector, such as labor laws, but rules governing informal sector transactions, in practice, would be largely limited to custom rather than state law.

Direct economic impacts of laws and regulations on the traditional sector are essentially limited to customary law, but state law can legitimize customary law.

2. Economic Impacts of Legal and Regulatory Reforms

What precisely is the nature and magnitude of these legal/regulatory reform impacts? This section addresses more specifically the direct economic effects of the legal and regulatory reforms recommended in the legal analysis and, employing a framework for evaluating the impacts of reforms in one sector upon the economic welfare of another, assesses their indirect impacts. By analyzing the effects of legal and regulatory changes, and assigning an estimated value to these impacts, this section of the report provides the economic rationale for the prioritization of legal regulatory reforms set forth in the concluding part of the report.

The evaluation procedure begins by tracing through the causal relationships between reforms, direct economic impacts, and indirect or multiplier effects. A numerical estimate is made of the percentage change in sectoral income of an "average" unit or firm in response to the given legal or regulatory reform ("*sectoral unit income score*"). Each such score is attributed to one or more of the economic effect criteria described above, or to the resulting multiplier effect. The scores are on a zero-to three scale, where zero represents "no impact" and three is "high impact per unit." Rough estimates have been made of the share of GDP represented by each of the sectors. These sector size estimates ("*sector size scores*") are presented on a four point scale, with one representing "very small" and four meaning "very large." Sector sizes in Guinea-Bissau are scored as follows: urban formal sector - 4, formal agricultural - 2, agro-industrial - 1, urban informal - 2, traditional - 4. The sector size score in each case is multiplied by the sectoral unit income score. This provides an expected sectoral impact score, or "*total sector score*", produced for both direct and indirect impacts on each sector. These scores are given in Tables 5 to 15.

These impact measures are then added across sectors to give an overall evaluation for each legal or regulatory reform, and the overall results are presented in Table 16 (the "Summary Evaluation Table"). The total sector scores and the summary evaluation scores for the economy as a whole have a rough correlation with the expected magnitude of the increase in GDP resulting from the reform. In other words, the larger the ordinal number score, the larger the expected GDP growth. (The ordinal-scale scores do not represent exact percentage GDP increases, but only express orders of magnitude.) The results, summarized here but presented more fully in section III.C of

the report, suggest the relative importance of certain areas of the law to the critical growth sub-sectors of TIPS.

The two highest-impact areas are property rights and environmental law, scoring 30 and 29 points respectively. Three key economic issues arise from the ban on land ownership and the relative weakness of environmental law: efficient current land use allocation, use of land as collateral for credit, and conservation of land for future value. Reforms that foster an active land market, together with guaranteed long-term transferable usage rights, will encourage market discipline toward efficient allocation of land uses, and may allow land to serve as collateral for credit. With a land market that also capitalizes the resource (and location) value of land into land prices, there would also be less wasteful use of timber and other valuable attributes of land. These conditions for private market efficiency would enhance conditions for both domestic and international investment, particularly in the formal agricultural sector. Since land law and environmental law are interdependent in many aspects, they should be addressed simultaneously.

Indirectly, more efficient use of land and better access to credit will increase the productivity of agricultural land, which means higher incomes for land-holders. A large portion of land-holders likely reside in the two major cities, and so their increased incomes will enter the urban formal sector. This will increase income in the urban informal sector as well, inducing some rural-to-urban migration (partially offset by increased demand for farm labor). The traditional sector would likely experience moderate gains in per capita income.

The reform of commercial legislation, taken as a whole, has an equally important impact. Business registration and licensing, restrictive business practices, company law, and bankruptcy could usefully be considered together, since they represent interrelated commercial law concerns. The scores for these areas total 30 points. Reforms in these areas would impact the formation of small businesses. They would tend to increase the number of small firms in the formal sector, in large part by shifting a portion of all firms from the informal sector to the formal sector, but also by increasing the overall rate of new business entry. The question is, whether these reforms also will significantly impact aggregate income and employment and contribute to the improved sectoral distribution of income. This is more likely in the case of business registration reforms than of the other reforms. The gains from these reforms include increased access to export markets, greater competition on formal sector prices, and increased tax revenues. Direct impacts are expected to be greater in the formal than the informal sector, and greater in urban than rural

areas. Indirect impacts, including increased per capita income, would be modest in the urban informal sector, and minor in the traditional sector.

Other areas where reforms are expected to have significant economic impacts are tax law, conflict of laws, consumer protection and the law of obligations, which are graded at 14.5, 12, 7 and 6 points respectively. Developing conflicts of law rules that legitimize certain customary rights and dispute resolution mechanisms would give greater certainty to land rights and other traditional behavior, and support a longer-term orientation in economic decision-making. This would have significant benefits for the traditional sector. Increasing consumer protection, by reducing uncertainty regarding product quality, could impact both export and local demand for formal sector output, and would also have some indirect impacts via multiplier effects. Reform of the law of obligations to accord with current international norms and practices would tend to lower perceptions of risk and increase foreign demand. These last benefits would primarily affect rural formal sector output, with an additional positive effect on employment and demand in the traditional sector, and a moderate impact on the urban economy.

Labor law reforms (4 points), and reforms in other areas of commercial law not mentioned previously are likely to produce much smaller impacts than the reforms discussed above.

C. RECOMMENDATIONS

The economic analysis indicates that property (land) law, environmental law, tax law, conflicts rules, and the specific components of commercial law mentioned above should be the priority areas for the legal reform program. A question arises, however, as to whether the reforms proposed and supported in the analytical sections of the report are technically and politically feasible given existing in-country constraints. These constraints are both technical and political. Technically, the scarcity of human resources will require outside support to serve as catalyst, to monitor on-going work, and to provide material resources. As far as political feasibility is concerned, most of the recommended reforms appear possible, except that any change in constitutional provisions governing land-holding would be difficult at this time.

Based on the analysis in the report, following is a summary of the major recommendations for legal and regulatory reform, in order of priority:

Property Law: Strengthen efforts to improve provisions for private "ownership" or control of land, where feasible.

Environmental Law: Enact an environmental protection code.

Tax Law: Simplify the existing tax structure, with emphasis on drafting a new Tax Code. All export taxes should be eliminated.

Business Registration and Licensing: Eliminate the requirements for notarization and publication in the *Boletim Oficial* for new companies. Review all licensing procedures; retain only those essential to some important public purpose.

Interface between Civil Law and Customary Law: Amend the Civil Code to provide that (in most cases) the personal law shall be that of one's tribe or ethnic group. Where a contract does not contain a choice of law clause, it should be controlled by the law of the tribe if the parties are from the same ethnic group and if the contract is to be performed on the land or within the region controlled by the tribe. Otherwise, the Portuguese-derived civil law would apply. Change the Code of Civil Procedure to legalize a system of tribal courts or ethnic decision making institutions, and to define the scope of their jurisdiction.

Restrictive Business Practices: Establish legislation on unfair competition and restrictive business practices separate from intellectual and industrial property laws.

Consumer Protection: Pass a consumer protection code.

Law of Obligations: Enact legislation on leasing, and adhere to the 1980 United Nations Convention on the International Sale of Goods.

Business Entities: Authorize the creation of a one-person company with limited liability; enact legislation on micro-businesses with simple registration, accounting and tax requirements; provide for establishment of a closely held corporation which could be created by two or more persons with direct management by the shareholders; improve protection for minority shareholders; and enact legislation on mergers, holding companies and dissolution.

Bankruptcy: Amend the Bankruptcy Law to remove the blanket prohibition against a bankrupt's engaging in business activity, and establish procedures to show bankruptcies in the Commercial Registry.

I. INTRODUCTION

A. PURPOSE AND PLAN OF THE REPORT

Any realistic attempt to foster growth across sectors of the economy in Guinea-Bissau must grapple with the legal and regulatory framework. Therefore, a critical issue now confronting Guinean policymakers concerns the strategy for reform of this system, i.e. which of the laws, regulations, and institutions comprising the system should be considered as priority areas for reform. The purpose of this report is to provide a preliminary roadmap, based on combined legal and economic analysis, for this reform process. The analysis presented in this report aims to assist Guinea-Bissau and the United States Agency for International Development (USAID) in identifying and assessing laws and regulations affecting private economic activities in the critical growth sub-sectors considered in USAID's TIPS (Trade and Investment Promotion Support) Project. The TIPS critical growth sub-sectors are the "production, processing and marketing (domestic/export) of rice, cashews, fruits, vegetables, and forest and fisheries products and commerce and services to support same."

This report therefore formulates a rationale, and outlines a plan and schedule, for addressing legal and regulatory reforms in Guinea-Bissau that are supportive of increased trade and investment. On the basis of the legal-economic analysis, and an assessment of factors affecting the feasibility of the types of reforms considered in the analysis, the report presents 23 prioritized recommendations for legal and regulatory reform in 12 areas. The report is not intended to be an in-depth analysis of the economic laws of Guinea-Bissau. It rather reflects the use of a set of economic and legal criteria to:

- screen existing laws;
- identify those most in need of reform;
- describe the economic, behavioral and other consequences of current laws and regulations, indicating whether or not these have been enforced; and
- justify the proposed revisions and additions.

In a more general sense, this report brings together legal and economic perspectives in order to assist Guinean and USAID planners in gaining greater understanding of Guinean laws and

regulations as components of a larger network of incentives affecting the behavior of economic actors. Studies published in recent years by Hernando de Soto, the "public choice" theorists, and others, have begun to explore the ways in which laws and regulations structure the market through incentives and disincentives. The present report attempts to apply this insight to the context of Guinea-Bissau by analyzing the provisions of relevant laws; by examining the market structure and the behavioral linkages through which the effects of economic laws and regulations are carried across multiple arenas of economic activity; and finally by assigning, on the basis of the legal and economic analysis, weights and priorities to those legal/regulatory changes which promise the most dramatic and positive incentive effects. Though this kind of analysis is critically important to the formulation of policy, the guidance it can offer is only approximate. Conclusions about the incentive effects of working-level changes in law and regulations, and about the resulting behavior of indirectly affected actors, are bound to contain an element of speculation. However, the authors of this report submit that it offers useful guidance for planning the reform of market institutions in Guinea-Bissau.

As for the plan of the report, this first part previews the methodology used herein and then provides a brief overview of the legal and economic system of Guinea-Bissau. Part II of the report contains an analysis of the existing laws that have a direct impact on the economic sector, including commercial laws and other legal areas that affect the private sector, such as tax, labor and environmental laws, and suggests specific recommendations for legal reform. Part III presents an overview of the market structure of the economy of Guinea-Bissau, and analyzes the expected economic impacts of legal and regulatory reform, both direct and indirect. It also considers the implications of the economic analysis for the critical growth sub-sectors of TIPS. Finally, the conclusions in Part IV contain a series of prioritized recommendations based on the analytical and feasibility criteria described in the methodology.

B. METHODOLOGY

Considering that modern business practices in Guinea-Bissau are based on laws of Portuguese origin, a comparative law approach has been utilized for this report, aiming at both civil law and common law readers. The text reflects civil law structure and concepts in common law language, rather than literal translation of civil law terminology. Whenever this was not possible, the original terminology was kept and explained by means of its equivalent in common law.

The comparative law approach is also reflected in the consultants that participated in this joint effort. The USAID/Checchi team, comprised of lawyers from Brazil (Ivon d'Almeida Pires Filho) and the United States of America (Beverly Carl), had local counterparts from the Center for Legal Studies (Centro de Estudos e de Apoio às Reformas Legislativas) of the Bissau School of Law (Faculdade de Direito de Bissau). There were also law professors and attorneys from Guinea-Bissau (Carlos Henrique de Jesus Pinto Pereira, Armando da Silva Procel), and Portugal (Ana Maria Peralta), who provided summaries of many of the legal areas that have been considered in this report.

Besides comparative law, this report also reflects a multidisciplinary approach spanning the fields of law and economics, aiming to provide an analysis of the behavioral and economic impact of laws. An economist from the United States of America (Arthur Silvers, Professor of Public Administration and Policy, University of Arizona) participated in the USAID/Checchi team for this purpose. The team is much indebted to insights and comments provided by anthropologist Eve Crowley and World Bank financial consultant Michael Crowe.

The areas of law addressed in the report were determined by the collective expertise of the team, whereas the identification of existing constraints in the legal system resulted from the team's evaluation of key legal provisions, the legal summaries provided by the local counterparts, and actual problems perceived by government officials, local attorneys and judges, and members of the private sector. A list of those interviewed and a summary of the meetings have been attached as Annexes A and B. The legislation cited throughout this report is listed in Annex C; requirements for notarization, registration and licensing of a new business entity were listed in Annexes D, E and F; and summaries of the legal areas that have been considered in the text were attached as Annexes G to V. Table 1 presents the main sources of law in civil law and common law jurisdictions.

The bases for the economic evaluation of legal and regulatory reforms were:

- (1) translation of changes in legal variables into economic variables (e.g., elimination of licensing fees eases market entry) and evaluation of the direct economic consequences of these changes;

- (2) development of an intersectoral impact analytic framework to evaluate the indirect impacts of legal and regulatory reforms (largely incident to the formal sector); and
- (3) provision of ordinal-scale weights for the assessment of the overall impact of legal and regulatory reforms.

The major issues covered in this report and its recommendations include:

- the content of economic laws and regulations;
- the economic effects of current laws and regulations;
- the private sector entities likely to benefit from reformed laws and regulations;
- the implications for the formal, informal and traditional sectors;
- the technical and political feasibility of proposed reforms; and
- the estimated level-of-effort required by Guinea-Bissau experts, assisted by USAID-funded consultants to formulate and carry-on the proposed reforms.

C. OVERVIEW OF THE GUINEAN ECONOMY AND LEGAL SYSTEM

1. Economic Context

Guinea-Bissau is a small nation of about 1,000,000 people on the coast of West Africa. Its economy yields extremely low income per capita, estimated at \$180 in 1992. This reflects a number of attributes of the economy, including its largely rural character (85 percent of economically active population in agriculture¹) with extremely low human capital (69 percent illiteracy rate).

A succession of hegemonic regimes that were economically debilitating further reinforced Guinea-Bissau's status as one of the five most impoverished nations in Africa. The first of these regimes was Portuguese colonialism which emphasized benefits for the metropolitan center rather than the development of Guinea-Bissau's human, physical and institutional infrastructure. Following a

¹. This figure refers to the labor force in rural activities, not the rural population. The census data use the term "Economically active population" instead of "labor force," and this should not be confused with the term "population."

lengthy revolutionary war ending in 1974, Portuguese rule was replaced with Soviet/Cuban hegemony. The ensuing Marxist regime promised to bring development with equitable distribution, but succeeded only in further dismantling the nation's frail economic infrastructure. This regime was terminated by the Guinean government in 1986, and attempts are now being made to bring to the nation an open market economic system with reduced governmental interference in operating and regulating the economy. Numerous development-assistance agencies from the developed world are currently involved, bringing funds, technical assistance and their own economic perspective. Fortunately, although an initial period of rapid economic growth from 1987-1990 has been followed with an attenuated growth rate, significant progress is evident.

Enduring and surviving these regimes has been a traditional society consisting of more than twenty different ethnic-language groups. They practice an essentially ancient agricultural technology that uses neither machines nor, to any significant extent, animal-traction. For the most part retaining strong ethnic-religious homogeneity, they dwell in villages (called tabancas) containing many extended family male-headed compounds (morancas) with straw-thatched huts; in the Fula and Mandinga ethnic groups, one such hut is provided for each of a husband's several wives and children.

From their generally secure base in subsistence agriculture, these people ebb and flow into the cash economy of the modern world when either relative prices have made the contact attractive, or when military disturbances have made continued tabanca-dwelling untenable. Complementing these price-dependent links with the modern economy is a well-articulated cash and barter system for retailing a portion of their production that these ethnic groups have developed over the centuries.

As in any other region of the world, urbanization is an important attribute of this economy, with the recent annual urban population growth rate of 5.2 percent being significantly higher than the 2 percent annual rate for the nation as a whole. However, the cities are not neo-colonial export-import outposts of the developed nations; their demographic composition generally reflects the ethnic character of their adjoining hinterlands. Bissau, the capital city, has a population of 200,000 and is Guinea-Bissau's port city; Bafata, the second largest, has about 20,000 people.

Agriculture is by far the largest sector, with rice being the largest crop. Cashews are the largest export product, and fishing licenses are the single largest source of government revenue.

2. Legal System

The legal and regulatory system of Guinea-Bissau is a composite of the laws and regulations that have accumulated and altered over many generations of successive regimes. Beginning with the traditional legal system, the Guinean legal structure experienced the parallel addition of the Portuguese legal system that became frozen in place with independence in 1973. It continued to change with the additions and amendments of the socialist regime, and is again being transformed with laws more permissive of free market economics. Obviously, the system is complex, and much of the amalgamated legal structure that impedes free market involvement is still very much in place.

Portuguese law, as of the date of independence of Guinea Bissau (September 24, 1973), remains in effect in the country, except to the extent it is inconsistent with the constitution, or subsequently enacted legislation. The Portuguese -- and by inheritance, the Guinean -- legal system is based on neo-Roman law as reflected in the Napoleonic Codes of the early 19th Century and modified by later German thinking. Since the organization, terminology and methodology used in neo-Roman civil law is so different from that of the Anglo-American common law, a few words of explanation seem appropriate for the reader whose life experience has been primarily in a common law nation.

The term, "civil" law has multiple meanings. First, it may be used to distinguish between common law and civil law. These are the two great legal systems in the world. In general, one can expect to find the common law system in nations which were former colonies of Great Britain--such as, Canada, the United States, India, Kenya, Nigeria, Malaysia and Australia. Most the rest of the world tends to follow the civil law model; this includes not only continental Europe and French, Spanish and Portuguese-speaking Africa, but also Japan, Latin America, Taiwan, and Thailand. Although Islamic nations may follow *Sharia* law in matters of family law, many look to civilian notions to control their modern commercial sectors. Even socialist nations, like the Soviet Union and East Germany, built their socialist legal structures upon a base of civil law. Consequently, when Guinea-Bissau was under marxist influence, its basic legal structure was still predicated upon the underlying Portuguese foundation.

Although the results reached by the two systems are often similar, the way in which they are arrived at is completely different. Likewise, although significant convergence between the two

systems is now being achieved in the European Community, that convergence seems to be more in the nature of the practical results obtained rather than in conformity of legal concepts. The process in Europe is not designated as "unification" of law, but rather as "harmonization" of law.

Second, within both systems, the term "civil" law is also used to differentiate rules of contract, delict, family, and related areas from criminal or penal law. Finally, within the Neo-Roman or civil law system, the phrase "civil" law is a term of art used to distinguish certain rules from "commercial law". Typically, civil law was placed in one code and commercial law in another.

It has been said that civil law is a code system and common law is based on cases. This is an oversimplification-- with an element of truth in it. The heart of the civil law system is a set of codes. The common law system did extract its principles out of plethora of judicial decisions handed down over centuries. Nonetheless, in many common law jurisdictions (California, New York, New Mexico) extensive and detailed sets of legal codes exist. Conversely, many civil law jurisdictions examine decisions of leading judges as a source of valuable experience in formulating and applying norms. For example, even before the entry of the United Kingdom into the European Community, the European Court of Justice was citing United States antitrust cases as an aid in developing EC anti-monopoly concepts.

Despite these recent trends in harmonizing and borrowing, common and civil law systems are different. Civil law is cast in terms of an a priori, rationalized system. Common law, on the other hand, is not predicated on any such organized system. Subsequently, common law scholars may analyze case decisions and endeavor to impose some structure on the results reached by the courts, but the notion of an overarching legal system is foreign to the common law mentality.

The substantive natures of the codes in the two systems bear little resemblance to one another. A civil law code is intended to be complete and to cover, within its purview, all possible situations which may arise now or the future. (Of course, civilians recognize that amendments and updating are required at times, but, in theory, a code should completely cover the subject with which it deals.) Common law codes make no such claim of comprehensiveness; rather they are mere skeletons which must be fleshed out by the case law. Common law codes frequently cover a narrow range of material with great specificity and detail (see, e.g., the provisions on damages for contractual breach under the Uniform Commercial Code).

Civil law codes are written in broad general terms. Abstractions predominate. Solutions are obtained by deductively reasoning down from great principles. For instance, the essence of Portuguese/Guinean tort law is contained in Article 483 of the Civil Code:

"One who intentionally, through fault, or by an illegal act injures another or his interest ... shall indemnify such person for damage caused by this conduct."

The common law of torts, in contrast, developed out of thousands of case decisions dealing with a variety of factual situations, ranging from pigs and cows, through cars and trains to computers and space shuttles. The principles which have evolved have been achieved through inductive reasoning and tend to be highly practical in nature. Likewise, the result is a mass of complex norms covering a myriad of situations with minute detail.

The division of legal material is totally different in the two systems--which can cause enormous confusion. Civil law is basically divided into public law and private; private law in turn subdivides into primarily civil law and commercial law. Common law, in contrast, is separated into torts, contracts, property, business associations, decedents' estates, etc. These topics are also covered in civil law, but within one of the larger categories of civil or commercial law. (See Table 1.)

The vocabulary of the two systems is again quite distinct. Terms that seem obvious to a civilian--"juridical act", "objective or subjective responsibility", "obligation"--have no meaning to a common law trained lawyer. Likewise, the terminology of the common law--"fiduciary duty", "torts," "unconscionable contract"--are mysteries to the civil law jurist. Worse, often the two systems use the same word to mean quite different things. For instance, "labor" law in the United States bears little relation to labor law in the civilian system of Guinea-Bissau.

In this report, we will endeavor to indicate the closest possible legal equivalent in the two systems. The reader must, nonetheless, be cautioned that Guinea-Bissau's formal legal system is rooted in the Portuguese civil law and extreme care should be exercised when referencing over to any common law experience or institution.

As the following discussion will note, there are gaps in the present legal system, but some of these lacunae may not be as serious as first appears. What an individual from a common law tradition may perceive as a sketchy law may be quite adequate when viewed within the civil law context. Because of the way in which civil law operates with general norms, even application of the 19th century codes may be less deleterious than an outsider might think. Although legal reform is desirable, advisers should avoid burdening this young nation with excessively detailed or complex rules. (See Table 2 for an overview of the coverage of existing laws in areas considered in this report.)

Considering the fact that a substantial portion of Guinean population is subject to ethnic customary law, a chapter on the interface of civil law and customary law was included after the analysis of the formal legal sector.

Table 1 - Main Sources Of Law*

Subject	CIVIL LAW			COMMON LAW		
	Civil Code	Commercial Code	Separate Legislation	Cases	Codes	Separate Legislation
Torts	x			x		
Contracts	x			x		
Sales/Personal Property	x				x	
Real Property	x			x		
Mortgages	x			x		
Liens, Pledges	x				x	
Company Law		x	x		x	
Bankruptcy		x**			x	
Negotiable Instruments		x	x		x	
Securities (stocks, bonds)		x			x	
Intellectual Property		x			x	x
Maritime Law		x		x		
Tax Law			x		x	
Labor Law			x	x		
Consumer Protection			x	x		
Environmental Law			x			x

NOTES:* Materials may be found simultaneously in more than one source.

** In Guinea-Bissau, Bankruptcy law is found in the Code of Civil Procedure, although civil law systems usually codify this in the Commercial Code.

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Table 2 - Legal Sector Enactment/Enforcement Indicators

	LAW/REGS	INCOMPLETE	RESTRICTIVE	ENFORCEMENT
LEGAL SECTOR				
Business Entities	Y	Y	Y	Y
Business/Registration Licensing	Y	N	Y	Y/N
Bankruptcy	Y	N	Y	N
Negotiable Instruments	Y	N	N	N
Financial Institutions	Y	N	Y	Y
Insurance	Y	N	N	Y/N
Domestic/Foreign Investment	Y	N	Y	N
Intellectual/Industrial Property	Y	Y	-	N
Maritime	Y	Y	-	Y
Tax	Y	Y	Y	N
Labor	Y	Y	Y	N
Contracts	Y	Y	N	Y
Torts	Y	N	N	Y
Secured Transactions	Y	N	N	Y
Consumer Protection	N	Y	N	N
Environmental Protection	N	Y	N	N

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II. LEGAL ANALYSIS

This section of the report examines those areas of law in Guinea-Bissau that the consultants deemed most relevant to economic activity generally, and to activity in the critical growth sub-sectors more particularly. The order of this discussion, which is reflected in the economic analysis, follows the logic of Guinea-Bissau's civil law categories, not the order of legal reform priorities. The order of priorities is fully presented in part IV of the report. Through their own experience of the incentive effects of different legal regimes on business growth, and in the course of their research in Guinea-Bissau, the consultants developed the set of economic effects criteria listed below to guide the selection of legal fields for study and to inform the analysis of the economic effects of reforms in those fields. These criteria are discussed further, along with their accompanying multiplier effects, in the economic analysis of part III of the report.

The criteria are as follows:

1. New business entry and competition resulting from the lowering of entry barriers.
2. More efficient resource allocation as a result of rules providing for efficient use, imposition of true costs, and greater access to factors of production.
3. Reduction of transaction costs, removing a drag on business activities.
4. Increased certainty and improved risk management, leading to more business risk-taking.
5. Increased business activity, leading to greater employment and/or employee income.
6. Improved access to international markets through rules making trade less costly and offering greater certainty of quality and profitability.
7. Increased tax revenue, allowing for greater public consumption and improved implementation of laws and regulations.

These criteria are matched in a matrix with the relevant fields of law in Table 3 below. The matrix previews the later discussion of economic effects and legal reform priorities, and should facilitate decisions as to reform strategy under the TIPS Project.

Table 3 - Laws and Direct Economic Effect Criteria

Criteria: <hr/> Laws	Business Entry/ Competition	Resource Allocation	Transaction Costs	Risk Management	Demand Production Employ.	International Market Access	Tax Revenue
Property		x			x		
Company	x			x	x		
Business Registration/Licensing	x		x		x	x	x
Bankruptcy	x				x		
Negotiable Instruments			x				
Financial Institutions		x					
Insurance				x			
Investment				x		x	
Intellectual Property		x				x	
Restrictive Business Practices	x	x					
Maritime				x		x	
Tax		x			x		x
Labor		x			x		
Obligations			x	x		x	
Consumer				x			
Environment		x					
Conflicts of Law				x			

A. CONSTITUTIONAL LAW: PROPERTY RIGHTS

Law n° 1/73, which was enacted by the People's National Assembly immediately after the Constitution of 1973, provided that the Portuguese legislation from the time of independence would continue to apply in the Republic of Guinea-Bissau, as long as not contrary to national sovereignty, the new constitution, new laws, and the principles and objectives of the Party (PAIGC). For this reason, many of the former colonial laws continued to be enforced locally. The revolutionary constitution of 1973 was, subsequently, replaced by the 1984 Constitution, which is presently in force as amended by Constitutional Act n° 1/91 and, more recently, by the National Assembly held in February 1993 (not yet published).

The 1984 Constitution kept the ban that existed from the previous constitution and Law #4/75 on private ownership of the soil, subsoil, waters, mineral, forest and energy resources, industrial production, infrastructure, transportation, information and communication, banking and insurance companies (article 12). These resources could be developed and the services performed by the private sector under government concession, as long as for the public good and benefit of social welfare.

Although private ownership of both urban and rural land has been banned, individuals sell and lease urban properties, since the ban on private ownership of land does not include buildings and other improvements. It is not uncommon to see ads for the sale of rural farms, called "pontas", even though the land itself is not private. This is possible by selling the "improvements" to another, who then can obtain the transfer of the concession from the government.

The Constitution also centralized in the government the control and planning of the economy, including foreign commerce and investment (article 13). Foreign investment could be authorized by the government as it deemed necessary to the economic and social development of the country. As far as direct private sector ownership was concerned, only cooperative associations for agricultural production and for the production of consumer goods and artwork was permitted.

In recent years, many land concessions have been granted to individuals and companies. Private businesses have boomed in all sections of the economy, principally in the export/import area, as the government has increasingly promoted the growth of a free market economy. The limitations set forth by the 1984 Constitution have been disregarded by the government and the private sector alike.

The constitutional revision of 1991 removed many of these constitutional constraints to the private sector, primarily by changing, among other provisions, articles 11 through 13 of the 1984 Constitution. Article 11 establishes now the concept of a market economy and the coexistence of public, cooperative and private property in Guinea-Bissau. Article 12 does not consider, any longer, industrial production, transportation, information and communication, banking and insurance companies to be under state ownership. Finally, the new article 13 does not provide that the national economy and foreign commerce is controlled by the State, although the State can still grant concessions, regulate foreign commerce, control foreign exchange operations, issue currency and promote foreign investment. Nevertheless, land, which includes the soil, subsoil, and its mineral and forestry resources, was kept under State ownership, which can continue to grant concessions for its use.

Although it does not appear feasible at the moment (see Section IV.B.2 below), some form of constitutional or statutory provision for the private "ownership" of land could have dramatic benefits for investment and national income - as shown in the economic analysis part of the report. Short of this, assisting efforts to extend and protect private control of land use could produce some similar benefits without formally authorizing private ownership.

B. COMMERCIAL LAW

In a civil law system, the phrase, "commercial law" is a term of art with precise legal consequences. In a common law nation, the phrase "commercial" law has no technical meaning. Even the word, "commercial", as used in the name of the uniform Commercial Codes found in the United States, does not have a precise technical or legal meaning.

In civil law system, commercial contracts (e.g., between two companies) are governed by the Commercial Code. On the other hand, an agreement by an individual to sell his car to another individual would not be considered "commercial" and would be controlled by the Civil Code. A contract between an employee and his company would be subject to the Labor Code, not the Commercial Code. In common law no such distinction exists: a contract is a contract. The Uniform Commercial Code (in effect in the 49 common law states of the United States) applies, with few exceptions, to everyone.

The 1888 Commercial Code applicable to Guinea-Bissau endeavored--for its time--to be complete. It covers, for example, commercial contracts; maritime law; bankruptcy; company law (equivalent to corporations and partnerships); securities (stocks and bonds); stock markets; accounting standards; and negotiable instruments. (In contrast, the so-called "Commercial" Code in the United States deals with little more than sales, negotiable instruments, and secured transactions.)

Nonetheless, the Commercial Code has been extensively supplemented, for example, by the Law of April 11, 1901 on Companies with Quotas; Decree No. 1,645 of June 15, 1915 authorizing corporations to issue preferred shares; by Decree Law No. 49,381 of November 15, 1969 on Auditing of Corporations; and Decree Law No. 397 of September 22, 1971 on Convertible Debentures. There is a real need for integration and compilation of all these laws, as well as a sophisticated indexing system; computerization could be invaluable in this process. Since Guinean independence, the commercial law of Portugal has been significantly modernized by legislation on one-person corporations, company mergers, holding companies, capital markets law (securities regulations), leasing, institutional investors, and consumer protection. Guinea-Bissau has no laws on these topics.

The very comprehensiveness of the Commercial Code makes it an unwieldy document to update and integrate, not to mention the difficulties of moving such massive changes through a legislature. Hence, it is strongly urged that for any revision process, the Commercial Code be broken into its component parts or chapters, with each one treated separately. Thus, the old bulky Commercial Code would be replaced by a series of codes dealing with discrete topics, such as a Code on Company Law, a Code on Insurance Law and a Code on Consumer Protection. The

trend in modern civil law jurisdictions is to divide the Commercial Code in just this manner.² (See Annex G).

1. Business Entities (Company Law)

If a company is characterized as "commercial", its activities are governed by the Commercial Code. Other types of companies and associations are subject to the rules of the Civil Code. A firm is considered "commercial" if it engages in commercial activities.

The Guinea-Bissau law provides six alternative forms for business associations: sole proprietorship, "sociedade en nome colectivo," "sociedade em comandita," "sociedades por quotas," "sociedades anonimas" and cooperatives. (See Annex H).

a. Sole Proprietorship

One operating a business as a sole proprietor cannot limit his liability. Furthermore, there is no micro-business legislation that would allow an individual or a small partnership to register and operate with minimum accounting and tax requirements. Reforms in these areas would promote the growth of very small businesses and the entry of "informals" into the formal sector of the economy.

² Although it is beyond the strict scope of this report, any commercial law reforms must be supported by functional dispute-resolution mechanisms. To our question whether Guinea-Bissau should establish a system of commercial courts, the response was that a system of commercial arbitral tribunals would be preferable. Use of arbitration would avoid the long delays inherent in the court system. Since the arbitrators would be selected and compensated by the parties, their indemnification levels could be sufficiently high to attract well qualified people.

Guinea-Bissau could usefully examine several models for arbitration statutes from other nations. Details of arbitration procedure will need to be carefully spelled out by legislation--e.g., division of costs, language of arbitration, method of selecting arbitrators; creation of arbitral panels, etc. If arbitration is to be effective, it is essential that the right to appeal from arbitral awards be severely limited. It is further suggested that Guinea-Bissau ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

b. Sociedade em Nome Colectivo

This is similar to a partnership in common law. It consists of two or more members, who do not enjoy limited liability. Rather the members are fully and personally liable for any debts of the association. At least two members are required and all members must participate in the management of the firm. Employed mainly for family operated businesses, it is a form rarely used today.

c. Sociedade em Comandita

This entity is similar to a limited partnership in the United States. Its members are divided into two categories: managing or general partners and limited partners. The limited partners may be undisclosed and are liable only to the extent of their investment; they may not participate in the management of the firm. The managing or general partners are subject to personal liability. Interests in a comandita partnership may be represented by shares of stock (sociedade em comandita por açções), but this is not necessary. Few businesses currently use this form.

d. Sociedade por Quotas

The most popular form of business organization in Guinea-Bissau today, this partnership with quotas limits liability of its owners to the amount of their invested capital provided it has been fully paid in. Their interests are not represented by certificates of ownership, but simply by a quota interest in the company proportionate to the member's investment. These quotas may be freely transferred, unless the legal charter of the company provides otherwise.

These companies must have a minimum capital divided into quotas. At least 50% of the capital must be paid in at the time of formation. They may be managed by persons who do not have to be quota holders. Usually, the largest shareholder acts as the managing partner. Financial aspects of such firms are subject to control of an Internal Auditing Council (Conselho Fiscal).

e. Sociedade Anônima

Similar to a corporation in U.S. law, a sociedade anônima allows the liability of its owners to be limited to the value of their shares. The shares may be either bearer or nominative. At least 10%

of the capital must be paid in at the time the corporation is formed. The capital may be raised through public subscription.

To organize a corporation requires a minimum of ten shareholders. The governing bodies required for corporations are: a Board of Directors, a Public Assembly (Shareholders' Meeting) and an Internal Auditing Council (Conselho Fiscal). The Conselho Fiscal is supposed to protect the interests of all the shareholders. Since, however, the Conselho is elected by the majority shareholders at the Stockholders' Meeting, the possibility always exists that the Conselho, together with existing management, may take actions adverse to the interests of the minority shareholders.

The right in the shareholders to inspect the books of a company is not guaranteed; thus, it may be difficult for minority shareholders to protect their interests. (In California, any shareholder, on written request, can demand to inspect the books at any reasonable time for any reasonable purpose; in Texas, a stockholder who has held his shares for at least six months, or who holds 5% of the company's shares, can inspect the books on written demand). The law of Guinea-Bissau does permit an investigation of the books upon petition of stockholders representing at least 10% of the shares, if there is reason to believe that "grave irregularities" have occurred (Decree Law 49381 of November 15, 1969, art. 29). It should be noted this requires a court order; moreover, it may not be easy to prove possible irregularities, nor to secure the 10% consensus needed to bring an action. Brazil has lowered this percentage requirement to 5%.

f. Cooperatives

Governed by Articles 207 ff. of the Commercial Code, cooperatives are not really a distinct form of business organization; rather they must be formed as a partnership, limited partnership, corporation (art. 105) or a partnership with quotas (Law of April 11, 1901 (LSQ[8])). A minimum of 10 members is required to form a cooperative. The amount that can be invested by any one owner in a cooperative is restricted. The shares are nominative and the right to transfer them is limited. Each member has only one vote. The capital of a cooperative is variable and the number of members unlimited. A member's liability is limited to the value of his share. Cooperatives are exempt from stamp taxes and from taxes on dividends and interest.

g. Some Areas for Reform of Company Law

(i) Empresa Individual de Responsabilidade Limitada

There is currently no way for a one-person business to limit its liability. In light of the large number of small businesses in Guinea-Bissau, the one-person corporation (empresa individual) would seem particularly appropriate. This device, with which the U.S. and an increasing number of European jurisdictions have experience, permits the separation of one's personal holdings from those of the corporation. If the business fails, one's personal assets would not (in normal circumstances) be at risk. There is a question whether the costs and formalities involved in their formation make the one-person corporation worthwhile in Guinea-Bissau, since the vast majority of merchants currently have few assets to put at risk either way. However, the potential future gains from this change (see part III.C.2) would likely justify the effort, particularly if legislation on micro-businesses, with simple registration, accounting and tax requirements, is enacted to allow formal sector entry and growth without existing formal sector burdens.

(ii) Sociedade Anônima Fechada

Some of the existing rules on corporations are desirable for larger, public companies, but unnecessary for small, closely held firms. Thus, consideration should be given to creating a closed corporation which: (1) would not require ten members, but which could be created by two or more persons and (2) which would be operated directly by the shareholders without the intervening complexity of shareholder meetings and boards of directors.

(iii) Mergers and Dissolution

Provisions need to be added on reasons for dissolution and on procedures to be followed in the event of a dissolution. Mergers and holding companies also need to be authorized and controlled

(iv) Securities Regulation

There are no laws governing the issuance of securities by public companies. At the present stage of development, such laws are probably unnecessary. Some time in the future, however, creation

of a legal structure to promote development of capital markets may be desirable. The Brazilian Capital Markets Law could offer a useful model here.

(v) Institutional Investors

An important source of finance for companies can be the institutional investor. An example of the institutional investor is the mutual fund which collects money from a large number of small investors and reinvests in a diversified group of companies. Other examples include insurance companies, which need to invest the premiums they collect, and pension funds, which typically invest in both debt and equity obligations. Ensuring public safety in these companies calls for complex regulations to delineate the duties and obligations of those handling these large sums.

(vi) Other Gaps

Rights of minority shareholders could be spelled out with more care; obligations of controlling stockholders to the company and to the other shareholders should be established; and agreements between or among stockholders regulated.

2. Business Registration and Licensing

To operate a new company legally in Guinea-Bissau, the organizers must undergo a complex process of registration and licensing. The provisions of the Portuguese Commercial Code have been replaced by Decree-Laws #42644/59 and #42645/59; which regulate the registration of business activities.

A 1990 World Bank study (*Tax Policy and Tax Administration in Guinea-Bissau*) has concluded that 75% of the businesses operate without licenses. Doubtlessly, an even higher percentage carry on business outside the registration system.

a. Registration of Companies

The first step toward registering a new company is to secure a Negative Certificate from the Commercial Registrar's office affirming that no other company is using this name. That certificate must be prepared on officially stamped paper (i.e., with an authorized watermark).

Likewise, an affidavit must be obtained from the Office of Civil Identification stating that none of the founders or managers has a criminal record. At least 50% of the company's authorized capital must be deposited in a bank and proof of such deposit obtained. An attorney should be used to prepare the "estatutos" (equivalent to the Articles of Incorporation and the by-laws in the United States). At this point, notarization according to the Notary Code (Decree-Law #47619/67) becomes necessary.

(i) The Notarization Process

Notaries in civil law countries should not be confused with notary publics in the United States. An American notary only authenticates signatures; often secretaries, these notaries require no special training. Usually, a notary public in a civil law jurisdiction is either a lawyer or has received substantial legal training. Considered an officer of justice, he has a key role to play in ensuring that all legal requisites, especially formalities, have been satisfied vis-a-vis certain documents considered to be of major importance, such as wills. Guinea-Bissau has one fully qualified notary who received three years of law school education in Cuba. Three other notaries in the provinces outside Bissau are qualified only to verify signatures.

Organizers of a new company in Guinea-Bissau will have to present the following documents to the notary:

- (1) The negative certificate regarding the company's name;
- (2) The certificate concerning the lack of a criminal record;
- (3) Proof of deposit of 50% of the capital in a bank;
- (4) Identity cards or passports of the organizers;
- (5) The "estatutos" of the company.

Most of those documents will have to be prepared on stamped paper or carry the appropriate stamps.

The Notary must record the estatutos in the Notarial Records. The law requires that his copy of these estatutos be made by hand. He next prepares a "Certidão Parcial para Publicação," as evidence that the estatutos were legally recorded in the Notarial Registry; the "Certidão Parcial" contains key facts, such as the company's name and its location in the Notarial Registry. The "Certidão Parcial" is then taken to the "Ministério da Função Pública" for publication in the "Boletim Oficial." After the "Certidão Parcial" has been published, one can request the Notary Public to issue a "Certidão Integral" which provides proof that the company was duly constituted.

All these procedures involve fees with complicated calculations. Notarial registration fees vary according to the business capital (2% up to 5 million PG, 1.5% from 5 to 10 million PG, 0.6% from 10 to 20 million PG, and 0.2% on the amount above 20 million PG, plus an additional 20% of the value of the fee is charged as personnel surcharge). Additional costs consist of smaller fixed fees for all the required steps of the registration process, such as the requirement of registration, the act of registration itself, and the issuing of the certificate of registration. The total amount of charges is not high, but the process is time consuming. Stamps and often stamped paper must also be obtained; if the agency is out of stamps or stamped paper, further delays can occur.

In theory all the above steps should have been completed before one attempts to register the company in the Commercial Registry. However, because publication of the Boletim Oficial is several months behind, an informal practice has arisen allowing interim registration if the organizers can produce a declaration from the Ministério da Função Pública that the Certidão Parcial will be published at a specific date.

(ii) The Commercial Registry

Now the company must be formally registered in the Registry for Buildings, Commercial Companies and Activities, and Automobiles (hereafter referred to as the "Commercial Registry"). To do so, one must present the Notary's Certidão Integral, showing the firm has been legally formed, and a copy of the publication; or, usually, the Notary's Certidão Parcial with the declaration of publication at a future date issued by the Ministério da Função Pública.

A sole proprietor must also file a statement identifying himself, giving his firm name, the location of his business and description of the kind of business in which he will engage. Other business

entities (such as corporations) must file statements setting forth their name, place of their headquarters (seat), amount of capital and names of owners.

Upon completion of this process, the business receives a "Certidão de Matrícula Definitiva de Sociedade". Proper registration ensures that, where permitted, liability of the company's owners vis-a-vis third parties is limited. Companies that have failed to register properly will encounter a number of impediments to carrying on business such as difficulty in obtaining credit. (See Annex I).

b. Licensing

In addition, all businesses are required to secure a variety of licenses, according to the activity. Licensing requirements apply to both businesses registered in the Commercial Registry and non-registered businesses, including individuals. Commercial licenses are issued by the Ministry of Commerce; industrial licenses by the Ministry of Industry; fishing licenses by the Ministry of Fisheries; logging licenses by the Ministry of Rural Development and Agriculture, etc. Transportation, mining and construction are activities that also require licenses from the corresponding ministries.

Such licenses require that companies produce copies of their estatutos, evidence of publication, an affidavit from the Treasury Department, and a declaration of non-bankruptcy. Other licensing requirements include clearances by the municipalities, the Fire Department, the Public Health Department (sanitation), Public Works (building safety) and police.

Africare, a non-governmental organization that operates in Guinea-Bissau, has set forth in detail the procedures for notarization, registration and licensing of a commercial company, and secured confirmation of these requirements and applicable fees from the respective directors of the Notary Public, Commercial Registry and the Ministry of Commerce (see annexes D, E, F). Data collected by Africare show that there are 2,087 legally licensed commercial operators, both individuals and companies, in Guinea-Bissau. Bissau, the capital city, has by far the largest concentration of businesses (47%), while the Eastern, Northern and Southern Provinces hold 17%, 21% and 15% respectively. Almost three-fourths of the total (74%) are in the retail sector, 17% in import/export activities, and 9% are grouped as warehouses, commercial agents, and street vendors - "ambulantes". Furthermore, 89% of these licenses were granted to Guinean nationals,

5% to nationals of Mauritania, 2% to Senegalese, 2% to Portuguese and 1% to Lebanese and Guinea-Conakry operators.

c. Changes Needed

These cumbersome approval procedures may prompt businesses to stay outside the formal sector. Moreover, the law does not indicate what results flow when a company has begun the registration and licensing process, but has failed to complete it.

Sound government policies should be concerned with securing maximum tax revenue from profitable operating companies, rather than barring firms at the entry level. No clear purpose seems to be served by the complicated notarization process. Likewise, with a severe shortage of legally trained persons in the nation, using a notary to copy long documents by hand is a waste of human resources.

Registration in the Commercial Registry does serve to place third parties on notice where the liability of company members has been limited. Thus, simple registration with the Commercial Registry seems justified, as does a name check procedure to avoid duplication. All other notarization, publication and registration requirements should be eliminated. Licensing procedures should be carefully scrutinized to ensure retention only of those essential to some important public purpose, such as environmental protection.

3. Bankruptcy

Bankruptcy, which is governed by the Code of Civil Procedure (articles. 1,135 ff.), may be declared if:

- a. a company stops paying its debts;
- b. the owner of the business takes flight;
- c. the assets of the company are destroyed or wasted; or

- d. the excess of a limited liability company's assets over its liabilities is obviously inadequate.

In general, bankruptcy is available only to merchants or businesses. Occasionally, it may be used by members in a company with limited liability. There are special rules regulating what is called the "insolvency" of individuals and non-business associations (arts. 1313 to 1325 of the Code of Civil Procedure). (See Annex K).

Prior to a formal court declaration of bankruptcy, a composition of creditors may be effected. If this is not worked out, a court order may be issued to liquidate the company and divide the assets among the creditors. Where the company's managers or owners have engaged in fraud, criminal sanctions can be imposed. Upon bankruptcy, all accounts become immediately due, future interest payments are waived, and the accounts closed after payment of the creditor's proportionate share of the assets. The bankruptcy administrator (or trustee) may order performance of outstanding bilateral contracts where appropriate. Actions by the company in the two years prior to bankruptcy may be nullified where required to protect the interests of all the creditors.

Once a merchant has been declared bankrupt, he is prohibited from engaging in business. We were advised that many companies encountering financial difficulties simply cease operating. If no creditor forces them into bankruptcy, the company disappears. The business-person can then begin again since he was never officially declared bankrupt.

This institution is simply disregarded by the business community and individuals alike. No one contacted had any recollection of a bankruptcy or person insolvency case. This is not too different from Portugal, until recent Portuguese legislation permitted business recovery procedures.

It is suggested that the prohibition against engaging in another business be removed for merchants whose bankruptcy involved no fraud. Business failures can occur for many reasons beyond the control of the business-person, such as crop failures or economic depressions. So long as prospective creditors are alerted to the earlier bankruptcy through an appropriate notation in the Commercial Registry, there is no reason to prevent an honest person from beginning again. In

fact, the ability to start over after initial failure has proved important to developing the entrepreneurial spirit.

4. Negotiable Instruments

Checks, promissory notes, letters of credit, stocks and bonds are regulated by the Commercial Code. (See Annex L). They may be made out to order or to bearer. These instruments in Guinea-Bissau follow international standards that permit their validity at face value and immediate judicial foreclosure, independent of notarization and other formalities.

Guinea-Bissau, through inheritance from Portugal, is a member of the June 7, 1930 Geneva Convention Establishing a Uniform Law on Checks and Promissory Notes; and the March 19, 1931 Geneva Convention on Checks. These conventions are intended to provide a complete legal regime covering acceptances, guaranties, payment, protests, endorsements, etc. For these reasons, no revision of these negotiable instruments rules is envisioned at this moment.

5. Financial Institutions

The banking system of Guinea-Bissau (See Annex M) was centralized in the "Banco Nacional da Guinea-Bissau - BNG" (National Bank of Guinea), which served simultaneously as a central bank (monetary control), a commercial bank, and a development bank. This latter function was carried out through its department for economic development, known as DESECO - "Serviço de Desenvolvimento Económico". This system unduly restricted credit to the private sector, while favoring the public sector of the economy. Decrees #31/89 and 32/89 altered this system significantly in 1989. They created the Central Bank of Guinea-Bissau and the National Bank of Credit. These decrees also authorized private banking. "Banco Internacional da Guiné-Bissau" - BIG (the International Bank of Guinea-Bissau), a private commercial bank, was incorporated under these new rules as a joint-venture of Portuguese and Guinean capital.³

Guinean regulations permit three types of financial institutions: commercial, investment and development banks, which are established by charters approved by the Central Bank. Foreign

³ These decrees, apparently unconstitutional at the time, were legitimized *post hoc* by the constitutional revision of 1991.

banks may operate in the country either through local branches directly or in joint-venture with a local institution. All banks must be licensed by the governor of the Central Bank, following approval by the Council of Ministers. The license should be issued within six to twelve months of the request, and is revoked if the institution is not incorporated within six months or does not begin operations within twelve months from the date the license is issued. A financial institution must be incorporated as a "Sociedade Anônima de Responsabilidade Limitada", but no shareholder is allowed to control more than 20% of the capital.

Minimum capital for a commercial bank is set at 3 billion PG or US\$300,000 (1993 US dollars @ US \$1 = approx. 10,000 PG); 10 billion PG or US\$1 million for an investment bank; and 20 billion PG or US\$2 million for a development bank. The type of financial institution must be indicated at the time of requesting the specific license. The request must contain information such as: the economic and financial reasons for the incorporation; the choice of financial institution, its location, and organization; the proposed articles of incorporation and by-laws; personal and professional identification of the founding shareholders and the number of shares they hold; criminal record of founding shareholders (criminal records of administrators, directors or managers in the case of corporations); and a declaration that the shareholders have not controlled, directed or managed companies that went bankrupt.

It is generally agreed that the new law on financial institutions, although it might seem restrictive, is adequate to the present needs of Guinea-Bissau. The 1991 constitutional revision allowing for private banking, mentioned in chapter II.A above, thus confirmed the government's intent to establish a market economy in the country.⁴ Credit is not easily available, but this does not seem to be as much a problem of the existing law as due to government policies to control inflation, and caution in securing collateral, to avoid past lending practices that resulted in non-payment.

6. Insurance

Insurance (See Annex O) is regulated by Decree #16/79, which replaced many provisions from the Commercial Code (arts. 425 ff.). Decrees #s 17/79, 18/79, 19/79, 20/79, 21/79, 4/80, 5/80 and 6/80 subsequently regulated a wide range of insurance contracts, such as: life, accident, work-related injury, travel, fire, theft, airplanes, ships, automobiles, and transportation of goods.

⁴ See the previous footnote.

Insurance law also provides for coverage in the case of civil liability for damages to persons and property. Fault liability is standard but, as specifically provided by law, strict liability applies to automobile accidents and certain manufacturing activities considered to be dangerous. Both punitive and actual damages are permitted. Civil damages are usually linked to criminal verdicts. Courts will award damages often using insurance tables as guidelines. Punitive or moral damages are usually fixed by the court at a much lower value than requested by the plaintiff.

The Commercial Code (art. 447) provides for crop insurance. In this case, the contract must specify the location and size of the land, the crop product and the season for harvesting and the average value of the insured goods. The insurer would cover losses and damages caused by the crop failure as measured against average production. In practice, insurance companies do not provide this kind of coverage.

Existing legal provisions seem to be sufficient to guarantee safe commercial operations. As a matter of fact, except crop insurance, business operators in the formal sector utilize the available instruments as regular business practice.

7. Domestic and Foreign Investment

The Investment Code, approved by Decree-Law #4/91, governs both domestic and foreign investment. An investment is considered foreign if the funds come from abroad even though their owner is a Guinean residing abroad. Likewise, an investment of funds from outside the nation will be treated as a foreign investment, even though their owner is a foreigner residing in Guinea-Bissau.

Foreign investors are guaranteed treatment no less favorable than that accorded to Guinean nationals. There is no requirement that foreign investors take in a local partner; likewise, there are no limits on the kinds of business in which he can engage. The foreign investor has the right to remit abroad dividends, interest, royalties, technical assistance fees and returns of capital (on liquidation of the investment). An approved project may keep a bank account in foreign currency in Guinea-Bissau. The only negative provision is that a foreign investment must be authorized by several ministries prior to approval, which is known to unduly delay implementation for several months. The nation will cooperate with the foreign investor in obtaining insurance against expropriation from the World Bank's Multilateral Investment Guaranty Agency.

Reductions in or exemptions from income taxes can be obtained as can waivers of or reductions in duties on imported capital equipment and raw materials.

Apart from these incentives, the Minister of Finance may authorize special tax treatment for a particular investment. The agency authorized to approve foreign investments is the GAI (Gabinete de Apoio ao Investimento), which is under the Ministry of Finance. GAI is the only agency authorized to approve such investments.

8. Intellectual and Industrial Property

Copyright protection is provided by the law on literary, scientific and intellectual property of 1927, the Code on Industrial Property of 1940, the 1983 Paris Convention for the Protection of Industrial Property, as well as the 1967 Stockholm Convention that established an international organization for the protection of intellectual property. (See Annex P and Q). The law makes a distinction between intellectual property, which is essentially non-business oriented, and industrial property, which is business oriented, such as patents and trademarks. Legal protection extends to both nationals and foreigners. The law provides protection for authors of any scientific, literary or artistic work with regard to the text, name and title. Penalties include imprisonment and loss of all published materials and even prison. Protection of industrial property extends to inventions; drawings and industrial models; industrial, commercial and service names; and trademarks. Patents appear to be protected. In light of existing international conventions and the development of new technology, such as computer hardware and software, it is recommended that the existing internal law be revised to conform with new international standards.⁵

⁵ More than a law is likely to be necessary. However, it is unlikely that intellectual and industrial property will be an issue in Guinea-Bissau given the present level of economic activity. It might be wiser to wait for economic pressure to justify legal reform in this case. Existing law seems to be adequate for present needs, although it would be desirable to have it updated according to newer international conventions on the subject. The consultants did not verify the status of the registration office for patents and trademarks, but given the general state of most public offices in the country, it will probably need support. (The consultants' scope of work aimed at establishing priorities for legal reform and not institutional needs.)

9. Unfair Competition

Unfair competition and restrictive business practices are considered in the convention, although there is no specific national legislation for that purpose. Review of the Code on Industrial Property was not possible as the text was not available. Thus, it is unclear how the restrictive practice clauses in these documents relate to unfair competition provisions of antitrust law. It may be important to address the issue of unfair competition and restrictive business practices apart from the protection of intellectual and industrial property.

C. MARITIME LAW

Maritime or shipping law consists primarily of approximately 200 articles in the Commercial Code (arts. 485 to 691). They include vessel ownership, shipbuilding, owner's liability, crew's responsibility and rights, bills of lading, freight contracts, employment, passengers, insurance, and maritime liens and mortgages.

Article 578 of the Commercial Code provides a priority order for claims against the vessel for debts incurred in the last trip. There are lien priorities also on the cargo and freight. Mortgages are paid after payment of maritime liens according to the order of priority in the Commercial Registry, usually by date of registration.

The maritime provisions follow standard shipping rules. It is difficult to assess from the legal text whether these provisions address Bissau's needs adequately, or if changes might be required due to the nature of services provided to vessels in Guinea-Bissau. For a comparative review of the importance and practice in the field of maritime liens and mortgages, see Annex W.

No immediate work is envisioned in this area in the short term. As this may become necessary with the increase of foreign trade, then revision should be considered, principally concerning the priority of maritime liens and mortgages, to secure claims against vessels and cargo for services provided in Guinea-Bissau.

A short-term concern might be strict liability for vessel-source pollution, principally from oil spills. National law should raise the standards of any vessel in GB waters, including the exclusive

economic zone, and require that they are insured and follow the requirements of existing international conventions on maritime safety and liability.

D. TAX LAW

Besides income tax, the tax system of Guinea-Bissau provides for taxes on capital, consumption, transfer of property, and the value of certain deeds and documents (stamp tax). Most taxes are enacted by government decree, rather than by the National Assembly, and come into force immediately, rather than in subsequent fiscal years.

Tax policy needs to be consistent with Guinea-Bissau's present market-oriented strategies, whereby private agents allocate resources efficiently by responding to market signals. Government interventions distort market signals and thus may lead to inefficient resource allocation, resulting in lower economic growth. Therefore, there is a strong relationship between the tax system and private sector growth, including the agricultural sector.

Income tax applies to monies received from commercial and industrial activities; rent from urban property; wages and other professional income; and profit, interest, and other advantages resulting from investment. There is also a complementary tax ("imposto complementar") which applies to global income accrued by individuals and companies from all sources during the fiscal year. Because of the high percentage of tax evasion from commercial activities, the government might pursue a strict tax enforcement strategy on all businesses, whether registered or licensed, or not, requiring them to pay taxes based on estimated profits since most businesses do not have any accounting.

Income taxes vary according to specific percentages established in the various decrees that created these taxes (see Annex R). Individuals and business entities pay income taxes annually, after calculations of taxes from different sources of income. An "imposto complementar" is paid on the remainder, at the rate of 5% for annual income up to 350,000 PG (US\$ 35 @ the exchange rate of US\$ 1 = approx. 10,000 PG); 10% for income between 350,000 and 1 million PG; 20% from 1 million to 1.5 million PG; 35% from 1.5 to 2.3 million PG and 50% for amounts greater than 2.3 million PG (US\$ 230).

The National Reconstruction Tax was created by Law #1/75, of the National Assembly, in place of the domicile tax and the labor tax. All individuals aged 16 or older residing in Guinea-Bissau and companies that operate in the country must pay this tax, including residents from tabancas. Its value was raised by Law #5/87 to 5,000 PG for males, and 2,000 PG for married females, or single females aged 18 or older.

Other taxes are not based on income or domicile, such as the tax on automobiles, tourism (service tax on lodging and meals provided by hotels, restaurants, bars, car rentals, and travel agencies), gasoline (30% ad valorem), and transfers of real and personal properties. Guinea-Bissau also charges a stamp tax on all official documents and deeds. There are import and export taxes as well, such as on oil imports and cashew exports. Except for cashews, all other export taxes have been abolished, but continue to be charged for other export goods (e.g., timber and fisheries). Cattle, alcohol, tonnage and maritime commerce are also taxed at varying rates.

At present, the government's revenue structure in GB concentrates on three sources: fishing licenses, taxes on cashew exports and duties on gasoline. This shows that there is a strong dependence on non-tax revenues and on taxation of international trade. Furthermore, tax laws are not codified, rates change frequently, and compliance is minimal. Although the Ministry of Finance has recently conducted a compilation of all tax laws that are applicable in Guinea-Bissau by chronological order, this study has not been cross-referenced and consolidated to reflect the laws and regulations that have been amended or revoked.

The direct tax system described above provides four different types of taxes: (a) professional tax, levied on wages and other forms of labor income; (b) business profit tax, levied on income from commercial or industrial activities; (c) rental income tax; and (d) capital income tax, levied on interest income and dividends. There is also a complementary tax on aggregate income of companies and individuals, and a residence tax. Besides the complexity of the existing system, it is plagued by inequity; for example, individuals with comparable income may be taxed at widely different rates.

The World Bank Report (November, 1990) suggests that Guinea-Bissau adopt a uniform system of income taxation based only on the Company Profits Tax and Personal Income Tax. All income, regardless of its origin, should be treated equally. This would be much simpler to administer, as there would be only one tax for companies and another for individuals, as opposed

to five scheduled taxes applied to different categories of income according to several income brackets. This system would not be discriminatory since it would treat all income equally irrespective of its sources, and taxpayers would contribute according to their total economic capacity, since all income would be aggregated and levied by a single tax.

As to indirect taxation, its main source (80%) is international trade. Imports are subject to a basic import tariff, eleven additional taxes, applying generally, and three taxes based on selected products. On the other hand, exemptions reduce the nominal import tariff rate at about 30% to an effective tax burden of only 6.7%. Exports are also subject to taxation. Implicit taxation on exports derives from the overvaluation of the exchange rate at approximately 27.2% over the last three years (1990 World Bank Report). Explicit taxation varies. Usually export products are subject to a 5% custom fee, but cashew nuts are taxed at a much higher rate (25%),⁶ even though exports, except for cashew nuts, should not continue to be taxed legally.

Taxes on domestic sales are limited to a few products and represent less than 9% of total tax revenues. Taxation of services is almost exclusively based on tourism. The tourism tax, however, is viewed as an instrument to promote tourism rather than to generate revenues. The World Bank Report recommends that taxes on imports and domestic goods, the tourism tax and other specific taxes be unified under a broad-based consumption (sales) tax on goods and services, which would be applied to all imported and domestically produced goods and to selected services. Exports would be tax exempt.

Tax policy and administration is fragmented across different government agencies with little coordination. The main framework was inherited from Portugal, bearing almost no relationship to the present needs of Guinea-Bissau. According to a 1988 IMF Memorandum, and the November 1990 World Bank Report, "the system is overly complex and its administration is plagued by redundancies that offer little benefits in terms of increased compliance. In addition, the organizational structure for both direct and indirect taxation is very weak with an acute scarcity of qualified personnel. The system distorts incentives to produce, has a strong anti-export bias, and is highly inequitable, only a small fraction of the economy is being taxed, and individuals with the same income are being taxed at widely different rates."

⁶ This is on all-inclusive rate consisting of an export tax (23%) and local charges (2%).

A series of administrative changes have been recommended in the Bank report, ranging from coordination among different ministries, the implementation of a taxpayer master file and identification number system, and an administrative appeals process to review cases, rather than rely on the judiciary only. It is expected that these suggested changes would bring in as much revenue as the system now in place at less administrative cost. In addition, improved voluntary compliance should result from simplified legislation.

The reforms proposed by the World Bank as part of the Structural Adjustment Program require extensive legislative review and perhaps the drafting of a Tax Code for Guinea-Bissau, one that would be more stable, equitable, and conducive to private sector growth. Nevertheless, the World Bank does not expect to carry out this legislative reform and suggests that a liaison arrangement be made between the Ministry of Finance and the Ministry of Justice in this regard.

E. LABOR LAW

Labor laws were revised by the General Labor Law of 1986, enacted by the People's National Assembly (Law #2/86). Civil service, maritime and domestic labor are controlled by special legislation, and not by the provisions of this labor law, which otherwise is applicable to all manual or intellectual labor activity contracted in Guinea-Bissau under the guidance and authority of an employer (Article 4). Although it does not explicitly apply to agricultural work, coverage of this was intended by the People's National Assembly as contained in the legislative history of the enactment (except for family labor, mutual help and social solidarity).

In general, the provisions of the General Labor Law call for unnecessary reporting by employers to the government on hiring and overtime work. Moreover, employers cannot penalize workers for misconduct and other infringements of their duties unless formal written procedures are filed with and decided favorably by the government (Article 37). The termination of a labor contract depends on similar procedures, which results in employers keeping inefficient workers. If termination is permitted for just cause or for one of a few narrow exceptions, the employer must pay compensation to the employee at the ratio of one month's salary for every year of service or fraction thereof, but not less than three month's salary.

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In practice, these rules are not fully enforced because of ignorance of the law by most workers and employers alike, as well as the lack of resources on the part of the government to enforce them. Because of this, the impact of labor law constraints on the private sector does not seem to be a major problem.

Nevertheless, new labor laws should be introduced to enable employers to adopt more efficient personnel practices legally, while at the same time protecting the basic rights of their employees. One suggestion would be to permit unrestricted termination of labor contracts by employers provided that employees are given previous notice and are compensated according to the length of their labor contract, similarly to what is now established by the law, but without the cumbersome procedural requirements. It is also suggested that consideration be given to applying the Labor Code only to companies with a certain number of employees and/or annual gross sales in excess of a specified amount to be determined. This approach would exempt most of the micro-businesses and small firms, while permitting enforcement efforts to concentrate in the modern sector where they can be most effective.

F. LAW OF OBLIGATIONS (Contracts, Torts, Secured Transactions)

The term "obligations" in civil law covers material which under common law would be divided into torts, contracts, agency, gifts, property and secured transactions (including liens, pledges, bailments, guaranties, mortgages and chattel mortgages). The relevant provisions, contained in Book II of the Civil Code, articles 397 through 1250, are fairly standard norms for a civilian code. (See Annex S). On the other hand, modern contractual arrangements such as leasing, franchising and factoring, for example, are not provided for. Although the present land law makes securing a mortgage on real property difficult, mortgages are used for ships and aircraft. The Civil Code and the Code of Civil Procedure ought to be scrutinized in more detail for cumbersome provisions that may result in the actual nonfulfillment of obligations. All obligations, whether resulting from a contract, a tort, or a secured transaction, are only "secure" if technical and procedural requirements allow their prompt enforcement.

The Code of Civil Procedure, for example, seems to establish rules that are inappropriate to the existing business environment and judicial system in Guinea-Bissau. The Code provides that checks, promissory notes, invoices and other commercial instruments (art. 46) may be enforced

under special foreclosure procedures contained in articles 801 ff. However, the Code requires that the signatures on these documents (including on checks) must be notarized to be enforced (art. 51), and if the amount on the document is greater than US\$ 280, notarization can only be performed if the person who signed the document is present. These provisions conflict with those from the international conventions on negotiable instruments that have been ratified prior to the enactment of the Code of Civil Procedure.

Conflicting provisions generate uncertainty for business activities. In principle, if the creditor cannot secure a notarized signature of the debtor, he must undergo lengthy court procedures, rather than the special foreclosure procedures, before he is allowed to collect his credit. In practice, local attorneys informed the authors that this is not required by the local courts, and average procedures last three to four months. Public documents, i.e. those that have been drafted by a Notary Public, as well as court decisions, are entitled to immediate foreclosure proceedings. But it would be unreasonable to expect that all commercial transactions be notarized. For these reasons, it is recommended that sections of these codes be revised to adapt to the needs of Guinea-Bissau.

As to international transactions, the 1980 United Nations Convention on the International Sale of Goods provides a set of substantive rules to govern transnational sales. An adroit compromise between the civil and common law systems, this convention should expedite importing and exporting by reducing transaction costs. Guinea-Bissau should consider ratifying this convention.

Fault liability is standard for tort cases in the country. Attorneys have stated that tort awards are usually very low. This affects consumer protection, a legal sector largely unprovided for in the existing legal system, except for general tort provisions in the civil code. Government agencies have expressed concern about the lack of regulations in this area to protect the general public against defective or low-quality products.

Because of the complexity and importance of the subject for the private sector, and considering that data are not readily available, except through analysis of the case law, further studies on the law of obligations should be carried on in the near future to assess the areas where reform might be needed.

G. ENVIRONMENTAL LAW

Environmental protection is an area of significant impact on the private sector in Guinea Bissau, in both urban and rural areas, but it must be implemented with care so as not to halt economic activity. In order to ensure the most efficient allocation of resources, based on real substitution costs, the concept of sustainable development should guide all efforts in designing new policies and legislation. On the other hand, by not addressing these issues in a timely fashion, Guinea-Bissau may be risking the sustainability of its present development drive by ruining its resource base through the salinization of agricultural land due to inappropriate irrigation, soil erosion and desertification due to deforestation, collapse of fish stocks due to overfishing, etc.

1. National Environmental Council

Decree #24/92, published in the Boletim Oficial #12, of March 23, 1992, established a national environmental council (Conselho Nacional do Ambiente - CNA) to assist the government in establishing an environmental policy and providing for its implementation; to propose a national environmental plan; to suggest laws and preventive measures to protect the environment; to promote public participation and environmental education; to support the establishment of protected areas; to propose enforcement action to other government agencies; to guarantee the environmental component in economic development plans and projects and territorial organization; to promote the environmental impact assessment of infrastructure projects and activities that may affect the environment; to establish contact and promote joint action of similar organs; and, among other things, to propose the negotiation and signature of international environmental treaties and conventions.

The Council consists of representatives from the Ministries of Rural Development and Agriculture; Natural Resources and Industry; Public Works, Construction and Urbanization; Fisheries; Health and Social Matters; Education and Culture; Commerce and Tourism; Women's Promotion; and the president of the Municipal Chamber of Bissau (mayor). Other members of the Council may include representatives from local government environmental and natural heritage associations, as well as members of public and private entities that can be chosen according to special expertise in environmental matters. The President of the Council will nominate these entities, upon proposal from the executive secretary. The Council is understaffed

(there is only one person as its executive secretary) and its members have not all been installed yet.

Much needs to be done in this area, ranging from making the CNA operational to passing a series of basic environmental laws for Guinea-Bissau. First, the powers of the Council are in inverse correlation to its capabilities. Inter-agency bodies, such as CNA, are appropriate to establish policies and make recommendations but are, usually, not efficient in policy implementation and/or law enforcement. This would be best accomplished through a national environmental protection agency that coordinates and supports a small network of regional agencies and NGOs.

Secondly, the institutional framework cannot function properly unless guidelines are established through a national environmental policy act, which is to be complemented by a series of environmental laws or an environmental code. Existing resource-related laws, such as the water, forestry and fisheries laws, each under the jurisdiction of separate ministries -- Ministry of Natural Resources, Ministry of Rural Development and Agriculture, and Ministry of Fisheries, respectively -- ought to be revised to conform with the concept of sustainable development. Environmental impact assessment, environmental liability, and protected areas, for example, must be regulated accordingly.

2. Water

Water uses are regulated by colonial legislation dating as far back as 1901 (see Annex T). In 1992 a national water council was formed to establish a national water policy to guarantee its multiples uses, such as fresh water supply to urban and rural communities, agriculture, hydroelectric power, navigation and recreation. One of the objectives of this council is the improvement of water management and legislation. A water code has been drafted to provide comprehensive codification and revoke previous laws. This bill provides for the regulation of all water uses, including domestic, industrial, and agricultural. Users may utilize rain water and other existing water on their land, as long as no mechanical means are utilized. Other uses, such as obtaining underground water from a well, will require a permit or a concession. This draft also provides for environmental protection by requiring environmental impact studies of projects that may affect water quality. Water polluters may face criminal charges, and pay for damages, clean-up costs and administrative fines.

3. Forestry

Decree-law #4-A/91 provides for protection of existing forests in Guinea-Bissau, from mangroves to dense sub-humid forests (see Annex U). Forest fires and soil erosion are two areas of concern in the law. It prohibits cutting trees in protected areas, such as along the margin of rivers, lakes and reservoirs, and provides for buffer zones to prevent forest fires. Logging is prohibited from sunset to sunrise (art. 29). The cutting of trees on agricultural lands or surrounding buildings is permitted, as long as the timber is not sold. Likewise, medicinal plants, fruits and firewood may be collected free of charge. Licenses and fees are required for commercial uses and timber exports.

4. Fisheries

The fisheries law (Decree-law #2/86) applies throughout the exclusive economic zone, the territorial sea and interior waters of Guinea-Bissau. Nationals and foreigners must be authorized to fish. Industrial fishing is prohibited in territorial and internal waters. Explosives and toxic substances are banned. Fishing rights are renewed every twelve months for a fee. A new license is issued only if the shipowner has been licensed before (see Annex V). Article 31 authorizes the Navy to inspect and confiscate nets, fish catch and even the fishing vessels, if not properly licensed. Penalties include administrative fines and criminal charges (art. 41 ff). Unofficial accounts, however, inform that the Navy is ill-equipped to enforce this law. Lack of fuel due to insufficient funding from the Treasury prevents the Navy from stopping or controlling illegal fishing from Guinean waters.

H. INTERFACE BETWEEN CIVIL LAW AND CUSTOMARY LAW

There are a series of legal principles which can assist a judge in deciding which law to apply when more than one legal system could be applicable. For example, if a New Yorker makes a contract with a Californian, the judge must decide whether to apply New York or California law. The norms guiding him in making that determination are known within the United States as "conflict of laws." The same problem arises across nation-state borders -- for example, where a Brazilian contracts with a Portuguese. The principles used to decide these transnational conflicts are called "private international law."

Conflict of laws principles can also be used to allocate legal authority among ethnic or religious groups. For instance, the validity of a Muslim's will in Indonesia can be governed by Islamic law. Or, a native American may be able to enter a polygamous marriage, if done so on the territory of his own tribal reservation and if polygamy is permitted under the laws of his tribe. Conflicts principles may look either to the personal (Muslim or Indian) law of the actor involved and/or to the law of the territory where the act occurred.

The formal legal structure inherited by Guinea-Bissau from Portugal contains a number of conflicts of law provisions which -- with appropriate modification -- could be used to allocate legal authority over business activities in the modern sector to be governed by the formal civil law and in the traditional sector to be controlled by tribal or ethnic law. Article 25 of the Civil Code provides for application of personal law in the area of family relations and decedents' estates. Article 31 stipulates that an individual's personal law is the law of the place of his habitual residence. For contracts, article 41 authorizes application of the law chosen by the parties to the contract. If the parties fail to select such law, the applicable law is again the place of habitual residence (Article 42).

For Guinea-Bissau there would be some benefit in replacing this test of "habitual residence" with that of one's "ethnic or tribal group." Thus, informal arrangements between members of the same ethnic group would be governed by that group's law. For persons who have left the territory of their ethnic group -- perhaps relocating to the cities--then perhaps the law might conclude that such individuals have implicitly chosen to have their lives governed by the general Portuguese derived civil law. Application of ethnic law could also be allowed for informal businesses centered within a particular tribal area. Issues of formation and control of micro-companies could be governed by the law of their ethnic group; enforcement of promises and remedies for breaches thereof (contract law) could also be left to local norms.

The net result of this approach would be the legalization of many informals and their activities. They would no longer have to comply with the complex registration procedures of the formal sector. The central government would then be freed from concern about evasion of the entry laws by the informals and could concentrate on regulating and taxing the larger companies. Such an approach would also allow indigenous groups to formulate some of their own laws, which may be more appropriate to their needs. For instance, in the United States, the Navajo version of the Uniform Commercial Code has a provision allowing one who has lost his property through a

bankruptcy proceeding to retain 50 sheep. This is a crucial exception in that culture where herding sheep and weaving wool are the main forms of livelihood.

Jurisdiction (competência) over disputes among persons of the same ethnic group should also be delegated to tribal judges or other ethnic institutions for dispute resolution. Resort to the regular civilian law courts would then be limited to cases between individuals from different ethnic groups, to persons who have relocated away from the territory of their ethnic group, to those involving some national or constitutional issue, and to those situations arising out of the modern economic sector. Apart from these exceptional situations, ethnic or tribal law should be applied and disputes resolved by decision-makers of the same ethnic group.

The decision-makers in these fora do not have to be legally trained; they may simply be elders highly respected by the local group. In New Mexico, judges on the various Indian reservations are elected. These judges seldom have any legal education, but they are usually considered persons of impeccable moral character by their people. Tribal courts may use modern concepts of civil procedure to resolve disputes or they may resort to ancient Indian traditions of mediation, conciliation or religious exhortation.

As a general rule, decisions of these ethnic institutions should be appealable only within the internal framework of the particular ethnic group. Resort to the outside civil court system should be restricted to situations where, for instance, the ethnic court or institution lacked jurisdiction, where some fundamental human right was violated, or where some other compelling policy interest is involved.

Taking this approach would allow the different groups within Guinea-Bissau to evolve their governing norms more slowly and more realistically. Such freedom should also assist in reducing some natural resistance to externally derived legal concepts. Meanwhile, it would free jurists to concentrate their efforts on those areas in the modern sector where reform or change is urgently needed.

The recommendations from this part are incorporated in Chapter IV (along with those of the economic analysis).

III. ECONOMIC ANALYSIS

The purpose of this economic evaluation section is to provide a prioritization of the legal and regulatory reforms proposed in the legal review and assessment presented above, based on economic criteria. The analysis is intended to provide a foundation and framework for subsequent large-scale research and evaluation to be undertaken under the USAID TIPS Project. As a result of this research, Guinea-Bissau and USAID should be able to jointly identify and assess laws and regulations that adversely affect private economic activities in critical growth sub-sectors.

Since this evaluation is intended by USAID to be of a preparatory and non-quantitative character, the bases for the economic evaluation of laws is:

- 1) translation of the legal and regulatory reforms recommended in the preceding sections of this report into economic effects (e.g., simplification of business registration regulations eases market entry) and evaluation of the direct economic impacts of the reforms;
- 2) development of an intersectoral economic impact framework to assess the indirect effects of legal and regulatory reforms (e.g., most reforms will directly impact the formal sectors, but development goals include economic consequences for informal and traditional sectors); and
- 3) provision of ordinal-scaled values for the likely combined economic impacts of each recommended legal and regulatory reform, taking into account the size of each sector affected.

This part of the report will first provide a brief presentation of the relevant Guinea-Bissau intersectoral economic behavior system that includes legal and regulatory variables as well as the traditional and modern economic relations. Analyses of the direct economic effects of recommended legal and regulatory reforms are then provided. The section then concludes with an ordinal-scale summary evaluation of the likely economic impacts of legal and regulatory reforms.

A. MARKET STRUCTURE OF THE ECONOMY OF GUINEA-BISSAU

The (private sector) economy of Guinea-Bissau can be characterized initially in terms of three broad sectors: a formal and an informal sector, both part of (for lack of a better term) the modern economy, and a traditional sector. The modern economy contains approximately 15 percent of the labor force, and whether an individual or firm belongs to the formal rather than the informal sector depends upon the costs and benefits of complying with the laws and regulations required for formal sector status and upon the wealth and occupational skills of the migrants who seek absorption into the modern economy.

The traditional sector has 75 percent of the population, which resides in tabancas or villages as described in part I.C above, produces primary goods for subsistence and for cash sales to both internal and modern sectors, and is extremely poor. As will be described below, the traditional sector creates very difficult challenges for externally offered or imposed public policy that is intended to raise its per capita income.⁷

Information gathered by the consultants suggests that traditional sector laws and customs tend not to conform with market-based economic relations. Also, there are variations among customary resource allocation laws and practices from one ethnic group to another, which should be understood in policy formulation. The current public policy objective is to raise per capita income in Guinea-Bissau; as is evidently understood by donors, failure to substantially incorporate the complexities of the traditional sector in this objective can result in seriously worsening the nation's income distribution. Rural to urban (or more appropriately, traditional to modern sector) migration may accelerate with neither sufficient jobs nor the urban infrastructure for absorbing the new migrants as they leave their communities.

This overview of the market structure of Guinea-Bissau first looks at the nature of, and returns to, the major factors of production: land, labor, and capital. There then follows an examination

⁷ The agricultural sector contains more than the "traditional" sector: it also contains the formal sector population living and working on the "pontas," e.g., the commercial farms. Following the estimates in the Appendix, that means the modern sector comprises 25% of the population, and includes the urban formal and informal sectors and the rural formal sector (e.g. agricultural and agro-industry, located on the pontas). The remaining 75% of the population is in tabancas (the "traditional" sector).

of the evidence and prospects for intersectoral factor movements, a key causal variable affecting this report's findings with respect to the income effects of legal reforms. Finally, the key characteristics and constraints of markets for goods and services are reviewed, with respect to each of the broad economic sectors: formal, informal, traditional, and public.⁸

1. Factors of Production and Factor Rewards

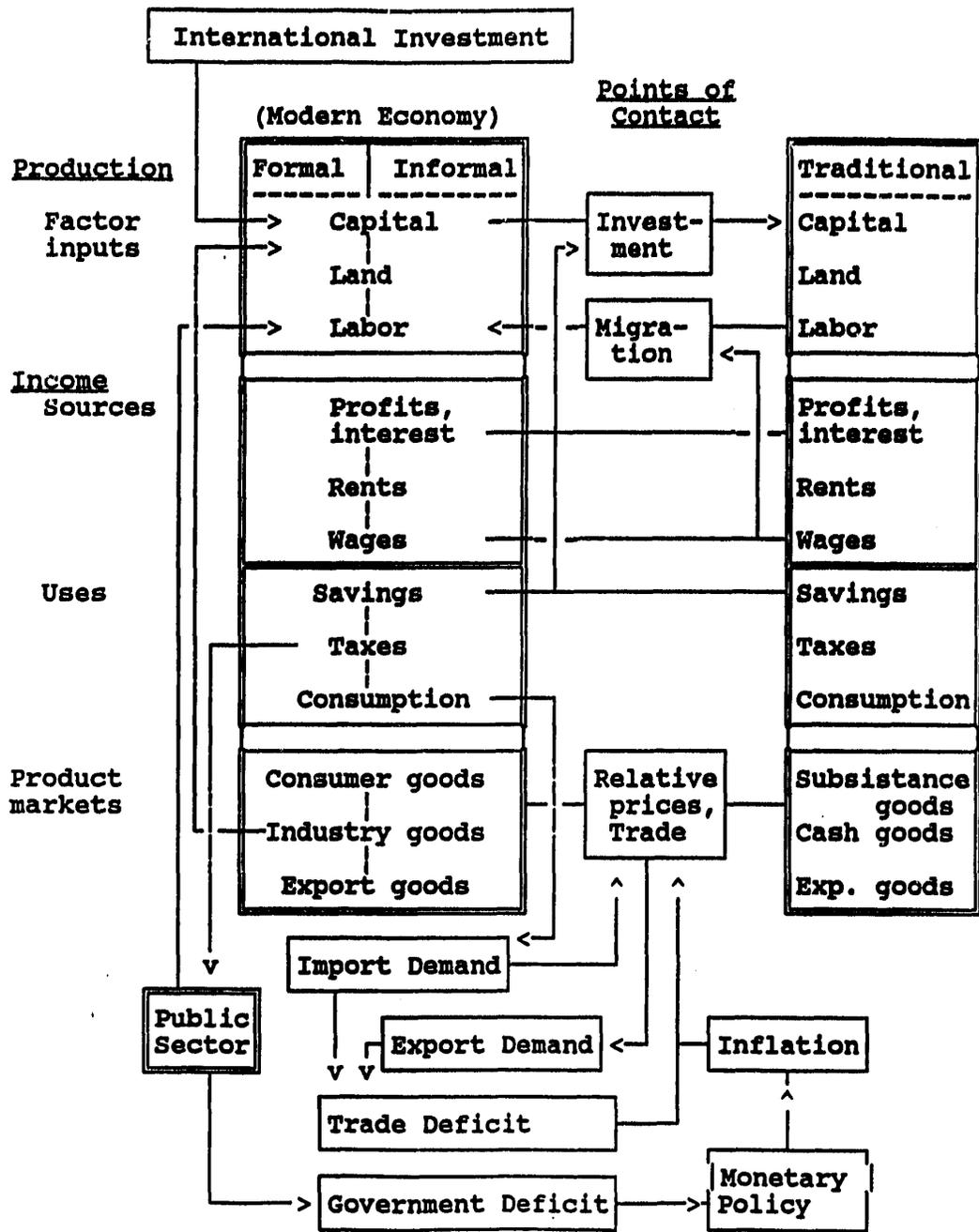
As depicted in Figure 1, each sector utilizes factor inputs in production: land, labor and capital. They utilize these inputs in differing proportions and with different technologies. Because laws and customs differ in these three sectors, rules for acquiring usage rights and for paying these three factors differ. For example, private property in land is, via the constitution, illegal (although usage transfer arrangements are common) and "alienation" of land conflicts with much of traditional sector custom. Further, payment of factor rewards (profits, wages and rents) often does not follow productivity criteria.

a. Land

In the modern sector, lands for commercial agriculture (pontas) have been awarded to private commercial interests, called "ponteiros" via a "concessions" procedure. In the traditional sector, common lands are allocated to moranca (extended family) heads, usually by the tabanca head (called the "homem grande") whose authority stems from his clan lineage. The moranca head allocates some land for joint farming by his extended family for subsistence crops (usually rice), and portions of the remaining land to individuals of his moranca, including his wives, for their own use which often includes cultivation of cash crops for the market. This land can be willed to heirs, so although it is only usufruct rights rather than land ownership rights that are being allocated, these land use rights have certain de facto private property attributes. These customary rights incorporate incentives for land use decisions that take account of the long-term benefits from proper use of the land.

⁸ For purposes of understanding intersectoral and policy linkages, in section B below, the public sector will be disregarded, and the formal sector broken down into rural and urban formal sectors. In part C below, where direct and indirect economic effects of reforms are evaluated, the rural formal sector is then further subdivided into agriculture and agro-industry for purposes of greater accuracy. (The public sector will only be considered here in terms of the impacts of reforms on tax revenue).

Figure 1. Schematic Diagram of Economic Structure



However, land cannot be sold, although in the modern economy, physical improvements on land can be sold and concessionary rights transferred; in the traditional sector, alienation of land is forbidden among the Balantas, and among the Fulas and Mandingas land use alienation (sale or rental) may occur, but land usage rights involve extended family interests (and gaining general agreement on such a transaction is unlikely). Consequently, although users of land in all sectors are motivated to allocate land to the most rewarding use under the circumstances, the sectors lack the discipline of competitive land markets to assure that land will be put to its "highest and best use."

Concern has been expressed for the rate of deforestation in Guinea-Bissau, and policy is now being articulated for conservation regulations. Although there are no private property rights on commercial ponta lands, the long-term concessions, together with the apparent practice of renting commercial lands, could encourage *ponteiros* to take account of the long-term opportunity costs of current land use decisions. A similar argument has been made concerning traditional sector lands allocated for agricultural use. This is not true, however, for private sector use of public timberlands (by the modern or traditional sectors), where there is little economic incentive for conservation and replanting.

The obstacle to conservation behavior seems not to be the lack of property rights for modern sector land users, but government ownership of large quantities of unused land and its free provision (often including fallow traditional sector lands) to applicants for concessions. With the consequent lack of a market for land, the marginal value of land is zero. Evidently, *ponteiros* who want to cut timber can get use rights to timberlands via free concessions from government stocks, and therefore the price of uncut timber is effectively zero (or close to zero).⁹ Perceiving the same to be true for future timber stocks, even with the current value of these future stocks capitalized into land prices, the land price is still zero. Consequently, there is no perceived opportunity cost (loss of future value) to current wasteful use of land. There do, however, appear to be "under-the-table" payments among concessionaires for concession rights previously granted by the government. To the extent such a black market exists and can be relied upon (an open question), the value of land is capitalized in the sales of rights.

⁹ However, as noted in section III.C.8 below, there is a government fee payable by concessionaires for the quantity of timber they cut.

b. Labor

In the formal sector, wages are affected by the low average investment in human capital, and this is reinforced with access to informal sector labor, which in turn readily draws upon traditional sector migrants. Further, current labor laws restrain labor demand to the extent that they are enforced. These laws require employers who intend to lay off any worker to make formal application for governmental permission, even for worker misconduct or low productivity. If permission is granted, each terminated employee must be paid one month's wages for each year worked on that job, but not less than three months' wages. Evidently, most workers and employers have little awareness of these laws and the government does not have resources to adequately enforce them, but apparently they still depress formal sector labor demand.

In the traditional sector, all moranca members are expected to provide their non-wage labor in farming the moranca lands for subsistence crops before being allowed to farm their individual plots for their own private gain. The homem grande of the moranca is thus assured of his own subsistence and of his extended family's. Further, as a result of the priority placed on farming moranca lands over time for schooling, the time spent on educating the young, and investment in human capital generally, is limited. Consequently, labor in the traditional sector does not develop its most productive use.

c. Capital

The supply of savings for investment is very limited, in part by the lack of banking and credit institutions (a number of banks have failed in recent years), although even traditional sector people have expressed their interest in having a trustworthy institutional means for safeguarding any available savings. Furthermore, the lack of private property rights to land in the modern sector and the inalienability of land in much of the traditional sector means that land cannot be used as collateral to secure loans from the formal sector. But potential lenders would consider the total land allocated to an individual as a measure of the productive capacity available for earning income.

Also, since there is virtually no investment in physical productive capital in the traditional sector (except for simple hand tools), the traditional sector has even less collateral to offer for securing

loans. Consequently, there is very little credit available for domestic investment in either the formal or the traditional sectors. Similarly, these limitations and the lack of certainty that liens on any collateral will be legally foreclosed in case of default present a severe deterrent to foreign sources of loanable funds (although the Portuguese-based Banco Internacional da Guinea-Bissau now has several branches and is considering selected investment possibilities). Possible new sources of credit might be from informal sector trader or traditional sector credit associations.

2. Intersectoral Factor Flows

a. Migration

Workers from the traditional sector have long been migrating to cities for seasonal jobs, and then returning to their tabancas afterward. Migration patterns are shaped by a complex of social pressures. For example, married women from the Fula and Mandinga ethnic groups are not permitted to leave their communities unless they are pregnant or lactating, a custom intended to assure fidelity. The older men apparently are sufficiently secure with their tabanca headship responsibilities that they have little incentive to seek temporary work elsewhere. As a result of these types of influences, migrants tend to be young. These migration patterns evidently have depended upon the supply of jobs in the urban areas and on their relative earnings. Further, there have been periods of substantial migration during the revolutionary war against the Portuguese, and also during the marxist regime when traditional sector rice production declined. In addition, there has been migration to other countries, particularly among the Papel population.

Data describing migration are difficult to obtain (although the recent census population will soon be available). There is evidence of continuing rural-to-urban migration within Guinea-Bissau in that the urban population growth rate is significantly higher than that of the nation as a whole. While there are no data describing the urban jobs taken by tabanca migrants, it is likely that a sizeable portion enter the modern economy via the informal sector, where there is greater ease of entry and wages are low.

The importance of rural-to-urban migration behavior is that policies that create jobs in the modern economy and cause a widening of urban-rural wage differentials can be expected to bring traditional sector populations to the cities in search of jobs. These shifts could improve welfare for the migrants. But if job access and urban infrastructure are inadequate for the tabanca

migrants, then a decline in social welfare is possible. However, there is insufficient evidence to evaluate the likely rapidity of these demographic shifts.

b. Interregional Investment

A possible alternative to rural-to-urban migration as a response to rural-urban wage differentials is inter-regional investment. Seeing higher profits in low wage regions, entrepreneurs -- and public policy-makers -- may invest in the rural areas either in the modern or the traditional sectors, thereby bringing jobs to people. This has been happening in rural Guinea-Bissau with government providing land concessions to the pontas, which include both registered (formal sector) and non-registered (informal sector) farms. According to a recent "ponta census," many pontas are farmed by tabanca labor.

Also, there have been modern sector investments in agro-industry in the rural regions, such as the under-utilized rice mill in Bafata. Further, the production of sugar cane, the most profitable crop per hectare, has been limited by the number of distilleries for aguardente de cana. Why private investors have not responded to what seems to be a profitable opportunity should be identified.

Parenthetically, whether the ponta concessions are, thus far, economically efficient and raise traditional sector incomes is not obvious. Offsetting possible gains from further commercializing the agricultural sector are opportunity costs associated with the implicit land value subsidy reflecting possible foregone future returns due to deforestation, and also the value of tabanca subsistence and cash crop production foregone. Although these costs may be small, the productivity of the pontas has been found to be quite low.

The possibility of drawing modern sector financial resources into the tabanca economy itself is very small, first because of the lack of modern sector private financial institutions; second, because of the lack of collateral in the tabanca economy -- either in transferrable land property rights or in other property.

3. Markets for Goods and Services

a. Formal Sector

The major points of entry for the public policy objective of raising the per capita income of Guinea-Bissau are the export-oriented primary goods and associated agro-industry sub-sectors (the critical growth sub-sectors). The primary goods sectors include fishing, timber and wood products, and perennial crops, including cashews, sugar cane, and fruits and vegetables. Also important is rice, the main staple crop, the excess demand for which accounts for a major proportion of the nation's imports.

Expansion of these activities naturally centers on the formal sector, since the attraction of financing requires dependability of contracts as well as enforceable liens against capital as collateral. This would be especially important for agro-industry growth which may have substantial capital requirements. However, government policy may restrain the formal sector rather than promote it. The government levies export taxes, as in the case of cashews (currently 25 percent¹⁰), a policy bound to attenuate demand and output. Policies that are needed to raise the nation's competitiveness for these sectors are costly, may increase the government deficit, and may depend upon donor financing. Technical agricultural assistance, for example, can raise the quality of crops and farming productivity (the recent punta census found that the use of tractors and pesticides on "modern economy" pontas is very rare), but at the same time requires expenditures of scarce government resources.

The entry of new firms into the formal sector is affected both by licensing and registration regulations and by bankruptcy law. There are significant costs in time and money for anyone intending to gain legal system access by licensing and registering a firm. Those without the requisite resources or fortitude may forego the opportunity, or may enter via the informal sector, where there may be significant advantages.

As mentioned previously, bankruptcy law in Guinea-Bissau provides that a person who undergoes bankruptcy will be denied formal registration for starting another business entity. But entrepreneurial development is to a large extent a trial-and-error process where business acumen

¹⁰ This rate includes an export tax of 23% and local charges amounting to 2%.

grows through "learning by doing," and this may involve failure and trying again. Since it is this process that is legally preempted via the bankruptcy law, the formation of new firms by experienced business people who have already learned (by their misfortune) what not to do, is curtailed for the formal sector. However, the informal sector is, in part, a "seed bed" for business start-ups where people with few resources can enter and "learn by doing," so many firms that could have entered via the formal sector instead may find the informal sector more practical.

Nevertheless, since there are advantages to formal sector participation, such as better access to the legal system when working with foreign principals, and since government collection of needed profits/income/excise taxes also depend upon registering, the significant costs involved in the licensing and registration process should be reduced; also, modification of the restrictive bankruptcy laws may be considered.

b. Informal Sector

De Soto's recent book *El Otro Sendero* has magnified the role of the informal sectors of developing nations as providing an institutional response to the self-serving use of laws and regulations by influential business interests, politicians and government bureaucrats. By sidestepping costly legal processes that tend to be exclusionary, the less privileged classes can create their own viable economies and thrive.

Because of its greater ease of entry, the informal sector plays a major role in retailing, with hundreds of street vendors seen along major streets, and it also provides various services that are important to both formal and traditional sectors, such as equipment repair and maintenance. But since the informal sector has low operating costs and tends not to pay taxes, entrepreneurs in the formal sector complain about this source of competition, viewing it as unfair. They may seek to reduce the size of the informal sector via stricter enforcement of licensing and registration laws. While such use of laws is inefficient, providing monopoly rents for the formal sector (competition from low cost street vendors is perfectly efficient), the modification of laws to reduce transaction costs and still gain registration for taxation purposes is desirable.

But the informal sector in developing countries is more than a non-legal institution that develops in reaction to bureaucratic rules and formal sector transactions costs. As suggested earlier, it plays an essential instrumental role as a "learning buffer" for populations with few resources.

Consequently, it serves as a major institution that assists the gradual absorption of rural migrants into the modern economy. Policies should strengthen this process of gradual transition via the informal sector, eventually leading toward formal sector participation -- although perhaps not until the next generation.

One compelling reason for balancing informal sector development policy formulation with policy directed at the formal sector is that rapid urban formal sector growth can accelerate rural in-migration and this can be deleterious. Migrants from the traditional sector tend to move into the homes and local communities of relatives and friends who extend the traditional "social security" sharing behaviors that they previously practiced in their tabancas. The migrants tend to enter the urban economy via the informal retail and service sectors. These local-market sectors, however, have a limited (derived) aggregate income level which depends upon such economic conditions as the level of exports, improved technology or investment. But to the extent that these conditions are fixed in the formal sector (although some exporting may occur via the informal sector), the total income flow to the informal sector is pre-determined.

As a result, rural in-migration rates substantially in excess of urban formal sector growth rates, together with the sharing of limited total informal sector incomes (also, it can be argued that the elasticity of substitution in this sector is infinite), compresses informal sector per capita incomes. Nevertheless, because of the income-sharing, the effective incomes of the migrants exceed their urban wages, thereby attracting more urban-bound migration than simple comparison of the marginal productivity-based urban-rural wage differential would suggest. Together with the difficulty of expanding urban public services at an equally rapid rate, the economic and social welfare of migrants falls. This information will feed back to potential rural migrants, perhaps slowing the in-migration rate. But the tendency of this process in developing regions is for the excess migration flow to continue. A balanced multi-sectoral development policy can mitigate these effects.

c. Traditional Sector

Much of traditional sector consumer goods are obtained via barter transactions and much is produced as subsistence crops via non-wage moranca labor, with the output of this labor (usually rice) being shared in the moranca. However, there is a substantial cash economy, with the production from individualized strips of farm land being available for sale in markets. These may

include urban markets and export markets, the latter on an informal basis at "informal" border crossings. Women tend to be very active in all these trading activities. The quantity of cash crop production has varied in the past with prices paid in urban markets; these tended to be depressed by official policy during the socialist regime, which set low prices for many farm goods. The reliance on non-cash subsistence farms has been a means for the traditional sector to weather these unfavorable market conditions.

d. Public Sector

The public sector has a major role to play in the development of Guinea-Bissau, and this includes provision of roads, schools, promoting technology transfer, and creating the legal and regulatory conditions that foster economic growth. However, these activities are costly and must be financed one way or another. There is reliance on foreign donor institutions, but loans from international banks remain limited.

The high current government deficit has been inflationary, and this is counter-productive in that it discourages exports and encourages imports (which has further consequences for exchange rates), and involves costly foreign debt repayment. Consequently, a favorable tax environment is needed to raise more public sector financing out of the current income stream. This will involve elements of tax reform that yield minimal negative impacts on production incentives.

Another reform involves the public ownership of industries in Guinea-Bissau. There remain numerous large firms in various sectors under public sector ownership that add to the government deficit. Privatization of these firms will improve the efficiency of the economy and reduce the prevalence of what potential foreign investors may perceive as subsidized competition.

B. SYNTHESIS OF POINTS OF INTERSECTORAL CONTACT AND POLICY IMPACT

On the basis of the above description of market structure, this subpart grapples with the following questions: (i) What characteristics of this structure can we expect legal and regulatory reforms to change directly, in economically positive ways? (ii) What interrelationships within this structure are likely to translate the direct impacts of legal/regulatory changes into significant multiplier effects on the economy as a whole? Once the points of likely direct and indirect

impact are described, the impacts of specific legal and regulatory measures can then be identified and measured in subpart C below.

The points of impact discussed above are summarized graphically in Figure 2 below. The direct sectoral impacts of legal and regulatory reforms are relatively straightforward; the indirect impacts are somewhat more complex. (Note that these are relative terms -- certainly in both cases the relationship of rules and incentives to economic behavior could justly be described as complex). For purposes of the analysis that follows, the points of direct impact can be described as:

Formal Sector. Direct economic impacts of laws and regulations upon the formal sector, including international demand for trade and investment:

Practically speaking, virtually all legal and regulatory reforms will be in this category. Most types of direct economic impacts generated by these reforms will meet one or more of the following criteria (see also the description of legal reform criteria at the beginning of part II):

- replacement of formerly government-run sectors with private sector markets that can set prices in relation to long-term opportunity costs, thereby promoting more efficient resource allocation;
- reduction of uncertainty concerning quality, prices, and profits, thereby promoting credit, investment and trade;
- reduction of barriers to entry;
- reduction of transaction costs;
- incentives toward greater production and employment;
- increased access to international markets; and
- greater tax revenue.

It is assumed that, practically speaking, government and donor policy-makers will not attempt to directly apply legal and regulatory reform toward the traditional sector, with the exception of permissive policies to either legitimize or ignore it. But since the traditional sector holds the great preponderance of Guinea-Bissau's population, this evaluation must consider the indirect impacts on traditional sector population of legal/regulatory reforms that directly impact the modern economy.

The first requirement here is an understanding of the points at which the modern economy makes contact with the traditional sector.

A. Three such contact points between the modern and traditional sectors are identified as follows (a modification of the linkages common to all multi-regional economies):

A(1). Migration from traditional sector to urban informal sector, itself a function of formal sector investment in the urban economy;

A(2). Formal sector investment in rural regions (e.g., plantations and agro-industry) bringing jobs to tabanca labor and slowing the rate of rural to urban migration; and

A(3). Sales of traditional sector cash crops to the modern economy.

Together, these three points impact traditional sector employment and per capita income.

B. Two points of contact between the formal and informal sectors of the modern economy are:

B(1). Economic growth of the formal sector and the total income of the informal sector (together with the population of the informal sector as affected by rural-urban migration, this determines informal sector per capita income); and

B(2). New business formation in the informal sector and informal business transition to the formal sector.

Each of these points of contact are impacted by policies concerning legal and regulatory reform.

A(1). Such legal and regulatory reforms as changes in financial institution laws, law of obligations and land law impact foreign and domestic trade and investment in the urban formal sector by increasing mean income in the urban informal economy [B(1)]. This attracts migration from the traditional sector.

A(2). The same laws under A(1) impact rural formal sector agricultural and agro-industry investment in rural regions. Traditional sector population gains employment in the rural formal sector. Earnings of *ponteiros* may be spent in the urban formal sector.

A(3). The same laws under A(1), along with tax and tariff laws affecting crop prices, impact modern economy incomes and commercial agricultural productivity (the latter could transfer to *tabanca* agriculture). Together, these impact modern economy demand for and traditional sector supply of cash crops; both are impacted by taxation and tariff laws that affect crop prices.

B(1). The same laws under A(1) impact both formal sector per capita income and consequently informal sector per capita income, and also, together with possible off-setting effects in A(2), the rate of traditional to informal sector (largely urban) migration. By implication, the ratio of formal urban-to-formal rural sector per capita incomes becomes a critical variable for guiding balanced development policy since it affects the rate of traditional sector migration to the urban informal sector.

B(2). Bankruptcy laws and laws concerning registration and licensing transaction costs impact new business formation in the informal sector and its rate of transition to the formal sector.

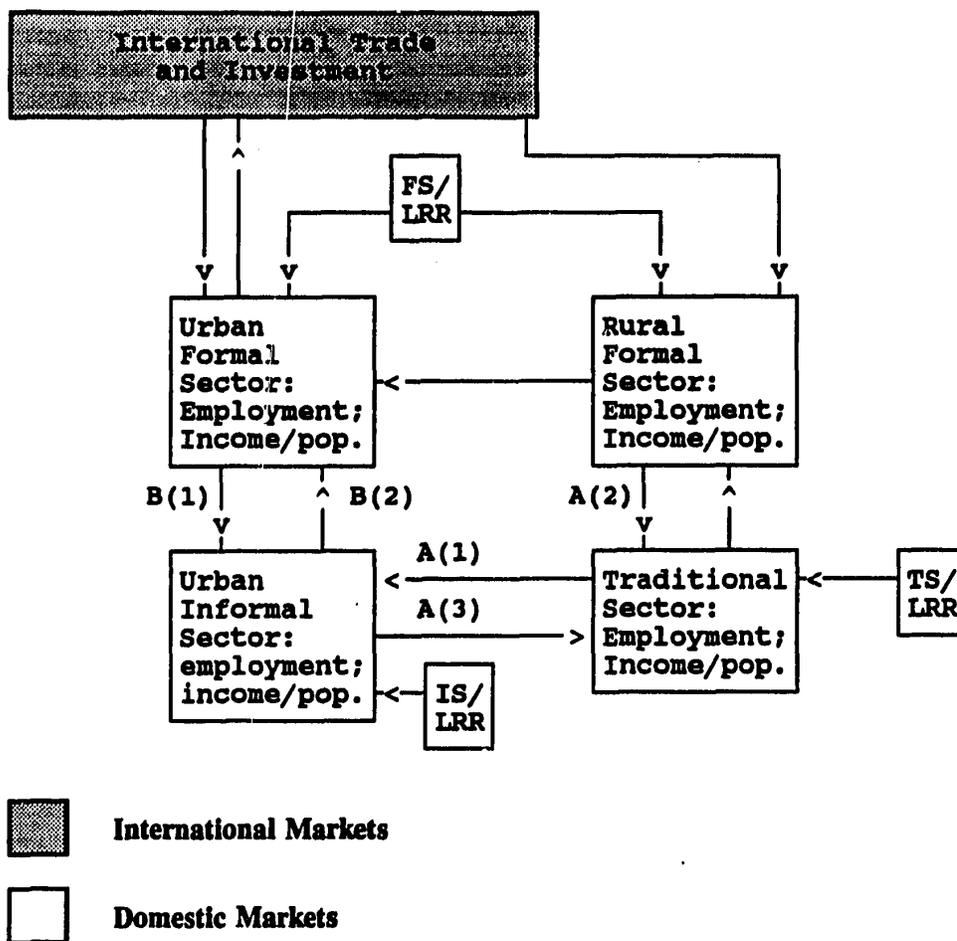
Informal Sector. Direct economic impacts of laws and regulations upon the informal sector:

There are laws that impinge on the informal sector, such as labor laws, but rules governing informal sector transactions, in practice, would be largely limited to custom rather than state law.

Traditional Sector. Direct economic impacts of laws and regulations upon the traditional sector:

This is essentially limited to customary law, but formal sector policy can be made to legitimize customary law.

Figure 2. Legal/Regulatory Reform (LRR) Economic Impact System



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C. ECONOMIC IMPACTS OF LEGAL AND REGULATORY REFORM

In this section of the report, the direct economic effects of each of the legal and regulatory reforms recommended in Part II above will be analyzed, and employing the framework developed above for evaluating the impacts of reforms in one sector upon the economic welfare of another, their indirect impacts will be elaborated. The sectors are: urban formal, rural formal (agriculture and agro-industry), urban informal and traditional. By tracing the effects of legal and regulatory changes, and assigning an estimated value to these impacts, this section of the report provides the economic rationale for the prioritization of legal/regulatory reforms set forth in the concluding part of the report.

The evaluation procedure begins by conceptually tracing through the causal relationships described above; there is neither data nor any intention to estimate the parameters of these relationships for obtaining statistically sound quantitative impact estimates. Instead, the sketching of these causal relations helps ensure that the major types of impacts are systematically given thoughtful consideration. Obviously, different analysts will have differing views of both the selection of key relationships and their relative importance. Following this logic, ordinal-scale scores are generated for the measurement of legal reform impacts. The procedure is as follows:

- (1) A numerical estimate ("guesstimate" is a better term) is given of the percentage change in sectoral income of an "average" unit or firm in response to the given legal or regulatory reform -- a sectoral "*unit income score*". Each such score is attributed to one or more of the economic effect criteria described above, or to the resulting multiplier effect. The scores are on a zero-to three scale, where zero represents "no impact" and three is "high impact per unit."
- (2) Based upon whatever relevant data and clues could be found, rough estimates have been made of the share of GDP represented by each of the sectors (these estimated income shares are shown in the Appendix at sub-part E below). The sector income size estimates are presented in the form of "*sector size scores*" on a four point scale, with one representing "very small" and four meaning "very large."

- (3) The sector size score in each case is multiplied by the sectoral unit income score. This provides an expected sectoral impact score, or "*total sector score*", produced for both direct and indirect impacts on each sector. These scores are given in Tables 5 to 15.

Sectoral scores are generated in this fashion, and illustrated by a table (an "LRR Impact Matrix"), in each case where a legal/regulatory reform is found to yield a measurable positive result. (See Tables 5 to 15). These impact measures are added across sectors to give an overall evaluation for each legal or regulatory reform, with the overall results shown in Table 16 (the "Summary Evaluation Table") at the end of this section of the report. This summary is accompanied by a discussion of implications for the role of the critical growth sub-sectors.

The total sector scores and the summary evaluation scores for the economy as a whole have a rough correlation with the expected magnitude of the increase in GDP resulting from the reform. In other words, the larger the ordinal number score, the larger the expected GDP growth. (The ordinal-scale scores do not represent exact percentage GDP increases, but only express orders of magnitude.) The scoring of the economic impacts of legal and regulatory reforms suggests the relative importance of some legal sectors to the critical growth sub-sectors of TIPS.

This procedure is illustrated in the LRR Impact Matrix in Table 4 below. Suppose an "example reform" is judged to generate a small direct impact on the formal agricultural sector (unit income impact score = 1) by reducing transactions costs, and also generates a small direct impact on the formal agro-industry sector (score =1) by raising productivity in that sector. Further, these direct impacts are then judged to generate a sizeable indirect impact (score = 3) on the traditional sector (sector size score = 4) by raising formal sector demand for cash crops. However, no indirect impacts are expected on either the urban formal or informal sectors. The unit income impact scores are then summed down the columns of the Impact Matrix to provide a "total unit impact score" for each sector, which is recorded in the second-to-last row in the LRR Impact Matrix. This score is then multiplied by the sector size score to give the "total sector impact score" for the legal or regulatory reform being evaluated in the LRR Impact Matrix.

Table 4: LRR Impact Matrix

Legal/Regulatory Reform: Example Reform	Formal Sectors			Urban Informal Sector	Traditional Sector
	Urban	Agr.	Agro-Ind.		
Sector of Impact:					
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Transactions Costs		1			
Increased Production/Productivity			1		
Unit Income Impact Scores, Indirect					
Demand for cash crops					3
Total Unit Impact Score		1	1		3
Total Sector Impact Score (size x impact)	0	2	1	0	12

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Using sector and size scores for the agricultural, agro-industry and traditional sectors of 2, 1 and 4 respectively, total sector impact scores of 2, 1 and 12 are obtained and shown in the bottom row of the LRR Impact Matrix. These scores are also recorded in the Summary Evaluation Table (Table 16) in the appropriate row for that legal or regulatory reform. The sector impact scores are then added together to give the total impact score for that legal or regulatory reform, which is shown in the last column of the Summary Evaluation Table (Table 16). In this example, the total impact score for this "example reform" would be 15 (= 2 + 1 + 12).

It should be noted at this point that the USAID-Bissau office has identified a set of "critical growth sub-sectors" for its development strategy for Guinea Bissau. These critical growth sub-sectors are specified by type of agricultural product (rice, cashews, etc.) and type of business activity associated with the production and distribution of each product (agricultural, agro-industry, commercial, etc.). This economic evaluation of the impacts of proposed legal and regulatory reforms is intended to support USAID-Bissau's forthcoming large-scale project (the TIPS Project) to develop the critical growth sub-sectors in Guinea-Bissau. The findings shown in the Summary Evaluation Table will provide impact measures relevant to the critical growth sub-sectors. However, the level of product and sectoral detail used in this analysis is limited. There is no disaggregation at the product level, and while this analysis breaks down the Guinea-Bissau economy into five sectors (agriculture, agro-industry, urban formal, urban informal, and traditional), the urban sectors have not been further disaggregated into commercial, services and other urban business activities.

In several cases, reforms are needed where there already exists an appropriate law but the law is not adequately enforced. Also, there are cases where no appropriate law exists, so that while there may not be a recommendation for reform of existing law, there may be a recommendation for establishment of a new law. In both cases, a review of their economic effects will be provided.

1. Property Rights

As noted in the legal analysis, the key issue of property ownership is determined in the constitution of Guinea-Bissau. The nation's Constitution had been structured, following independence in 1974, to support a socialist economy. In 1991, most of these restrictive articles were amended, removing their prohibitions. However, there remains the article prohibiting private

ownership of land. A brief discussion of the economic consequences of this prohibition will be offered, but it bears repeating, that a new land law is currently being drafted to extend greater private control over the use of land without, however, eliminating the prohibition of private land ownership.

a. Direct Impacts

Three issues arise from the private land ownership ban: efficient current land use allocation, use of land as collateral for credit, and conservation of land for future value. The limited land markets for commercial agricultural land and for traditional sector lands limit the possible role of market discipline for yielding highest and best use. That land cannot be used as collateral for obtaining credit is only one of several factors affecting private sector access to credit. Other factors include: the recent failure of the Banco Nacional da Guinea-Bissau, along with the lack of confidence that the judicial system will implement lien foreclosure in the event of default. Physical assets on the land, evidently, can be used as collateral. The failure to manage forest lands as an on-going source of timber, causing an elevated rate of deforestation, may also be partly attributable to the prohibition of private land ownership, but there currently exist elements of a land market via practices of transferability of concessions with long-term usage rights.

The emergence of an active land market together with guaranteed long-term transferable usage rights -- where the transfer process is between private parties and is allowed to include payment between them of a market-established fee -- will result in market discipline toward efficient allocation of land uses, and may allow land to serve as collateral for credit. Although such collateral would be less essential for urban sectors which have more physical relative to land property, this could eventually encourage more efficient (and intensive) production on the pontas (but initially, it would remove the implicit land subsidy, causing ponta crop prices to rise). With a land market that also capitalizes the resource (and location) value of land into land prices, there would also be less wasteful use of timber and other valuable attributes of land. These conditions for private market efficiency would enhance conditions for both domestic and international investment, particularly in the formal agricultural sector.

b. Indirect Impacts

More efficient use of land and better access to credit will eventually increase the productivity of agricultural land, which means higher incomes for land-holders. A large portion of land-holders

likely reside in the two major cities, so their increased incomes will enter the urban formal sector. This will initially increase income in the urban informal sector as well, inducing some rural-to-urban migration.

These agricultural efficiency changes would yield greater use of capital and other inputs, including possible increased labor use (rent-labor ratios would rise). However, the outcome for agricultural labor would depend both upon likely technological displacement and upon several other factors affecting the possibility of increased quantities of land and agricultural output, and thereby increased labor hire. These include the use of agricultural technical assistance to raise crop quality and utilize equipment effectively, and new marketing institutions with access to international markets.

If these contingencies are fulfilled, then the increased agricultural productivity, occurring in more rural Guinea-Bissau, will benefit traditional sector labor, and also generate multiplier demand effects that would expand local retail and service towns to serve the agricultural sector. This growth would also help absorb traditional sector labor, including displaced agricultural labor. It would thereby partly offset the attraction of migrants to the major city, and would also increase both formal and informal demand for traditional sector cash crops, benefitting traditional sector incomes.

The impacts of property rights reforms are summarized in Table 5 below.

Table 5: LRR Impact Matrix

Legal/Regulatory Reform: Property Rights Reform	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact: Urban	Agr.	Agro-Ind.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Resource Allocation:					
Land Market Efficiency		2	1		
Access to Credit & Investment	1	3	3		
Unit Income Impact Scores, Indirect					
Demand for Urban Goods	0.5				
Multiplier Effects				1	2
Total Unit Impact Score	1.5	5	4	1	2
Total Sector Impact Score (size x impact)	6	10	4	2	8

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2. Commercial Law

a. Business Entry Issues

There are several laws that obstruct small business entry into the formal sector, and these tend to shift such activity to the informal sector. These include company law, registration and licensing, and bankruptcy law.

(i) Company Law: Sole Proprietorships

As stated previously, the law does not allow limited liability for single person companies. Individuals who intend to enter the formal sector but are concerned about risk must join with at least one more individual to form a "sociedade por quotas" or with at least nine other shareholders to form a "sociedade anonima". Failing this, an individual might either abandon his aspiration as an entrepreneur, or he might seek to skirt unlimited liability risk by operating in the informal sector. The informal sector, however, imposes its own costs that limit company growth by depriving the entrepreneur of access to formal sector laws and protections such as bank loans and export rights, and exposes the firm to continual extortion. The recommended reform that a sole proprietor be allowed to obtain a "sociedade" form of organization would provide limited liability; this could encourage increased formal sector market entry, in part by encouraging an increase in business decisions involving higher risk. (See section II.B.1.g.(i).)

(ii) Business Registration and Licensing

All business entities are required to go through several steps in order to pursue business in a given line of commerce, including registration, licensing, notarization and publication of corporate statutes, etc. (see part II.B above). Most of these steps involve payment of fees, purchase of stamps, and expenditure of time. Some of the fees are proportioned to the capital scale of the firm, and certain steps of the process involving significant delay (for example, publication of the notarial recording) also provide for interim registration so the firm can begin operating. Consequently, the extent to which these transaction costs actually obstruct formal sector entry is not obvious.

It has been observed in other countries that at various points of the licensing and registration process, payment of speed money ("graft") may be a customary component of the transactions costs. Whether or not this occurs in Guinea-Bissau is not known to these researchers. What is clear is that business registration and licensing involve significant transactions costs that raise the costs of entry into the formal sector, and to some extent this will either preempt small firms from entry or encourage them to operate in the informal sector.

Recommended reforms for this process include elimination of those non-essential licensing procedures that serve only as inspection points for the regulations of other government agencies (e.g. health and fire safety), provision of temporary permits pending later inspection, and simplification of the notarization and registration process. These reforms will reduce transactions costs affecting the market entry of small firms.

(iii) Bankruptcy Law

As noted above, one consequence of bankruptcy in Guinea-Bissau law is that the businessman is prohibited from ever again starting a business, at least in the formal sector. Some businessmen, to avoid the bankruptcy declaration, simply cease operating when financial difficulties arise, and some disappear. The preemptive nature of the bankruptcy law seems costly to the nation's supply of entrepreneurial skills. It is known that a large portion of new firms fail, since entrepreneurship necessarily involves "learning by doing." This, however, is information that should be known to potential creditors, who should be able to make their own evaluation of the applicant's creditworthiness. In the case of fraudulent business practices, criminal laws rather than punitive bankruptcy provisions could be relied on.

The recommended reform would be to eliminate the prohibition of reentry against business-people who experienced bankruptcy, with appropriate publication in the Commercial Registry being a means for informing potential creditors of the past bankruptcy. This reform would increase the supply of potential entrepreneurs.

(iv) Impacts of Commercial Law Reform

• Direct Impacts

These commercial law reforms would impact the formation of small businesses. They would increase the number of small firms in the formal sector, in large part by shifting the proportion of all firms from the informal sector to the formal sector, but also by increasing the overall rate of new business entry. The question is, whether these reforms also will significantly impact aggregate income and employment and contribute to the improved sectoral distribution of income.

Reforms involving provision of limited liability for sole proprietorships and allowing reentry of principals with previous bankruptcy involvement both have the initial effect of increasing the demand for investment. In turn, creditors are faced with the problem of assessing the credit risk in making loans. This not only involves greater risk assessment costs over levels previously experienced when loans to these higher risk applicants were preempted by the restrictive commercial laws, but also will involve loans with higher default probabilities. These costs, of course, will be passed on in the form of higher interest rates.

The resulting increased demand for formal sector credit should put some upward pressure on interest rates in general, so while the reforms will increase the number of firms overall, a consequence of increased interest rates could be a reduction in the demand for expansion capital by extant medium and larger size firms. The effect on sectoral employment and income, however, depends upon efficiencies obtained by the increased competition from the newly entering firms.

By encouraging formal rather than informal sector participation, the reforms will increase competition for domestic as well as export markets. To the extent that these markets were previously protected, the increased competition would lower prices, increase innovation, raise consumer surplus for domestic consumers, increase export trade, and increase output, employment and income overall. At issue, however, is the number of firms involved and their actual impact on price competition. This number is likely to be small (see the discussion under informal sector impacts, below). If their price impact is also small, then the gains from competition could be largely offset by increased capital costs to existing medium and large firms.

Clearer results can be predicted concerning the impacts of registration and licensing reforms. By reducing transactions costs, these reforms would reduce the cost of entry. The firms directly impacted by these reforms would likely be of lower risk compared with firms directly impacted by company liability and bankruptcy reforms. These reforms would therefore have less effect on interest rates than the company and bankruptcy law reforms. Therefore, the competitive gains from the price competition these firms would bring to the formal sector, together with savings in extortion expenses from their not being in the informal sector, would not likely be offset by any displacement of capital from larger firms. Consequently, licensing and registration reform yields a clear gain for the formal sector. At issue, then, is the size of the gain.

The size of current transactions costs for licensing and registration do not appear to be very high, according to the information obtained from the notary interviewed by the consultants. But when the per capita income of informal sector entrants is considered (recall that the 1992 per capita income was \$180), these transactions costs could still be preemptive for much of the informal sector. If these costs could be reduced by 50 percent, then the possibility of joining the formal sector becomes more realistic for many in the informal sector. Two issues must be considered: first is the number of informal sector participants who are aware of the existence and advantages of licensing and registration procedures for entry into the formal sector, and the second is a new law (the consulting team has not been able to obtain and review this law) that purportedly levies substantial taxes on all informal sector participants who fail to register and obtain licenses -- if they can be caught. The number of informal sector participants who would be aware of and consider responding to licensing and registration requirements is likely to be very much higher than would be the case for the limited liability and bankruptcy reforms.

Nonetheless, even after reforms that reduce the latter source of transactions costs, an important immediate effect of the reforms would be to increase tax collections from the newly formal sector firms. While this would improve public sector finances, an important formal sector gain, it would offset transactions cost savings. Two types of impacts are therefore at issue here: first, benefits to the new formal sector participants such as access to export licenses and markets, and other legal/contractual protections; second, the impacts of increased formal sector competition on formal sector prices (i.e. efficiency). These impacts are judged to be moderate in magnitude.

Concerning the rural/urban incidence of impacts, the urban informal sector is likely to be significantly larger than the rural informal sector. Consequently, each of these three commercial

law reforms would have a greater impact on the formal commercial sector (urban) than the formal agricultural sector.

- **Indirect Impacts**

The types of firms that would shift from the informal to the formal sector in response to company and bankruptcy law reforms are probably not very characteristic of the average informal sector entity. What may separate Guinea-Bissau from De Soto's informal sector in Peru is that a much higher proportion of urban informal sector participants (in such cities as Bissau and Bafata) come from the traditional sector as relatively recent migrants seeking participation in the modern economy. With extremely high illiteracy rates and virtually no capital, these people have little possibility of entering this economy via the formal sector. Rather than consciously choosing the informal sector because formal sector legalities and transactions costs are too burdensome, these people are more likely to settle into the informal sector with the assistance of their previously arrived relatives and friends, because that is the only sector they are likely to learn anything about.

This is to suggest, subject to further future research, that the number of informal sector firms situated near the interface with the formal sector and which, with company and bankruptcy law reform, would shift their choice and decide to go formal, may be a small proportion of all informal sector firms. If this is true, then the impact of the recommended company and bankruptcy reforms on the size of the informal sector would be very small; impacts on the traditional sector would be nil.

The impacts on informal sector size due to licensing and registration law reform, although perhaps not very large, would be substantially greater than for the other two commercial law reforms. This reflects the large total number of firms in the informal sector. There are an estimated 11,800 informal sector workers in manufacturing alone, nearly 75 percent of total manufacturing employment, and these numbers are likely to be small relative to the number in retailing. Because so much of the informal sector is urban, an initial indirect impact of licensing and registration reform would be to raise per capita incomes of urban informal sector residents if the change in disposable formal sector income, after increased tax collections, is positive. In turn, this would increase the attraction of migrants to cities from the traditional sector and would slightly increase the population of the urban informal sector. Income sharing would then offset

the initial small increase in urban informal sector mean incomes. Apart from this, impacts on the traditional sector would be small.

The impacts of reforms in company, bankruptcy, and licensing and registration laws and regulations are summarized in Tables 6 to 8 below.

b. Other Areas of Commercial Law

(i) Negotiable Instruments Law

No substantive reforms were recommended. It was learned that if a non-collectible check is written in an amount exceeding \$270, the creditor requires that the issuer appear in person to notarize his signature. Although this provision would render the use of checks virtually uncollectible and therefore considerably weaken the enforceability of contracts, in practice, the courts do not recognize this procedure. Nevertheless, since the written law is not consistent with judicial practice, it is recommended that the written law concerning negotiable instruments be revised for consistency; however, this change is not expected to have economic impact.

(ii) Financial Institutions Law

The availability of bank credit in Guinea-Bissau is extremely limited, in part reflecting the recent failure of a major bank, but also very restrictive central bank credit policy that sets limits on bank credit and a very high reserve ratio for banks (30% of deposits, non-interest bearing). The severe weakness of the debt capacity of domestic firms also plays a role here. However, these are economic and policy problems rather than legal and regulatory issues.

Table 6: LRR Impact Matrix

Legal/Regulatory Reform: <u>Company Law</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Risk Management/ New Entry & Competition	0.5	0.5	1		
Unit Income Impact Scores, Indirect					
Income Per Worker					
Multiplier Effects					
Total Unit Impact Score	0.5	0.5	1	0.5	
Total Sector Impact Score (size x impact)	2	1	1	1	0

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Table 7: LRR Impact Matrix

Legal/Regulatory Reform: <u>Bus. Regist. & Licens.</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Urban	Agr.	Agro-Ind.		
Sector of Impact:					
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Transactions Costs	0.5	0.5	0.5		
Tax Revenues	0.5				
Access to Int'l Markets	0.5	0.5	0.5		
New Entry & Competition	0.5				
Unit Income Impact Scores, Indirect					
Income Per Worker				0.5	
Multiplier Effects				0.5	0.25
Total Unit Impact Score	2	1	1	1	0.25
Total Sector Impact Score (size x impact)	8	2	1	2	1

Table 8: LRR Impact Matrix

Legal/Regulatory Reform: <u>Bankruptcy Law</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Urban	Agr.	Agro-Ind.		
Sector of Impact:					
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
New Entry & Competition	0.5	0.5	1		
Unit Income Impact Scores, Indirect					
Income Per Worker				0.25	
Multiplier Effects				0.25	
Total Unit Impact Score	0.5	0.5	1	0.5	
Total Sector Impact Score (size x impact)	2	1	1	1	0

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(iii) Intellectual and Industrial Property Law

Although intellectual property is protected by a 1927 law, protection does not extend to new technology such as computer hardware and software. It is recommended that this law be updated. However, at the current level of technological development of the Guinea-Bissau economy, any economic impacts from this reform are not anticipated for the foreseeable future. Antitrust law and other regulations against restrictive business practices are treated in the legal analysis under industrial property law, and current law appears very permissive. Reforms are suggested concerning restrictive business practices, but this will be evaluated in a separate section below. With the latter exception (evaluated below), no economic impacts from intellectual and industrial property law are expected.

3. Restrictive Business Practices

As explained above, Guinea-Bissau does not have anti-trust legislation, *per se*, but has included vague wording in its industrial property legislation which, however, is unlikely to limit such practices. Although much of the rationale for legislation to control restrictive business practices may belong to the future, there is the threat that the legal and regulatory system (licensing and registration regulations, for example), could be used in an anti-competitive way to protect private interests in the formal sector. The major beneficiaries of new legislation to control restrictive business practices will largely be the urban formal sector, but the economic gains of competitive prices will also "trickle down" to the informal and traditional sectors.

The impacts of these reforms are summarized in Table 9 below.

Table 9 LRR Impact Matrix

Legal/Regulatory Reform: <u>Restrictive Bus. Pract.</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
New Entry/Reduced Monopoly Rents	1	1	1		
Unit Income Impact Scores, Indirect					
Multiplier Effects				0.5	0.5
Total Unit Impact Score	1	1	1	0.5	0.5
Total Sector Impact Score (size x impact)	4	2	1	1	2

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4. Maritime Law

The recommendation above that the provisions of maritime law be up-dated to provide for strict liability in the event of oil spills is not expected measurably to impact the Guinea-Bissau economy in the foreseeable future.

5. Tax Law

It is estimated that tax revenues account for only eight percent of GDP. Yet the graduated marginal income tax structure attains its highest rate (50 percent) for individuals with annual earnings of over U.S. \$230, and different sources of personal income (rents, wages, etc.) are taxed at different rates, so that individuals with identical incomes, but earned from different sources, are taxed differently. Tax avoidance is widely practiced. The present tax system is inequitable, and creates disincentives and other market distortions. Tax reform to resolve these problems would yield both more efficient production (largely in the formal sector, but via multiplier effects, spreading to informal and traditional sectors) and would also yield much more tax revenue. The impacts of these reforms are summarized in Table 10 below.

Table 10 LRR Impact Matrix

Legal/Regulatory Reform: <u>Tax Law</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Resource Allocation/ Tax Revenues	0.5	0.5	0.5		
Invest. & Work Incentives	1	1	1		
Unit Income Impact Scores, Indirect					
Multiplier Effects				1	0.5
Total Unit Impact Score	1.5	1.5	1.5	1	0.5
Total Sector Impact Score (size x impact)	6	3	1.5	2	2

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6. Labor Law

As described in the legal analysis above, the current labor law provides a great deal of protection to workers, making very difficult employer efforts to dismiss workers for misconduct or for inefficiency. These laws would create a significant incentive to reduce the labor intensiveness of production and to keep workers for shorter periods. However, in large part, the laws are not enforced, so they have little economic impact. Nevertheless, the recommendation has been made to reform these laws so they would be supportive of worker interests while reducing labor hire disincentives. It is expected that these benefits will be small, largely incident to the urban formal sector, but also affecting the smaller rural formal and informal sectors.

The impacts of these reforms are summarized in Table 11 below.

Table 11: LRR Impact Matrix

Legal/Regulatory Reform: <u>Labor Law</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Resource Allocation,					
Labor Hire Incentives	0.5	0.5	0.5		0.125
Unit Income Impact Scores, Indirect					
Total Unit Impact Score	0.5	0.5	0.5		1.25
Total Sector Impact Score (size x impact)	2	1	0.5	0	0.5

7. Law of Obligations (contracts, torts, secured transactions)

The law of obligations is generally supportive of business transactions. Although it may take several months to foreclose on liens or other collateral in the event of default, this problem is not unique to Guinea-Bissau; judicial practice is evidently supportive of business transactions. Nevertheless, Guinea-Bissau has not ratified the 1980 United Nations Convention on International Sale of Goods, and this exception may impact the level of uncertainty for foreign business people in transacting with local traders. While the impact of not signing this convention on the nation's level of international trade is not known, signing the Convention should reduce the degree of uncertainty that currently affects the willingness of foreign business to transact with domestic traders, and should moderately impact exports. Since the agricultural sector, including agro-industry, accounts for virtually all of the nation's international trade, impacts for the urban formal sector are likely to be negligible for the foreseeable future.

This reform would primarily affect rural formal sector output, and thereby impact the incomes of *ponteiros* and industrialists, many of whom would reside and spend incomes in the urban formal sector. Consequently, the urban formal sector would be indirectly impacted to a small extent, as would the urban informal sector. Further, traditional sector employment in the rural formal sector and demand for its cash crops would be positively affected.

The impacts of these reforms are summarized in Table 12 below.

Table 12: LRR Impact Matrix

Legal/Regulatory Reform: Law of Obligations	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact: Urban	Agr.	Agro-Ind.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Transaction Costs, Risk Reduction & Increased Foreign Demand		1	1		
Unit Income Impact Scores, Indirect					
Multiplier Effects	0.25			0.5	0.25
Total Unit Impact Score	0.25	1	1	0.5	0.25
Total Sector Impact Score (size x impact)	1	2	1	1	1

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8. Consumer Protection Law

There is no consumer protection law *per se*, but damages incident to consumers resulting from purchase of defective products or services are to be compensated via tort liability.¹¹ However, the amount of tort liability is limited. The recommendation is made that tort liability be increased to further consumer protection. This will have the impact of causing producers and sellers to improve product quality.

Similarly, it is recommended that Guinea-Bissau adhere to the United Nations Convention on the International Sale of Goods, which contains provisions similar to the implied warranty of merchantability in U.S. common law. By reducing uncertainty regarding product quality, these consumer protection reforms could impact both export and local demand for formal sector output, and would also have some indirect impacts via multiplier effects.

The impacts of these reforms are summarized in Table 13 below.

¹¹ The civil law equivalent would be liability in *delict*.

Table 13: LRR Impact Matrix

Legal/Regulatory Reform: <u>Consumer Protection</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Risk Reduction (product quality):					
Export Markets	0.5	1	1		
Local Consumers	0.25				
Unit Income Impact Scores, Indirect					
Multiplier Effects				0.5	
Total Unit Impact Score	0.75	1	1	0.5	
Total Sector Impact Score (size x impact)	3	2	1	1	0

9. Environmental Law

In part because of the lack of private ownership rights to land, such environmental harms as soil erosion, salinization of agricultural land and desertification due to deforestation are widespread in Guinea-Bissau. Resources that may now be abundant will become costly and very scarce in the future. Consequently, and particularly in the absence of private land ownership rights, strong environmental protection laws are essential for the long run economic future of Guinea-Bissau.

When private land ownership rights exist, land-holders understand that resources, whether renewable or non-renewable, on their land are the source of current and future profits. Whether or not land-holders always carefully conserve land-based resources, the motive to protect long-term profits is a powerful incentive to avoid wastage or destruction of these resources. In Guinea-Bissau, an important explanation for private sector deforestation practices may lie in government ownership of major stocks of timberlands together with its practice of granting free timberlands concessions to the private sector. This results in a zero price of land, and encourages wasteful cutting by eliminating incentives for private sector management of land to gain long-term economic value.

There is evidently a government fee for cutting wood on concession-holders' lands, but while this may attenuate short-term demand for wood, the fee still goes to the government rather than to current or future land-holders.¹² The value of the timber therefore cannot be capitalized into the value of land. Holders of timberlands therefore lack incentives to manage their holdings to preserve future value, which they perceive as nil. Under these circumstances, the resulting market failure implies that regulations are needed for limiting timber-cutting and replanting.

If the government prohibition against land ownership is retained, then measures which assure long-term usage rights to concession-holders, together with clear transferability of land usage

¹² To the extent that a single government office both oversees conservation of forests and collects timber-cutting fees, a potential conflict of interest arises. There is not necessarily a problem with this arrangement, since many governments follow this pattern, using natural resource fees of this kind to maximize either revenue (with a relatively low fee) or conservation (with a relatively high fee). In present circumstances, however, it may be worthwhile for Guinea-Bissau to consider separating the conservation and fee collection functions.

rights, should support a functioning land market. Also, the government could charge a one-time price for the value of the standing trees in granting private concessions (rather than its apparent current practice of charging all land-holders for cutting trees). If this value could then be recouped when the land is transferred (e.g., sold) to another private user, then the emerging land market could well establish price-based incentives favoring appropriate timberland management. Passage of environmental protection legislation, and allowing inclusion of market-based fees in the land transfer process, will help assure development potential for the long run. Since these laws are most applicable to the rural formal sector but will also be applicable to the large traditional sector, these are the sectors that will benefit most, but in the long run. However, these beneficial effects will spill over to both the urban formal and informal sectors.

The impacts of these reforms are summarized in Table 14 below.

Table 14: LRR Impact Matrix

Legal/Regulatory Reform: <u>Environmental Law</u>	Formal Sectors			Urban Informal Sector	Traditional Sector
	Sector of Impact:	Urban	Agr.		
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Resource Allocation:					
Future Timber Markets		2	2		1.5
Environmental Conserv.		2			1.5
Unit Income Impact Scores, Indirect					
Multiplier Effects	0.25			1	1
Total Unit Impact Score	0.25	4	2	1	4
Total Sector Impact Score (size x impact)	1	8	2	2	16

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10. Conflicts of Law

The traditional sector has maintained itself, for better or worse (and many say for the better), in a kind of homeostasis through many serious challenges, mostly brought by foreign elites, whether appearing as colonialists or as benefactors. This is largely due to the functionality of its laws and customs. However, many traditional sector laws and customs are in conflict with the modern Portuguese-based legal system. This is particularly true of land law.

Drawing upon principles from conflicts of law the reform is proposed of legitimizing all customary law for land rights (excepting environmental regulations) and for disputes occurring on tabanca locations, with state civil law applicable to all other conflicts. This type of law would give greater certainty to land rights and other traditional behavior, and support a longer term orientation in economic decision-making.

The impacts of these reforms are summarized in Table 15 below

Table 15: LRR Impact Matrix

Legal/Regulatory Reform: Conflicts of Laws	Formal Sectors			Urban Informal Sector	Traditional Sector
	Urban	Agr.	Agro-Ind.		
Sector of Impact:					
Sector Size Score:	4	2	1	2	4
Unit Income Impact Scores Direct					
Resource Allocation/ Risk Management:					
Certainty of Returns from Property & Investment					3
Unit Income Impact Scores, Indirect					3
Total Unit Impact Score					3
Total Sector Impact Score (size x impact)	0	0	0	0	12

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D. IMPLICATIONS FOR CRITICAL GROWTH SUB-SECTORS

The critical growth sub-sectors identified by USAID-Bissau are contained in the rural-based agricultural (cashews, rice, fruits and vegetables), forestry, fishing and agro-industry sectors -- supported by the urban commercial and service sectors. The analysis above shows that legal and regulatory reforms can have a significant impact on these sectors, particularly those concerned with land law, environmental protection, tax, and business registration.

Also, reforms such as these, that stimulate the critical growth sub-sectors and have their primary effect on rural areas, can have measurable impact on the traditional sector, with less effect in speeding-up the process of urban migration to the informal sector than a more urban-oriented development policy. Thus, the indirect effects of reforms in such high-impact areas such as property rights, environmental law, and conflicts rules fall heavily into the traditional sector -- partially as multiplier effects stemming from growth in the critical growth sub-sectors (the conflicts rule reforms being an exception to this). This underlines and supports the TIPS Project strategy of obtaining widespread welfare benefits by providing incentives for expansion in the critical growth sectors.

The scoring for economic impacts of legal/regulatory reforms is summarized in the Summary Evaluation Table 16 below. The majority of the reforms would involve changes in inadequate existing laws. In addition, cases of adequate existing law but inadequate enforcement include contracts and secured transactions. Cases of no existing laws but new ones recommended, include restrictive trade practices and conflicts of law principles to legitimize traditional sector rights.

Table 16 - Summary Evaluation Table

Type of Law or Regulation	Formal Sectors			Urban Informal Sector	Traditional Sector	Total Score
	Urban	Agr.	Agro-ind.			
1. Property Rights	6	10	4	2	8	30
2. Environmental Law	1	8	2	2	16	29
3. Tax Law	6	3	1.5	2	2	14.5
4. Business Regist./Licensing	8	2	1	2	1	14
5. Conflicts of Law	0	0	0	0	12	12
6. Restrictive Business Practices	4	2	1	1	2	10
7. Consumer Protection	3	2	1	1	0	7
8. Law of Obligations (contracts, torts, secured transactions)	1	2	1	1	1	6
9. Company Law	2	1	1	1	0	5
10. Bankruptcy	2	1	1	1	0	5
11. Labor Law	2	1	0.5	0	0.5	4
12. Negotiable Instrmnts.	0	0	0	0	0	0
13. Financial Institutions	0	0	0	0	0	0
14. Insurance	0	0	0	0	0	0
15. Foreign Investment	0	0	0	0	0	0
16. Intellectual Prop.	0	0	0	0	0	0
17. Maritime Law	0	0	0	0	0	0

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E. APPENDIX

Estimated Size of Sector as Percent of GDP, 1990

Sector	Percent of GDP
Traditional	40
Urban Informal	11
Urban Formal	37
Rural Formal: agriculture	8
Rural Formal: agro-industry	4
Total	100

Parameters and estimates involved in these calculations include: traditional sector population is 750,000 and earns approximately 82 percent of GDP in agriculture, silviculture and fisheries, implying traditional sector annual per capita income of \$96; informal sector is in manufacturing and commercial sectors with 75 percent of employment in these sectors, and with annual per capita incomes assumed at \$105, this accounts for 190,000 people; formal sector then has a population of 60,000 with annual per capita income of \$1470. Additional data on sectoral shares of GDP, including manufacturing (11%), agriculture-forestry-cattle and fishing (48%), public administration (7%), commerce-transportation-services (30%), and construction (4%) and the sectoral composition of exports (total exports: 13% of GDP) was obtained from *Estatísticas Económicas e Financeiras*, 1st Semester 1992, Banco Central da Guinea-Bissau, August, 1992.

IV. CONCLUSIONS

A. SUMMARY OF FINDINGS

The scoring of the estimated economic impacts of legal and regulatory reforms contained in the economic analysis of this report (Table 16), suggests the relative importance of some legal sectors to the critical growth sub-sectors of TIPS.

Two prominent areas are property rights and environmental law. These scored 30 and 29 points respectively. In this report, the issue of property rights mainly centers on amending the constitution to permit "private ownership of land". Because this change is not feasible politically (see below), one must consider bringing on-going land-law revision and future regulations as close as possible to private property to induce the economic behavior described earlier. It is important to note that both land law and environmental law are interdependent in many aspects and should be addressed simultaneously. These laws should have the greatest impact on the majority of the population.

Because a land-law committee already exists, TIPS should provide continued support to its work. Regarding environmental law, TIPS could support the drafting and implementation of a national environmental code for Guinea-Bissau, drawing from the extensive comparative experience of other countries, which ought to be adapted to local environmental resources and conditions.

The reform of commercial legislation, taken as a whole, is equally important. Items 4, 6, 9, and 10 could usefully be considered together, since they represent interrelated commercial law concerns.¹³ These areas total 30 points, distributed among Business Registration and Licensing, Restrictive Business Practices, Company Law, and Bankruptcy, listed by order of importance. This report finds that a full-fledged revision of the Commercial Code would not be necessary at the moment and, perhaps, would not be consistent with present in-country capability and the scope of TIPS.

¹³ Items 12 through 17 constitute the remainder of the commercial law category, and could therefore be considered for reform at the same time if this were deemed desirable. However, as the economic analysis makes clear, these topics in themselves are of least importance to GDP growth generally and the critical growth sub-sectors in particular.

Other important priorities are tax law, conflict of laws, consumer protection and the law of obligations which are graded at 14.5, 12, 7 and 6 points respectively. Labor law (4 points), and the remaining commercial law reforms are of less importance and could be addressed at a later date.

In conclusion, property (land) law, environmental law, tax, conflicts rules, and the five specific components of commercial law mentioned above comprise the priority areas for the legal reform program.

B. TECHNICAL AND POLITICAL FEASIBILITY OF REFORMS

How feasible are the above-mentioned reforms, in terms of technical resources and political acceptability?

1. Technical Feasibility

A 1990 assessment of selected legal institutions of Guinea-Bissau is provided in Annex X. Most of the constraints indicated in those findings are still true. Basically, the shortage in human and material resources persists and, as mentioned below, will need to be addressed in order to provide the necessary local legal infrastructure for the reforms discussed in this report.

The Office of Legal Studies, Legislation and Documentation, known as GELD (Gabinete de Estudos, Legislaçao e Documentaçao), within the Ministry of Justice, continues to have the mandate to review and propose legislation, besides serving as an archive of legislation and legal materials. The expatriate legal advisors have now been replaced with Guinean lawyers, headed by Mr. Armando Procel, who was appointed director of this office in 1990. The overall condition of GELD improved significantly from the earlier assessment as far as office space, organization, and participation in legal events, but it still lacks a librarian, a secretary, and typists. It now has only one receptionist/typist. The four existing lawyers, including the director, are not enough to carry on GELD's daily work, let alone additional law-making that will involve significant research and inter-ministerial coordination.

A minimum professional staff for this office should include at least seven legal advisors. These lawyers should reflect a broad comparative law experience. Presently, two have graduated from Portugal, and two from former socialist countries. It is recommended that any new hire ought to have experience in other legal systems, such as the American and Brazilian systems. Consideration should be given to seeking foreign donor assistance to finance a one year Master of Law degree program in a nation with a common law system by one or two GELD lawyers. The purpose of such training would not be to persuade them to adopt common law solutions to problems, but rather to open a window on the world and expose them to a variety of legal approaches.¹⁴

An independent Bar Association has been in existence since early 1992. Membership includes approximately 60 lawyers, which doubles the total number of lawyers in the country since 1990. All of them hold several jobs, usually a government position combined with private practice. The demand for good legal work is placed on a few lawyers, who seem to be involved in most law-drafting that takes place, usually as part of "ad hoc" committees appointed by the government. Nevertheless, this incipient Bar could and should participate in the legal reform process. A system of short-term seminars and continuing legal education should be developed to help Bar members meet the challenges of a rapidly changing economy and society.

¹⁴ It should be pointed out that the suggestion here is not to have GELD as the sole legal drafting office in the country, but that it be strengthened to serve a better coordinating role and provide better technical service. Guinea-Bissau is a poor country, therefore the notion that each ministry should have a full legal office can hardly be justified. For this reason, GELD within the Ministry of Justice could serve as the leading legal office of the Executive Branch, playing a coordinating and advisory role. The other ministries could keep one or two lawyers (as they often do) for their internal needs. Interministerial law-making would be under the responsibility and coordination of GELD, and ministerial law-drafting would be reviewed by GELD for consistency before being sent to the legislature.

Nor would it make sense to move GELD from the Ministry of Justice to the legislative branch, for the purpose of GELD is not just to draft laws, but also to provide legal assistance to the executive branch and to serve as a repository of law. In a democratic government, the executive branch also initiates legislation and drafts regulations, therefore if GELD were removed, another GELD would have to be created to fill the void. The legislative branch may consider, nevertheless, having a legal committee that reviews incoming bills for constitutionality and legality, as an additional check.

The Law School has shown marked improvement over the years, assisted by able professors from the Lisbon School of Law. Soon, in 1994, the first class of Guinean lawyers will graduate. There is strong interest from the faculty (which is now comprised of mostly Guineans), the student-body and the community in its activities. Besides teaching the civilian legal system of Portuguese origin, as applied to Guinea-Bissau, this school also provides courses in Guinean customary law. Its Center for Legal Studies and Support to Legislative Reform (Centro de Estudos e de Apoio as Reformas Legislativas) has promoted seminars and research in topics of direct interest to TIPS, such as customary law and land law. Cooperation with the law school should provide theoretical background in support of the intended legal reforms. Again, programs should be developed to permit foreign comparative study by one or more Guinean law professors in another legal system, such as that of the United States or Brazil.

The necessary knowledge of Portuguese Civil Law and of applicable Guinean Law of Portuguese origin is available in-country. Customary law, on the contrary, has not been systematized yet. Existing writings have often been the result of social or anthropological research without legal assistance. Much work still needs to be conducted in this area to have a firm understanding of the extent and variety of customary law among the various ethnic groups in Guinea-Bissau.

The scarcity of human resources discussed above will require outside support to serve as catalyst, to monitor on-going work and to provide the comparative law perspective. Outside support will also be needed for material resources and to pay for the consulting services of local experts.

2. Political Feasibility

As far as political feasibility is concerned, Guineans in general would like to reform their existing legal system so that they will have legislation that takes into consideration the Guinean reality. This is certainly the case of commercial laws. The existing Commercial Code is Portuguese, applied to Guinea-Bissau since the last century because of its colonial past. It is the consensus of the legal community and of government representatives met by these consultants that a new Commercial Code is needed. For these reasons, no political obstacle to changing the Commercial Code or any of its sections is expected. The same holds true for maritime law and the law of obligations.

Constitutional law is already in the process of changing and several amendments have been put in place to allow a multiparty system, separation of powers and a market economy. For the purpose of this report, constitutional law relates mainly to private ownership of land. The drafting of a new land law has already taken place, providing for improved use rights that resemble private property. Private ownership *per se*, however, does not seem to be politically feasible. The constitutional revision that was passed recently did not include changing the provision that granted ownership of the soil and subsoil to the State.

Tax law is also politically sensitive. In the past several years, the government has mentioned the intention to reform the tax system. The World Bank would like to see significant changes take place as well, but so far any attempts have been timid. It is the belief of these consultants that tax reform may be feasible if the government is convinced that increased revenues and more rational operation will be part of a proposed new system.

The usual social and political implications of labor law do not seem to hinder the feasibility of reform in Guinea-Bissau. The 1986 Labor Code is very restrictive to business practices but it is largely not enforced. Besides, it does not apply to the great majority of the work force, which is rural and family-oriented. Despite the risk of reviving past socialist sentiments, the possibility of labor law reform should not encounter much opposition.

Consumer protection legislation has been suggested by numerous officials, often related to imports, rather than the quality and safety of internal products. Health concerns are also obvious with respect to products that are openly commercialized on the street and in the markets. New laws would be most welcome in this regard, but one must question how enforcement would take place, given the poor quality of goods being traded, and the current lack of quality control among Guinean traders and consumers. The setting of standards that are compatible with the Guinean reality and massive educational campaigns should lower obstacles to enforcement.

Despite the apparent support for environmental protection, Guinea-Bissau still needs to implement major legislation to protect its natural resources. If these changes do not come gradually, political and economic resistance will be inevitable. This has been the norm elsewhere in the world, and will certainly be the case there, where the commitment to economic growth is strong. Environmental education will play a fundamental role, along with legislation, in order to change

present unsustainable practices in timber and fisheries, for example, to avoid depletion of these resources. Environmental legislation must also be implemented and enforced along with new land laws and regulations. An indication of government support for these laws would be the allocation of human and financial resources to environmental offices, such as the national environmental council, which is presently understaffed and under-funded. Environmental law will be highly visible and political, although its importance to the sustainability of Guinea-Bissau's development and donors' support and interest will ensure its feasibility.

The environment is also an area where USAID could collaborate with other international donors. The World Bank is interested in institution building, UNSO in natural resource planning, and IUCN in developing public awareness strategies, while USAID could provide Guinea-Bissau with support to establish the legal basis for environmental protection. A recent report on "Environmental Needs and Activities in Guinea-Bissau" stated that the political climate is currently very receptive to environmental projects. This ought to be done immediately in collaboration with the environmental council and other relevant agencies, due to increasing pressures on the country's natural resources.

Procedural rules concerning conflict of laws, i.e. that will provide for the interface between civil law and customary law and promote its coexistence, interested everyone. This interface already exists to some extent in practice, since the formal legal system of Portuguese origin operates at a different level and does not intend to regulate or enforce disputes that can be settled within ethnic groups according to traditional customary laws.

Procedural rules to create a system of conflict of laws and to formally recognize local mechanisms of dispute resolution would help clarify the division between Portuguese-derived civil law and the various customary laws. It may be possible to delegate the regulation of micro businesses and many informals, as well as some of the localized business transactions and contracts, to customary practices and remedies. Such an approach, if feasible, would actually expand the scope of ethnic authority--not limit it. At the same time, it would free up officials of the central government to concentrate on larger businesses, major transactions, and revenue enhancement from significant income producers. Further legal anthropological research is imperative to determine whether the various customary law regimes in Guinea-Bissau contain sufficient norms on enforcement of promises and other business transactions to make this a realistic possibility.

C. RECOMMENDATIONS

Throughout the above text, a number of suggestions for legal changes were made. Following is a complete statement of those recommendations in order of priority, as dictated by the preceding economic impact and feasibility analyses:

- **PROPERTY LAW**
 1. Strengthen efforts to improve provisions for private "ownership" or control of land, where feasible
- **ENVIRONMENTAL LAW**
 2. Enact an environmental protection code.
- **TAX LAW**
 3. Tax reform is recommended to simplify existing tax structure, with emphasis on drafting a new Tax Code. All export taxes should be eliminated.
- **BUSINESS REGISTRATION AND LICENSING**
 4. Eliminate the requirements for notarization and publication in the *Boletim Oficial* for new companies.
 5. Review all licensing procedures; retain only those essential to some important public purpose.
- **INTERFACE BETWEEN CIVIL LAW AND CUSTOMARY LAW**
 6. Amend the Civil Code to provide the following:

- a. The personal law shall be that of one's tribe or ethnic group. Alternatively, "habitual residence" could be used as the basis for the personal law for those who have left their tribal territories and for persons whose parents come from more than one tribe; in the latter case, the personal law would be the Portuguese derived civil law.
- b. Where a contract does not contain a choice of law clause, it should be controlled by the law of the tribe if the parties are from the same ethnic group and if the contract is to be performed on the land or within the region controlled by the tribe. Otherwise, the Portuguese derived civil law would apply.
- c. Similar rules could be formulated for informals with a close nexus in the tribal area.

7. Change the Code of Civil Procedure:

- a. To legalize a system of tribal courts or ethnic decision making institutions; and
- b. To define the scope of their jurisdiction or competence (examples of cases to be excluded could be those involving persons from more than one ethnic group; persons who have relocated outside the territory of their ethnic group; disputes involving some national or constitutional issue; disputes in excess of a certain amount; companies whose gross sales exceed a stipulated amount, etc.).

• ***RESTRICTIVE BUSINESS PRACTICES***

8. Establish legislation on unfair competition and restrictive business practices separate from intellectual and industrial property laws.

- ***CONSUMER PROTECTION***

9. Pass a consumer protection code.

- ***LAW OF OBLIGATIONS***

10. Enact legislation on leasing.

11. Adhere to the 1980 United Nations Convention on the International Sale of Goods and ratify the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

- ***BUSINESS ENTITIES***

12. Authorize creation of a one person company with limited liability.

13. Enact legislation on micro-businesses with simple registration, accounting and tax requirements.

14. Provide for establishment of a closely held corporation which could be created by two or more persons and which could be directly managed by the shareholders.

15. Improve protection of minority shareholders by:

- a. Forbidding controlling shareholders and/or company management from "abuse of power" (violation of fiduciary duty in common law);

- b. Granting them the right to inspect books under liberal conditions;

- c. Regulating agreements among and between shareholders;

- d. Considering authorization of cumulative voting which can increase the possibility of the minority being represented on the Board of Directors.
- 16. Enact legislation on mergers, holding companies and dissolution.
- 17. The following may be appropriate subjects for legislation at some later date when the economy is more developed:
 - a. Securities regulation (capital markets).
 - b. Regulation of Institutional Investors.

- ***BANKRUPTCY***

- 18. Amend the Bankruptcy Law to:
 - a. Remove the prohibition against a bankrupt's engaging in business activity, provided that he was not proved guilty of fraud; and
 - b. Establish procedures to ensure that the Commercial Registry will reveal if one has gone through bankruptcy; this is important to alert prospective creditors.

- ***LABOR LAW***

- 19. Revise the labor law to:
 - a. Exempt smaller companies and informals from its purview by, e.g., making it applicable only to companies with at least a stipulated number of employees and minimum annual gross sales of a certain amount;

- b. Authorize employees to be dismissed at will and without cause upon thirty days' notice and payment of the amount of compensation stipulated in the labor law.

- ***OTHER AREAS FOR REFORM***

- ***General Commercial Law***

- 20. Divide the Commercial Code into component parts or chapters for ease in compilation and revision; and replace it with a series of new codes, such as a Code on Company Law, an Insurance Code and a Negotiable Instruments Code.

- ***Negotiable Instruments, Financial Institutions, Insurance, Domestic and Foreign Investment***

- 21. The requirement for notarization of checks should be eliminated.

- ***Intellectual and Industrial Property***

- 22. Enact new legislation to conform with international conventions that have been ratified.

- ***Maritime Law***

- 23. Enact national law to require compliance with international safety and liability standards by all vessels in Guinean waters.

D. ESTIMATED LEVEL OF EFFORT

The estimated level of effort to carry out the suggested reforms will vary according to the level of in-country support that will be provided by the U.S.-funded program, i.e. material resources

to local government agencies and non-governmental organizations, and financial resources to attract good local consultants to the various reform projects.

It is a given fact that no single Guinean legal institution will be able to conduct this process alone; concerted action will be required and who is involved will depend on the area of law that is under consideration. The Ministry of Justice through GELD should play a coordinating role by setting up specific legal reform committees with participants from other government agencies as well as private organizations, such as the law school, the bar association and other groups or institutions whose interests will be directly affected by the proposed reforms, such as the Chamber of Commerce, rural associations, etc. Although the process ought to be participatory, large committees are also ineffective. For this reason, participants must be restricted to those with technical capability and knowledge of the field. Any attempt to form committees because of political or financial opportunity should be discouraged. These committees should average seven to eight members and, in no circumstance, have more than ten people.¹⁵

The approach should be incremental, so as not to overcommit scarce and already strained human resources. It is recommended that one or two projects be selected and finalized before considering other new legal reforms. Because legal reform is dynamic, other issues and areas that may not have been considered in this report might become important. Therefore, the project should have the flexibility to respond to occasional pressures from, and needs of, other government offices and the private sector. As the work progresses, additional changes can be considered.

Because all existing lawyers are committed to other government duties, their participation will most likely be part-time. This may delay the reform process. Financial rewards (compensation) should be contingent on achievement to ensure dedication and guarantee that deadlines are met.

¹⁵ This is not to suggest that law-making is a non-political and exclusively technical process. There are stages where the process is political, mixed and exclusively technical. Once the political decision is reached, it often becomes a technical matter to carry out the decision in the form of a draft. What is suggested here is to avoid forming committees, principally large committees, and staffing them with political appointments rather than participants with technical capability. This combination of political favoritism and financial opportunity should be avoided. (See section IV.B.1.)

Thus, considering these constraints and the participatory approach, one can expect the process to take one to three years to be completed in any given area. The amount of expatriate expert advice and drafting work necessary in each case is difficult to estimate, but one should assume an order of magnitude of approximately 10 to 20 person-months of technical assistance for each of the major legal areas discussed above -- depending on the level of complexity and the extent to which expatriate advisors will be expected to be involved in drafting.

ANNEX A

LIST OF PERSONS INTERVIEWED

Abdu Mane	Legal Advisor, Ministry of Commerce and Tourism
Alberto Lopes	Supreme Court Justice.
André Lima	Legal Advisor, Ministry of Justice
Armando Procel	Director of the Legal Advisory Office, Ministry of Justice; Vice-President of the Bar Association
Artur Sanha	Legal Advisor, Ministry of Justice
Augusto Tavares	Legal Advisor, Ministry of Natural Resources
Augusto César Tolentino	General Director, National Press
Carlos Rui Pereira	Secretary-General, National Council for the Environment
Carmelita Pires	Legal Advisor, Ministry of Justice
Djalo Pires	Minister of Justice
Eduardo Sanka	Lawyer, member of the Bar Association
Filinto Barros	Minister of Finances
Francisco Conduto de Pina	General Director of Tourism
João Gomes Cardoso	Minister of Natural Resources
Junior Saico Baldé	Notary Public
Malal Saré of Fisheries	President of the Bar Association; Legal Advisor, Ministry of Fisheries
Malam Bacai Sanha Labor	Minister of Administrative Reform, Civil Service and Labor
Malam Djawra Commerce and Tourism	General Director of Internal Commerce, Ministry of Commerce and Tourism
Munira Jauad Commerce and Tourism	General Director of Foreign Commerce, Ministry of Commerce and Tourism
Nelson Carlos Medina	Director of Administrative Reform
Simão Mendes Service and Labor	Economist, Ministry of Administrative Reform, Civil Service and Labor
Victor Arsenio Balde	Director of Planning and Industrial Legislation
Tereza Antonia da Veiga Legal	Advisor, Secretary of State of Planning

ANNEX B

SUMMARY OF MEETINGS

- (1) **General Director of Foreign Commerce - Munira Jauad**
Legal Adviser - Abdu Mane (February 24, 1993).

This office is responsible for regulating all exports and imports of Guinea-Bissau and to monitor the execution of bilateral and multilateral contracts. There is only one employee with a college degree out of 17 total. Primary concern of Ms. Munira was the non-existence of any law that allowed her office to control imports as to quality, origin and price. She felt her office needed to protect the consumer against incoming products of poor quality and unknown origin. Guinean businesses also needed protection and capacity building in order to negotiate more effectively abroad, for GB went from a 100% state controlled economy to 100% free market without any preparation. Exports need protection as well to guarantee the quality of Guinean products abroad. Cashew exports were given as example. Senegalese cashew nuts are mixed with Guinean nuts to benefit from the better prices charged due to the higher quality of the latter, thus, downgrading GB exports. GB exporters should also pool together to bargain better prices for their products in the international market. Her office exerts some controls on a case-by-case basis, but urges that it be set up by law. The Ministry does not even have an organic law, which could attribute some powers to her office.

- (2) **General Director of the Official Press - Augusto César Tolentino (February 24, 1993).**

All GB legislation must be published in the official press (Boletim Oficial da República da Guiné-Bissau) to enter in force, however the "Boletim" is usually 12 weeks behind schedule. Mr. Tolentino has collected and catalogued by computer, on his own, all legislation that applies to GB since 1900. This catalogue is up-to-date to the time of this writing (February 1993). He has also indexed Supreme Court decisions since 1975, decisions of the People's National Assembly, national requests and name changes. It is his intention to have this data distributed to the courts, the bar association, the law school, the ministries and other interested parties, who would then have immediate and accurate access to the law.

- (3) **Ministry of Justice - Gabinete de Estudos, Legislação e Documentação (GELD) - Armando Procel, Carmelita Pires, André Lima, Artur Sanha (February 25, 1993).**

GELD lawyers feel that Portuguese commercial legislation (the 1888 code and other laws enacted until 1973) needs to be revised and a truly Guinean code adopted, one that would take into consideration not only Guinean customary law and practice, but also modern and more efficient provisions. It was argued that previous laws were enacted for a different society (Portugal) and only applied to GB indirectly, or enacted according to the colonial perspective. Company law and registration procedures should be simplified and brought up-to-date to the modern world. Because the compilation of these laws could prove to be an overbearing task, it was suggested that reform could be done incrementally, such as a code on company law, a maritime law code, etc. The need to reform existing law on the

organization of companies to allow the possibility of a one person company (empresa individual) and to simplify the procedures for business registration were considered to be the principal priorities. GELD was cautious about creating a specialized commercial court, since it would be difficult to determine appropriate jurisdiction between civil and commercial cases. At present, there a "tribunal" for family and labor cases.

- (4) **Ministry of Administrative Reform, Public Function and Labor - Minister Malam Bacai Sanha (February 25, 1993)**
Economic Advisor - Simão Mendes
Director of Administrative Reform - Nelson Medina

A new public service statute will address employment in the public sector. The minister stated that the 1986 labor law was drafted at a time when the State controlled the economy and there was no private sector. For this reason, the labor code is so strict on job protection, and created a special procedure to dismiss employees. He believes the code must be revised to adapt to the new situation, since most public companies have been or are in the process of being privatized. The Ministry itself is being reformed, whereby they plan to have an office (Direção Geral do Trabalho) that will train workers who lost their jobs with privatization to insert them into the private sector. They also plan to form a tripartite council, called "Conselho de Consertação Social", formed by representatives from the government, employers and employees, to determine labor policy, propose legislation and regs, and establish the minimum wage. New bills have been proposed by the Ministry concerning collective bargaining and labor representation in the companies. The Council of Ministers are analyzing new strike and union laws. As to the informal sector, nobody really knows what it represents to the national economy. He feels that this sector must be regulated, but one should know how it functions and what it represents first. He would like to see USAID helping the Ministry to organize the Direção Geral do Trabalho, principally in training those that need to shift from public to private companies (these would be similar to SESI, SENAI, SENAC in Brazil, short-term, on-the-job training); also holding seminars and research about the private sector, focusing on informals; and, finally, in drafting new laws and regulations. He would like to see the private sector more involved with capacity building, rather than wait for governmental initiative, since the private sector would be the beneficiary of a better-trained work-force. Perhaps, the Chamber of Commerce could help in this regard. He pointed out that labor law only addresses the urban sector of the economy, while rural, maritime and residencial workers are outside its scope. The director of administrative reform informed that the new statute for public service should be published in March. They plan to start working on the revision of the land law in June '93 to make it more appropriate to the new private sector.

(5) President of the Bar Association, Legal Advisor, Ministry of Fisheries - Malal Sané (February 26, 1993).

The President of the Bar Association believes that the commercial code needs to be adapted to Guinean reality and conditions. Most people do business here as individuals, partnerships usually involve only two or three partners. Individuals cannot limit their liability, even if they register their activity as a sole proprietorship. Business activity, nevertheless, is primarily conducted by individuals, and #2 "sociedades por quotas" (a type of limited partnership). Corporations (sociedades anónimas) are rare, since the law requires at least ten shareholders to start such a company. Cooperatives are also insignificant, usually involving handicrafts, sewing, bamboo chairs, and often consist of women only. Although tabancas operate in somewhat a cooperative fashion, production is not common to tabanca members. He talked about the requirements to form, register and license a company, and indicated that lawyers in general complain about existing procedures as too cumbersome [see description below, Notary Public]. Foreign investment is even more complicated, since the investor must also obtain favorable opinions from all ministers of the economic sector in order to be authorized by the Council of Ministers. There is no department to aid and promote foreign investment, or to help organize a small company. This is something that perhaps the Chamber of Commerce could start.

As far as fisheries is concerned, there is no fisheries policy or plan (Plano Director de Pescas). The Ministry functions according to demand. Present "Lei Geral das Pescas" is Decree-Law #2/86, from March 29, 1986, which was regulated by Decree #10/86, from April 26, 1986. Fishing licenses were updated by "Despacho Ministerial" #21/92, from December 4, 1992, which establish present values to issue licenses. The Ministry of Fisheries is planning to revise the fisheries law in conjunction with the Health Ministry. It also belongs to the National Environmental Council, and is concerned with present fishing practices, which may have a significant impact on existing resources.

(6) Ministry of Finances - Minister Filinto Barros (February 26, 1993).

The minister does not believe the economic problem of GB is because of the legal system, but one of competition in the international market and protectionism in Europe. The country does not generate enough income, therefore funds are not sufficient even having reduced the public sector. The private sector must be financed from outside to increase production. GB cannot reduce its taxes anymore, since the internal revenue represents only 6% of the GNP (PIB), while other African countries is 17%. There are too many exemptions whether granted by law to attract foreign capital, such as the investment code, or requested by donors, when they build roads, hospitals, schools, etc. The ministry is considering revising existing law to focus on the agricultural sector, which represents the future of the country. He does not believe investment will come to GB since the profit margin is higher in Europe and African countries lack infrastructure, which increase the costs for the foreign investor. On the other hand, the work force is cheap but not qualified. As for the informal sector, the whole regional commerce with neighboring countries

bypasses the controls of the government, but he does not believe it is significant. Horizontal exchange (South-South) has not brought positive results, since these countries produce similar goods, while the markets for Southern countries are in the North. The internal informal market is also believed to be insignificant as far as revenue is concerned and does not need to be regulated from a revenue standpoint. The productive sector needs credit, but that is only available to the commercial sector. He also favors private property so that the government could collect property taxes, because present concessions are "fiction", the State does not have any benefit, whether rural or urban.

(7) Director of Planning and Industrial Legislation - Victor A. Balde, Legal Advisor - Tereza Antonia da Veiga (February 26, 1993)

Mr. Balde informed that there are approximately 50 small to medium-size industries in GB, while micro (defined as that with less than 10 people) and informal industries amount to 2,000. The latter are not licensed by the Ministry. The Ministry does not intend to control these, rather it plans to support them. There are about 5 foreign-owned industries based in GB. But there is no credit available to the productive sector, the two banks (BIG and Totta Açores) have short-term credit lines to commercial activities. The Ministry is trying to create a Pilot Fund, with the support of ASDI and the UN to support industrial activities with better interest rates. They need to revise the 1950 industrial regulations to adapt to present conditions in Bissau, but Mr. Balde believes that a national industrial plan is needed first. They must determine what are the industrial priorities for GB, such as import substitution and or processing internal products, and this should be considered before the new law. Present licensing requirements are: petition to the Minister informing the building location, a negative certificate from the criminal records and a declaration of financial capability. An industrial license can be granted to either an individual or a company. After receiving the request, they require approval by the Ministry of Public Works and Urbanism, the Municipality (City Hall), the Health Department and the Judiciary Police to issue the license. Some of these requirements, he feels, could be simplified, and the USAID could help the Ministry in this revision to remove unnecessary barriers. He also indicated concern for environmental matters.

(8) National Environmental Council - Carlos Rui Pereira

The "Conselho Nacional do Ambiente" (CNA) was established by Decree #24/92, due to pressure from international NGOs in anticipation to the Rio '92 Environmental Conference. There are 15 members in the CNA, representing different government ministries, NGOs, and the forestry, fisheries and agriculture private sectors. It is presided by the President of the Council of State. The Council has not met yet since all of its members have not been empowered. It has functioned through its executive secretariat - a one-man operation at present. The powers of the Council involve an enormous task of coordination and legislation. The country faces depletion of its natural resources, such as its forests (either through deforestation, charcoal/firewood production and extensive agricultural practices), and fisheries. The Council intends to propose a national environmental policy act, compile

existing national and international environment-related legislation, and propose new legislation concerning environmental protection. The World Bank is providing support to the development of a national environmental plan. CNA needs to have organizational support for its implementation and would like to network with international organizations and NGOs, such as WWF, that might be interested in developing joint activities and projects in GB. It seems that CNA's operation has been guaranteed for the first two years by the dutch cooperation. After that they plan to be self sufficient by taxing some activities, such as an additional tax to fishing licenses and exports, and drawing a percentage of the Forestry Fund, paid by the lumber industry.

(9) General Director of Tourism - Francisco Conduto de Pina (March 3, 1993)

A tourism commission was formed by the PAIGC in 1974, but the government at that time did not encourage tourism activities because those were associated with prostitution, trash and other problems. In 1980 the Tourism Complex of Bubaque was built by the Swedish, and since 1985 there has been increased interest in bringing foreign tourists to help the balance of payment. Thus, the Secretary of State for Tourism was created. The final objective is to reach quality tourism with good roads and good communications. There are 957 beds distributed among 18 units (hotels) at present; 52% in Bissau, 22% in the interior, and 26% in the Bijagós Archipelago. In November '92 a Lodging Law and a Travel Agent Law were approved by the Council of Ministers, which have not yet been published. A gambling law is soon to be approved. There is also a Tourism Fund Law that basically establish a 10% surcharge on services. A national tourism plan, developed in conjunction with Portuguese experts, will be considered by the National Assembly. All hotels, except the one in Bubaque, have been privatized. Some still have government participation, such as the 24 of September, a partnership between GB (38%) and TAP (62%), but the government plans to sell its shares to the private sector as soon as possible. The National Tourism Council (Conselho Nacional do Turismo - CNT) plans to collaborate with the CNA for the protection of the environment. At this point, tourism represent only 0.5% of the GNP (PIB), but the objective is to reach 4 to 6% in the next 5 years and more than 10% within 10 years. It is estimated that 1,700 persons work in tourism-related activities. While in Europe the rate is 0.8 person per bed, the average here is 1.5 to 2 per bed. Main concerns now are lack of investment to develop infrastructure, capacity building (training), and marketing. The private sector does not have enough capital to invest, interest rates are very high, but joint ventures might be possible, such as a Bangalo Complex in Varela, whereby nature and tourism would be integrated.

(10) Ministry of Natural Resources - Minister João Gomes Cardoso Legal Advisor - Augusto Tavares (March 3, 1993)

The Ministry of Natural Resources has jurisdiction over water, mines (including hydrocarbons) and energy. Forestry shifted to Rural Development. The Water Code was approved in 1991/92 but it still needs publication and regulations. FAO provided technical legal assistance for the water law. The Mining Code and regulations on "Pedreiras" have

already been approved. There is also a "Lei do Petróleo", whereby oil prospection is a risk contract. Energy is a more complex matter. Present energy matrix is 10% from electricity, 90% from charcoal and firewood. Gas is insignificant. But charcoal is under the Ministry of Rural Development, which controls forestry also. The Hydroelectric Power Plant in Saltinho, financed by the African Development Bank (Banco Africano de Desenvolvimento - BAD) since 1985 will generate enough power to make GB self-sufficient and may even export energy. The work should start in 1994/95 and should take approximately 5 years, including the dam, transport and distribution of energy. An environmental impact assessment is presently under way by the same Portuguese company that developed the technical project. As a member of the National Environmental Council, this Ministry would like to introduce conservation in all offices. He mentioned that most people associate environmental protection with drought, charcoal, deforestation, but not with natural resources management, such as water uses and control, such as the importance of water to irrigation, public health and fisheries. GB is squeezed between the desert in the East and brackish, estuarine water in the West. Fresh surface water is, thus, very limited. Underground water uses must be careful not salinate existing aquifers. For this reason, one must be very cautious in promoting the growth of modern agriculture in areas that may not be appropriate, or that cannot sustain that activity due to a natural restriction in the water supply.

(11) Notary Public - Junior Saico Baldé (March 4, 1993)

There is only one notary public for the whole country. The other regional offices only notarizes signatures but are not authorized to draft legal documents such as articles of incorporation and the by-laws of a company. This office is subordinate to the Ministry of Justice. Its revenues are distributed 60% to the Ministry of Finances and 40% to the Ministry of Justice. Mr. Saico explained in detail the procedure that someone must go through to form, register and license a company, and showed samples of "estatutos" that he has written by hand on the notary's official books. Present law requires that all notarized document be kept this way. The requests for notarization, as well as registration and licensing, must be written on stamped, 25-line, blue stationery. The required procedure and some ways of circumventing the cumbersome delays have been discussed in the text of this report. Not only the initial "estatutos" are notarized and registered, but any change that may occur after that. According to him, from 1988 to 1991, he notarized between 100 to 200 companies per year, but this number dropped in 1992 and even more so in 1993, due to the lack of credit and failures of initial joint-ventures between Portuguese and Guinean partners. Also, as the investment climate improved in Angola, many investors from there simply returned and did not operate the companies registered here. He estimated that 10% of the companies were "sociedades anónimas", more than 50% were "sociedades por quotas" and the remainder the other types, particularly "firmas individuais". Mr. Saico believes that much of the procedures could be simplified by changing existing legislation to remove the stamped paper requirement and the copying of "estatutos" by hand, for example. Also, the Commercial Code itself could be revised to allow the formation of single-person companies.

(12) Minister of Justice - Djalo Pires (March 4, 1993)

Similarly to most of those interviewed, the Minister of Justice would like to see the Commercial Code revised and adapted to Guinean conditions. This may have to be done by sections, since a full revision would take a long time. Initial areas of priority would be a code on company law and revision of the law on notarization and registration of businesses.

(13) Supreme Court Justice - Alberto Lopes (March 4, 1993)

The growth of the private sector has reflected in the work of GB courts, which has increased due to debt collection from unpaid bank loans and partnership conflicts. Many of recently created enterprises were joint-ventures between Portuguese and Guinean nationals. Apparently, some of these were mock-companies, formed as "national" companies to avoid the requirement of the foreign investor to bring hard-currency to GB. In these, the Guinean partner has token participation, but eventually become the local operator of the foreign partner. Lack of business experience and the inherent difficulties to do business locally lead to mismanagement and conflict between the partners, some of which have come to court. He envisions that company termination and bankruptcy cases will become common. Mr. Lopes recommended that a specialized arbitration tribunal be created for handling commercial cases, to avoid choking the regular court system. Although arbitration is provided in the Code of Civil Procedure, these rules must be revised to give more authority to arbitration awards and automatic enforcement by the courts, if needed. The Regional Tribunals would review these awards on appeal only. The Chamber of Commerce, for example, could keep a list of accredited and reputable arbitrators to be chosen by the parties, and even small business conflicts could be mediated by the Chamber. As a whole, the Commercial Code is outdated and is largely not applied. It should be changed into a modern Guinean Code.

(14) Director of Internal Commerce - Malam Djawra (March 5, 1993)

This office issues licenses to all business activities in GB, from import licenses to operational licenses. Long lines at the door of Mr. Djawra and the constant interruptions from other clerks indicate where the choking point of "doing business" in Bissau is. In order to receive a license to operate in the internal market, one must deposit 250,000 PG in the order of the Ministry of Commerce at a local bank, which will be returned when the commercial activity terminates. This deposit is 10,000,000 PG to operate in the international market (import/export). Licenses may be issued to individuals or to companies, whether nationals of GB or of a foreign country. In order to receive a license, one must petition the Ministry of Commerce (signature must be notarized), who will request the inspection of the business location by the Municipality, the Health Department and the Judiciary Police, to confirm whether the location is appropriate. If no reply is received within 30 days, the license will be issued. Licensing regulations are provided in Decrees #s 22 and 23/86. Principal problems the business sector faces at the

moment is the lack of credit and the uncontrollable informal sector. Sugar, oil and flour come from Senegal or The Gambia by land, without any control by the "Alfândega". Regional exports, such as palm oil and charcoal are the same. Only import/exports from/to European countries that go through the port are really controlled. On the other hand, it was said this provides for cheaper goods in the market, sold by the informals.

(15) Bar Association lawyers - Armando Procel e Eduardo Sanca (March 5, 1993)

There are approximately 60 lawyers now in Guinea Bissau, most of whom are members of the Bar. Only 4 or 5 are practicing solely in the private sector, without any government job. Membership in the Bar costs 50,000 PG (roughly US\$5) per month. This is only enough to pay the rent, according to vice-president Mr. Procel. The Bar Association needs seed money to be fully operational, to purchase typewriters, a copier, a computer, general furniture, books, etc. Seminars and training to build the legal capacity of local lawyers is seen as a priority for the Bar. Clients usually mistrust lawyers and prefer to solve their problems directly. They also lack resources to pay for legal fees and court costs. The courts, on the other hand, lack materials to the point that the lawyer must provide cover for the cases, paper and even pens, so that a case is processed. There are few Portuguese codes from the time of independence (1973) available, which makes the lawyers job even more difficult in finding the applicable law, since most of them are young and have studied abroad according to the new laws. The Bar would like to provide this service by having an appropriate library and good working conditions to its members.

ANNEX C

IDENTIFICATION OF EXISTING AND PROPOSED LEGISLATION

CONSTITUTIONAL LAW

Lei nº 1/73, Boletim Oficial da República da Guiné-Bissau nº [], de 4 de janeiro de 1975.

Lei nº 4/75, Boletim Oficial da República da Guiné-Bissau nº [], de 5 de maio de 1975.

Constituição da República da Guiné-Bissau, Suplemento ao Boletim Oficial da República da Guiné-Bissau nº 1, de 16 de maio de 1984.

Lei Constitucional nº 1/91, Suplemento ao Boletim Oficial da República da Guiné-Bissau nº 18, de 9 de maio de 1991.

COMMERCIAL LAW

Código Comercial: Aprovado pela Carta de Lei de 28 de Junho de 1888 e Decreto de 23 de agosto de 1888, Diário do Governo nº 203, de 6 de setembro de 1888 [Portugal].

Código Civil: Aprovado pelo Decreto-Lei nº 47.344, de 25 de novembro de 1966 [Portugal].

Código de Processo Civil: Aprovado pelo Decreto-Lei nº 44.129, de 28 de dezembro de 1961; com modificações do Decreto-Lei nº 47.690, de 11 de maio de 1967, Rectificado no Diário do Governo nº 167, 1ª série, de 10 de julho de 1967 [Portugal].

Business Entities

Código Comercial, arts. 104 a 230.

Lei de 11 de Abril de 1901, Diário do Governo [Portugal] de 13 de abril de 1901, Sociedade por Quotas. Fonte: Código Comercial.

Decreto Lei nº 43.843, de 5 de agosto de 1961, Altera a Lei de Sociedade por Quotas. Fonte: Código Comercial.

Decreto-Lei nº 49.381, de 15 de novembro de 1969 - Fiscalização das Sociedades Anónimas. Fonte: Código Comercial.

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Business Registration

Decreto-Lei nº 42.644, de 14 de novembro de 1959, Registo Comercial. Fonte: Código Comercial.

Decreto nº 42.645, de 14 de novembro de 1959, Regulamento do Registo Comercial. Fonte: Código Comercial.

Decreto-Lei nº 47.619, de 31 de março de 1967, Código do Notariado.

Business Licensing**• Commerce**

Decreto nº 29/88, Boletim Oficial da República da Guiné-Bissau nº 37, de 12 de setembro de 1988.

• Industry

Diploma legislativo nº 1:491, Boletim Oficial da Colônia da Guiné nº 11, Suplemento ao nº 34, de 26 de agosto de 1950.

• Fisheries

Decreto nº 10/86, Boletim Oficial da República da Guiné-Bissau nº 17, 2º Suplemento, de 26 de abril de 1986. Regulamenta a Lei Geral sobre a Pesca.

• Agriculture

Decreto nº 43.894, Boletim Oficial da Guiné nº 38, de 27 de setembro de 1961. Aprova o Regulamento da Ocupação e Concessão de Terrenos nas Províncias Ultramarinas.

• Forestry

Decreto nº 4/82, de 15 de maio de 1982. Determina a concessão do direito de abate, serração e comercialização interna de madeira.

• Shipping

Decreto nº 25/92, Boletim Oficial da República da Guiné-Bissau nº 12, de 23 de março de 1992.

Bankruptcy

Código de Processo Civil de 1939, arts. 1135 a 1325.

Negotiable Instruments

Código Comercial, art. 284.

Lei Uniforme relativa às letras e livranças (Anexos I e II à Convenção de Genebra de 7 de junho de 1930). Fonte: Código Comercial.

Lei Uniforme relativa ao cheque (Anexos I e II à Convenção de Genebra de 19 de março de 1931). Fonte: Código Comercial.

Decreto nº 13.004, de 12 de janeiro de 1927, Emissão de cheque sem provisão. Fonte: Código Comercial.

Financial Institutions

Decreto nº 31/89, Boletim Oficial da República da Guiné-Bissau nº 52, de 27 de dezembro de 1989, Lei das Instituições Financeiras da Guiné-Bissau.

Insurance

Código Comercial, arts. 425 a 462.

Decreto nº 16/79, Boletim Oficial da República da Guiné-Bissau nº 38, de 24 de setembro de 1979.

Decretos nºs 17/79, 18/79, 19/79, 20/79 e 21/79, Boletim Oficial da República da Guiné-Bissau nº 38, de 24 de setembro de 1979.

Decretos nºs 4/80, 5/80, 6/80, Boletim Oficial da República da Guiné-Bissau nº [], de 9 de fevereiro de 1980.

Decreto nº 15/80, Boletim Oficial da República da Guiné-Bissau nº [], de 15 de março de 1980.

Código Comercial, arts. 425 a 462.

Foreign Investment

Decreto-Lei nº 4/91, Boletim Oficial da República da Guiné-Bissau nº 41, de 14 de outubro de 1991, Código de Investimento.

Intellectual Property

Código Civil, art.1.303.

Decreto nº 13.725, de 25 de maio de 1927.

Decreto nº 30.679, de 24 de agosto de 1940. Código da Propriedade Industrial. Fonte: Código Comercial.

Resolução nº 4/88, Boletim Oficial da República da Guiné-Bissau nº 11, 2º Suplemento, de 16 de março de 1988. Ractifica a convenção de Estocolmo, de 14 de julho de 1967, que institui a Organização Mundial da Propriedade Intelectual.

Resolução nº 5/88, Boletim Oficial da República da Guiné-Bissau nº 11, 2º Suplemento, de 16 de março de 1988. Ractifica a convenção de Paris para a protecção da propriedade industrial, de 20 de março de 1983.

MARITIME LAW

Código Comercial, arts. 485 a 691.

TAX LAW

Decreto nº 39/83, Boletim Oficial da República da Guiné-Bissau nº 52, 2º Suplemento, de 30 de dezembro de 1983, Código de Contribuição Industrial.

Decreto nº 43/88, Boletim Oficial da República da Guiné-Bissau nº 46, de 15 de novembro de 1988, Código da Contribuição Predial Urbana.

Decreto nº 23/83, Boletim Oficial da República da Guiné-Bissau nº 32, suplemento, de 6 de agosto de 1983, Código do Imposto Profissional.

Decreto nº 8/84, Boletim Oficial da República da Guiné-Bissau nº 9, 2º Suplemento, de 3 de março de 1984, Código de Imposto de Capitais.

Decreto nº 7/84, Boletim Oficial da República da Guiné-Bissau nº 9, suplemento, de 3 de março de 1984, Código de Imposto Complementar.

Lei nº 1/75, Boletim Oficial da República da Guiné-Bissau nº 19, de 10 de maio de 1975, cria o Imposto de Reconstrução Nacional.

Decreto nº 27/80, Boletim Oficial da República da Guiné-Bissau nº 22, de 31 de maio de 1980, cria o Imposto sobre Veículos Automóveis.

Decreto nº 33/89, Boletim Oficial da República da Guiné-Bissau nº 52, 3º Suplemento, de 27 de dezembro de 1989, cria o Imposto de Turismo.

Decreto nº 20/80, Boletim Oficial da República da Guiné-Bissau nº 19, suplemento, de 10 de maio de 1980, Regulamento do Imposto do Selo.

Decreto nº 9/87, Boletim Oficial da República da Guiné-Bissau nº [], de 4 de maio de 1987, cria o Imposto de Consumo sobre a Gasolina.

Decreto nº 13/88, Boletim Oficial da República da Guiné-Bissau nº 8, suplemento, de 22 de fevereiro de 1988, estabelece a taxa de 30% ad valorem sobre a gasolina.

Lei nº 1846, Boletim Oficial da Guiné nº 51, de 17 de dezembro de 1966, cria o Imposto de Transações.

LABOR LAW

[Decreto] nº 2/86, Boletim Oficial da República da Guiné-Bissau nº [], de 5 de abril de 1986, Lei Geral do Trabalho.

LAW OF OBLIGATIONS (Contracts, Torts, Secured Transactions)

Código Civil, Livro II, arts. 397 a 1250.

Código de Processo Civil, Livro I, Título II, arts. 46 a 54; e Livro III, Título III, arts. 801 a 947

ENVIRONMENTAL LAW

National Environmental Council

Decreto nº 24/92, Boletim Oficial da República da Guiné-Bissau nº 12, de 23 de março de 1992.

Water

Decreto de 17 de setembro de 1901, Suplemento do Boletim Oficial da Guiné nº 48/1902. Aprova o Regulamento para aproveitamento das nascentes das águas minero-medicinal.

Decreto nº 35498, Suplemento do Boletim Oficial da Guiné nº 12, de 09 de fevereiro de 1946. Concessão do aproveitamento de águas públicas nas colônias.

Decreto nº 35592, Boletim Oficial da Guiné nº 22, de 11 de abril de 1946. Regula a participação do Estado no aproveitamento de águas públicas nas colônias, quando destinadas à produção de energia.

Decreto nº 52/92, Boletim Oficial da República da Guiné-Bissau nº 40. Cria o Conselho Nacional das Águas, Comité Interministerial das Águas e Comité Técnico das Águas.

Anteprojecto de Código das Águas.

Forestry

Decreto Lei nº 4-A/91. Boletim Oficial da República da Guiné Bissau nº [], de 29 de outubro de 1991.

Decreto 4/82, Boletim Oficial da República da Guiné Bissau nº []. Determina a concessão do direito de abate, serração e comercialização interna de madeira.

Fisheries

Decreto-Lei nº2/86, Boletim Oficial da República da Guiné-Bissau nº , de 29 de março de 1986. Lei Geral das Pescas.

Decreto nº10/86, Boletim Oficial da República da Guiné-Bissau nº , de 26 de abril de 1986.

Despacho Ministerial nº21/92, de 4 de dezembro de 1992

Annex D - REQUIREMENTS TO NOTARIZE A NEW BUSINESS ENTITY

source: AFRICARE / Guiné-Bissau

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AFRICARE/ Guiné-Bissau

C.P. 203 • Bissau • República da Guiné-Bissau
Telefone: (245) 20.10.66 • Telex: (696) 240 • Fax (245) 20.10.66

"Melhoramento da qualidade de vida na Africa rural para desenvolvimento das condições hydraulicas, a produção agricola, e dos serviços de saúde."

Bissau, 03/03/93

Ao:

Senhor Saico Balde Amadu
Notario
Ministerio da Justica

AFR/GB Ref. /93

Muito me apraz pela Vossa magnanima contribuicao e ajuda na correccao dos dados recolhidos para compilacao, sob a Vossa benefica orientacao.

Sei qual foi o tempo dispendido por Vos, na execucao deste trabalho, mas, estou convicto que mais uma vez, o Senhor nao poupou esforcos na nova revisao dos dados, com o fito do trabalho ser perfeito e eficientemente elaborado.

Congratulo-me, bastante com o Vosso dedicado interesse, na consolidacao do trabalho.

Eis pois, denovo, as respectivas correccoes e alteracoes feitas, segundo as Vossas sabias orientacoes.

Desde ja, aproveito para reiterar os meus agradecimentos, em nome do projecto, sob a minha coordenacao.

Com a mais alta estima e admiracao,

Richard D. Rogers Jr.
(Coordenador do Projecto)

AFRICARE HOUSE

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Notariado da Guine
Ministerio da Justica:
03 de Marco de 1993

Escritura de Uma Nova Sociedade-

O Acto Notarial que legaliza uma nova Sociedade e baseado no Codigo do Notariado Decreto-Lei no. 47619. Dentro do Livro de Notas para Escritura Diversas os estatutos da nova Sociedade estao lavrados. Os passos do processo'vem a seguir:

I. Escritura-

A. Documentos Necessarios-

1. Certidao Negativa (ou Certidao de Denominacao)- passado pelo Conservatoria do Registro Comercial.
2. Prova do Deposito - do Capital Social
3. Estatutos da Sociedade
4. Bilhete de Identidade (ou passaporte)- dos Socios

Notas:

1) Capital Social- os minimos nao sao oficialmente estipulados. Um minimo de 50% do valor declarado tem que ser depositado numa conta bancaria para abrir o processo caso nao houve possibilidades de depositar o valor completo. Na pratica, quando o valor do capital social e menos de PG 1.000,000, esse valor e usado na determinacao de taxas a cobrar por actos notariais.

2) Os Estatutos-tem que ser preparados pelo algum Jurista; as formas mais comuns sao Sociedades por Quotas e Sociedades Anonimas.

B. Taxas-

(Baseado em Decreto 18/88 e alterado por Despacho no. 7 de 1988 do Ministerio da Justica; B.O. 21/88). O total da taxa a pagar e determinado pelo quantidade das items listado a seguir:

1. Art 6 e 7 - Escritura - capital social declarado.
2. Art. 22 - Emolumentos- numero de folhas
3. Art. 29 - Emolumentos- numero de linhas
4. Art. 33 - Taxa de Reembolso- 20%
5. Selos - PG 300 por folha

(Nota: Enquanto a Escritura e feita, a primeira Certidao e passado);

II. Certidao Parcial (ou Certidao para Publicacao)

A. Documentos- somente a data e o Livro em que a Escritura foi

feita.

B. Taxas- Decreto 18/88, Despacho 7, B.O. 21/88

1. Art. 22- Emolumentos- por folha
2. Art. 29- Emolumentos- por linha
3. Art. 33- Reembolso- 20%
4. Selos - PG 300 por folha

III. Certidao Integral- (Certidao da Escritura com o Averbamento da Publicacao)

A. Documentos- somente uma copia da Certidao que foi publicado no Boletim Oficial para proceder a Matricula Definitiva da Sociedade no Registo Comercial.

B. Taxas- Decreto 18/88, Despacho 7, B.O. 21/88

1. Art. 22- Emolumentos- por folia
2. Art. 29- Emolumentos- por linha
3. Art. 33- Reembolso- 20%
4. Selos - PG 300 por folia

IV. Exemplo do Processo (Narrativa)-

Dois socios estao interessado em criar uma sociedade por quotas que vai operar no ramo de comercio. Eles contratarao um jurista para escrever os estatutos da nova empresa 'Fulano e Fulano, ltda.' Com esses estatutos, os bilhetes de Identidade deles e uma Certidao Negativa eles aparecem no escritorio do Notario (Ministerio da Justica). O capital social declarado e PG 1,000,000 e os estatutos sao escritos em 10 laudas (de 25 linhas ou 5 folhas).

A Escritura e feita pelo Notario. Uma estimativa das taxas que Fulano e Fulano vai pagar vem a seguir:

Escritura:

Art. 6-	8,500	(Capital Social de 1,000,000)
Art. 7-	10,000	(Capital Social de 1,000,000)
Art. 22-	2,000	(5 folhas vezes 400)
Art. 29-	1,000	(10 laudas vezes 10)
Sub:	21,500	

Art. 33-	4,300	(20% Reembolso)
Selos -	1,500	(5 folhas vezes 300)

Total: 27,300

Enquanto a Escritura e feita, o proximo passo e a prova que os Estatutos foram entrado no Livro de Escrituras Diversas. Esse e feito atraves da Certidao Parcial. Tambem chamado Certidao para Publicacao, esse documento e feito para continuar o processo de

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legalizacao duma Sociedade.

Uma estimativa das taxas que Fulano e Fulano vai pagar para a Certidao Parcial vem a seguir:

Certidao Parcial:

Art. 22-	2,000	(5 folhas vezes 400)
Art. 29-	<u>1,000</u>	(10 laudas vezes 10)
Sub:	3,000	

Art. 33-	600	(20% Reembolso)
Selos -	<u>1,500</u>	(5 folhas vezes 300)

Total: 5,100

Com a Certidao Parcial, os dois socios podem continuar para os proximos passos. Um requerimento dirigido ao Director-Geral da Funcao Publica (Reparticao de Publicacao) pedindo a publicacao e feito. A taxa (PG 59,083 por lauda) e pago no INACEP (Direccao Comercial). A fatura do pagamento e a prova que a Certidao vai ser publicado; a Funcao Publica vai passar uma Declaracao.

Os proximos passos sao localizados na Conservatoria do Registro Predial, Comercial e Propriedade Automovel. A Matricula da nova Sociedade Fulano e Fulano e feito, as taxas pagas, e uma Certidao de Matricula Definitiva passado.

Quando a Certidao para Publicacao e publicado no Boletim Oficial, e com a Certidao da Matricula Definitiva, os socios do Fulano e Fulano podem voltar ao Notariado.

O ultimo passo e a Certidao Integral que vai levar as mesmas taxas com a Certidao Parcial. A unica diferenca e que a Certidao Integral prova que Fulano e Fulano foi completamente e legalmente contruida.

Annex E - REQUIREMENTS TO REGISTER A NEW BUSINESS ENTITY

source: AFRICARE / Guiné-Bissau



AFRICARE/ Guiné-Bissau

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Telefone: (245) 20.10.66 • Telex: (696) 240 • Fax (245) 20.10.66

"Melhoramento da qualidade de vida na Africa rural para desenvolvimento das condições hidraulicas, a produção agricola, e dos serviços de saúde."

Bissau, 04/03/93

Ao:

Senhor Domingos Pinto Vieira e Silva
Conservador
Ministerio da Justica

AFR/GB Ref. /93

Muito me apraz pela Vossa magnanima contribuicao e ajuda na correccao dos dados recolhidos para compilacao, sob a Vossa benefica orientacao.

Sei qual foi o tempo dispendido por Vos, na execucao deste trabalho, mas, estou convicto que mais uma vez, o Senhor nao poupara esforcos na nova revisao dos dados, com o fito do trabalho ser perfeito e eficientemente elaborado.

Congratulo-me, bastante com o Vosso dedicado interesse, na consolidacao do trabalho.

Eis pois, denovo, as respectivas correccoes e alteracoes feitas, segundo as Vossas sabias orientacoes.

Desde ja, aproveito para reiterar os meus agradecimentos, em nome do projecto, sob a minha coordenacao.

Com a mais alta estima e admiracao,

Richard D. Rogers Jr.
(Coordenador do Projecto)

AFRICARE HOUSE

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Conservatoria do Registo Predial, Comercial e Propriedade Automovel
Ministerio da Justica
04/03/93

(Todo e feito em papel selado com a assinatura reconhecida pelo Notario).

I. Matricula:

A) Requerimento-

Para: O Conservador do Registo Predial, Comercial e Propriedade Automovel
Ministerio da Justica
Bissau

Objectivo: Matricula Definitiva da Sociedade no Registo Comercial ou de comerciante em nome individual.

Conteudo do Requerimento:

- Denominacao
- Sede
- Objectivo
- Capital Social
- Nomes dos Socios

Forma: Feita em meia folha de papel selado

B) Documentos:

- 1) Certidao (1) - da Constituicao Publica ou Escritura Publica
- 2) Declaracao (1)- da Funcao Publica do no. do Boletim Oficial em que sera publicado o acto (dado o atraso das publicacoes)

C).Taxas- Tabela de Emolumentos dos Actos do Registo Comercial- (Decreto 18/88; alterado com o Despacho no. 7/88 do Ministerio da Justica).

- 1) Nota de Apresentacao (Art. 1)- Preco fixo (PG 700)
- 2) Matricula (Art. 2) - Preco fixo (PG 4000)
- 3) Inscricao (Art. 3) - Capital Social Declarado
- 4) Reembolso (Art. 24.a) - Por linha

II. Certidao da Matricula:

A) O pedido e feito no mesmo requerimento da Matricula. As taxas sao seperadas em fase nos dois actos do Registo.

B) Taxas-

- Fixa PG 5.687,00 como base. A taxa aumenta se o documento ultrapassar duas linhas. (02-09-93)

III. Certidao Negativa (ou Certidao de Denominacao)

A) Requerimento:

Para: O Conservador do Registo Predial, Comercial e
Propriedade Automovel
Ministerio da Justica
Bissau

Objectivo: Constituicao duma Sociedade; para verificar
que o nome nao esta matriculado no registo.

Conteudo do Requerimento:

- Denominacao
- Sede

Forma: Feita em meia folha de papel selado

C) Taxa:

- Fixa: 5.687,00 PG (01-03-93)

IV. Exemplo:

Vamos supor que dois socios estao interessados em criar uma nova sociedade por quotas que vai operar no ramo de comercio. Um dos passos que eles devem fazer e o registo da propria empresa ou Sociedade "Fulano e Fulano ltda," na Conservatoria do Registo Comercial. Os socios ja passaram pelo Notariado, Funcao Publica e a Imprensa. O capital social declarado e de PG 1.000,000 e os Estatutos da Sociedade estao escritas em 10 laudas de 25 linhas cada. Com isso, os socios do 'Fulano e Fulano' estao prontos para a Matricula Definitiva; com uma Declaracao da Funcao Publica (Reparticao da Publicacao) e com a Certidao Notarial, eles apresentam um requerimento.

Uma estimativa das taxas que Fulano e Fulano deverao pagar, situa-se aproximadamente no seguinte:

Matricula Definitiva da Sociedade:

Art. 1- Apresentacao	700,00	
Art. 2- Matricula	4.000,00	
Art. 3- Inscricao	24.900,00	(Capital Social de 1 milhao)
Art. 24- Reembolso	<u>7.500,00</u>	(250 linhas vezes PG 30 por linha)
Total:	37.100,00	

Certidao da Matricula Definitiva da Sociedade:

Fixo: 5,687.00 (Si nao ultrapassa duas laudas; por Art. 24.b, PG 1500 por lauda)

Annex F - REQUIREMENTS TO LICENSE A NEW BUSINESS ENTITY

source: AFRICARE / Guiné-Bissau

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AFRICARE / Guiné-Bissau

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"Melhoramento da qualidade de vida na Africa rural para desenvolvimento das condições hidraulicas, a produção agricola, e dos serviços de saúde."

Exmo. Senhor
Dr. Malam Djaura
Director
Direccao Geral do Comercio Interno
Ministerio do Comercio e Industria

AFR/GB Ref. no. /93

Bissau, 25 de Fevereiro de 1993

Exmo. Dr. Djaura,

Em primeiro lugar, gostaria de Vos agradecer pelo seu tempo e interesse sobre o projecto "Guias Comerciais".

Nesse momento, depois de um arduo trabalho baseado na recolha e compilacao de dados informativos, fornecidos de fontes fidedignas de credibilidade como o Exmo. Senhor, julgamos oportuno solicitar a Vossa colaboracao na revisao desta nossa pesquisa, para que tenha um cariz mais cotado. A seguir vem uma lista de informacoes recolhidas quer pelos regulamentos ou leis que regem as varias etapas seguidas para a legalizacao da documentacao, assim como as respectivas taxas em vigor.

Mais uma vez, solicitamos ao Senhor que tenha a bondade de nos dar o seu contributo na materializacao deste trabalho, julgando ser idoneo que se faça uso da sua assinatura.

Com A Mais Alta Consideracao e Estima,

Richard D. Rogers Jr.
Coordenador do Projecto
Guias Comercias

Dropped off
3/1/93
Retained 3/3/93
No

AFRICARE HOUSE

11/193 24

Direccao-Geral do Comercio Interno
Ministerio de Comercio e Industria
25 de Fevereiro de 1993

Concessao de Alvara:

(Toda essa documentacao (requerimentos) sera feita num papel selado com os respectivos selos e reconhecida a assinatura no Notariado)

I. Requerimento:

Para: Ministro do Comercio e Turismo
C.P. (?)
Bissau

Informacao:

- Pessoa singular ou colectiva (no. do B.I. ou Cartao de Estrangeiro)
- Local do Sede
- Tipo de Atividade

Para efeito de: Alvara e Registro no Registro Nacional dos Comerciantes (RNC)

Area Responsavel: Direccao Geral do Comercio Interno

(Deve ser mandado com os documentos listados a seguir)

II. Documentos:

1. Pessoas Singulares- (ou pra o Designado duma Sociedade)
 - a) Certificado (1)- Registo Criminal
 - b) Certidoes (2) - Quitacao
 - Falencia ou Concordata
 - c) Declaracao (1)- Civil do Requerente
2. Pessoas Colectivas (em nome da Sociedade, com os referidos acima)
 - a) Certidoes (3) - Quitacao
 - Falencia ou Concordata
 - Matricula Definitiva

III. Vistoria-

A Direccao-Geral do Comercio Interno (DCI) procedera o pedido de parecer aos seguintes Ministerios e Organismos:

- A. Em qualquer Regiao:
- Comite de Estado
 - Comando da Policia local
 - Centro de Saude

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Ministerio do Comercio e Industria
(25/02/93)

B.No Sector Autonomo:

- Direccao-Geral da Policia Judiciaria
- Direccao-Geral da Higiene do M.Saude Publica
- Camara Municipal
- Secretaria de Estado do Turismo (*quando se trata de actividades hoteleiras).

IV. Taxas (02/93):

- Import-Export----- 525,000
- Retalhista----- 150,000
- Armazenista-----150,000

(* No caso de Imp/Exp e Retalhista; vai pagar 675,000. O maximo e de 825,000 para todas as areas)

V. Caucao/Deposito:

No caso de Importacao/Exportacao e necessario um deposito de PG 10,000,000 feito num banco comercial.

VI. Outros:

*1. Varios alvaras- uma padaria que fabrica e vende pao no mesmo lugar (local) vai precisar de um alvara- da Industria. Si no caso de um rede de locais que vendem pao de um sol padaria os filias vao precisar de alvara do Comercio (retalhista) enquanto a padaria vai precisar um da Industria. Em qualquer caso parecido com esta, para importacao ou exportacao, um alvara do Comercio e necessario.

*2. Sobre Turismo- Em breve, a Secretaria-Geral do Estado de Turismo vai emitir ou seu proprio alvara. Um Decreto foi assinado em Setembro 1992 estabeleceu o regime juridico sobre actividade turista, hoteleira, etc.. (os casos especificado em Art 2, no. 4 do Decreto 29/88). Para fins dessa guia, nos vamos considera o process equal o que esta listado acima; notando que o processo vai mudar enquanto o referido Decreto e publicado no Boletim Oficial.

VII. Base Juridica-

- Decreto 29/88; (Regula o acesso a actividade comercial); Boletim Oficial no. 37 de 12 de Setembro de 1988.
- Decreto 22/86; (Operacoes de importacao e exportacao); Boletim Oficial no. 32 de 13 de Agosto de 1986.
- Decreto 23/86; (Precos Maximos e Precos Livres); Boletim Oficial no. 32 de 13 de Agosto de 1986.

VIII. Outros Exemplares

Ministerio do Comercio e Industria
(25/02/93)

- "Acesso a actividade comercial" (DCI- Outubro 1992)
- Um dossier sobre concessao de alvara (Imp/Exp/Retalhista) para pessoa singular.
- Um dossier de concessao de alvara (Imp/Exp/Retalista) numa Sociedade.
- Um dossier de Alvara para vendedor ambulante.

IX. Contactos:

- Dr. Malam Djaura
Director
Direccao-Geral do Comercio Interno
- Domingos Kebaty
Licencamento

Revisto Por:

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DIREITO COMERCIAL

1. FONTES

A principal fonte do Direito Comercial é o Código Comercial (português) de 1888.

Atendendo à antiguidade do Código, muita matéria comercial encontra-se, porém, regida por lei avulsa. Salientamos a seguinte:

a) Registo comercial - DL nº 42 644, de 14/11/59 e Decreto 42 645, de 14/11/59;

b) Sociedades por quotas - Lei de 11 de Abril de 1901;

c) Fiscalização das Soc. anónimas e por quotas - DL 49 381, de 15/11/69;

d) Acções - Decreto 1 645, de 15/6/1915 (acções privilegiadas), DL 1/71, de 6/1 (restrições à transmissão de acções por negociação particular);

e) Letras, livranças e cheques - Lei Uniforme relativa a letras/livranças e Lei Uniforme relativa a cheques, respectivamente resultantes da Convenção de Genebra de 7/6/1930 e da de 19/3/1931;

f) Falência - Código de Processo Civil

Pelo facto de só vigorar na Guiné-Bissau o Direito Português anterior à data da declaração unilateral da independência (24/9/73) e não ter existido até agora uma razoável produção legislativa guineense, o Direito Comercial do país encontra-se extraordinariamente desactualizado.

2. NOÇÃO E ÂMBITO

Tendo o C.Comercial Português enveredado por uma concepção objectiva do Direito Comercial, este pode ser definido como "Direito dos actos de comércio".

A 1ª noção a ter em conta para a determinação da matéria abrangida no Direito Comercial é, pois, a de acto de comércio.

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Annex G - DIREITO COMERCIAL

Ana Maria Peralta

Março 1993

ANNEX G

DIREITO COMERCIAL

1. FONTES

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- d) Acções - Decreto 1 645, de 15/6/1915 (acções privilegiadas), DL 1/71, de 6/1 (restrições à transmissão de acções por negociação particular);
- e) Letras, livranças e cheques - Lei Uniforme relativa a letras/livranças e Lei Uniforme relativa a cheques, respectivamente resultantes da Convenção de Genebra de 7/6/1930 e da de 19/3/1931;
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2. NOÇÃO E ÂMBITO

Tendo o C.Comercial Português enveredado por uma concepção objectiva do Direito Comercial, este pode ser definido como "Direito dos actos de comércio".

A 1ª noção a ter em conta para a determinação da matéria abrangida no Direito Comercial é, pois, a de acto de comércio.

No entanto, a categoria do comerciante não deixa de ter uma enorme relevância para o Direito Comercial, sendo relevante, desde logo, para a qualificação de certos actos como comerciais (actos de comércio subjectivos).

2.1. Actos de comércio

Há duas categorias essenciais de actos de comércio:

- a) Actos de comércio objectivos - os previstos no Código Comercial e em outra legislação comercial (compra e venda, transporte, mútuo, penhor,

- b) **mandato, operações bancárias, sociedade, etc.);**
Actos de comércio subjectivos - os actos praticados pelo comerciante no exercício da sua actividade.

O Código Comercial, para além do regime específico de cada acto, contém um regime geral dos actos de comércio, sujeitando-os todos a um conjunto de regras próprias, diferentes do regime dos contratos civis.

Apontamos como exemplo:

- a) **Regime de solidariedade nas dívidas comerciais;**
b) **Em geral, responsabilidade de ambos os cônjuges pelas dívidas contraídas no exercício do comércio;**

Os actos de comércio objectivos podem ser:

- actos isolados;
- desenvolvidos no seio da empresa*

* É a propósito da empresa (art.230º do C.Comercial) que o Código trata das actividades industriais.assim sendo, o Direito Comercial abrange o comércio e a indústria.

A tendência doutrinária e jurisprudencial tem sido a de alargar o número de actos comerciais, através da analogia e da interpretação extensiva.

2.2. Comerciante

2.2.1. Noção de comerciante

Numa 1ª noção, podemos dizer que comerciante é toda a pessoa, singular ou colectiva, que exerce o comércio.

Não obstante a tendência objectivista do C.Comercial, saber quem é comerciante releva para muitos efeitos:

- a) **qualificação dos actos de comércio subjectivo;**
b) **regime especial de certos actos, quando praticados por comerciantes - 396º, para o mútuo e 400º, para o penhor;prazo de prescrição de 2 anos - 317º,b do C.Civil.**
c) **especialidades no regime geral dos actos de comércio - 100º, parágrafo único e 15º;**
d) **arresto - 403º,3 do C.P.C.: os bens dos comerciantes matriculados não estão sujeitos a arresto;**
e) **obrigações dos comerciantes: art.18º C.comercial;**
f) **falência - privativa dos comerciantes;**

2.2.2. Tipos de comerciantes

Atentando no artigo 13º do C.Comercial, seríamos tentados a afirmar que há 2 tipos de comerciantes:

- a) pessoas singulares ou comerciantes em nome individual - nº1 do art.13º;
- b) sociedades comerciais - nº2 do art.13º.

Contudo, uma grande parte da doutrina aceita a existência de outros comerciantes. De facto, há todo um conjunto de pessoas colectivas, para além das sociedades, com intervenção directa na actividade comercial - empresa pública, cooperativas, ACE - e que, por exercerem o comércio, devem ser consideradas comerciantes.

2.2.3. Requisitos para aquisição da qualidade de comerciante

As sociedades comerciais são consideradas comerciantes natos - para serem comerciantes basta serem sociedades. Assim há apenas que averiguar quando é que uma sociedade é comercial. A resposta é dada pelo art. 104º do C.Comercial: - objecto comercial: prática de actos de comércio; - forma comercial: ter adoptada um dos 5 tipos previstos.

Para as pessoas singulares e pessoas colectivas que não sejam sociedades, de acordo com a concepção acima perfilhada, o nº1 do art.13º impõe a verificação de determinados requisitos:

A - Capacidade para adquirir a qualidade de comerciante

Trata-se de capacidade de exercício.

Em certos casos, a lei prevê situações designadas de **incompatibilidades** - a actividade comercial é incompatível com certas outras actividades. Ex: 253º, magistrados judiciais, gerentes das sociedades comerciais, etc.

A doutrina distingue:

- a) quando a incompatibilidade se destina a proteger o comércio, aquele que desenvolve a actividade não adquire a qualidade de comerciante. Ex: falido (1191º do C.P.C.).
- b) quando a incompatibilidade se destina a proteger determinados cargos ou situações, quem exercer o comércio adquire a qualidade de comerciante.

B - Exercício profissional do comércio

- a) Prática de actos de comércio objectivos, substancialmente comerciais;
- b) Exercício em nome próprio (exclusão do mandatário);
- c) Exercício efectivo e habitual (não é necessária a exclusividade);
- d) Exercício como modo de vida.

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Annex H - SOCIEDADES COMERCIAIS

Ana Maria Peralta

Março 1993

ANNEX H

SOCIEDADES COMERCIAIS

Ana Peralta

Março 1993

1. Noção

A legislação comercial não contém nenhuma noção de sociedade, pelo que há que recorrer à noção do Código Civil.

O Código Civil trata a sociedade no Livro do Direito das Obrigações, no Título dos "contratos em especial". Define, no art.980º, este contrato: "contrato de sociedade é aquele em que duas ou mais pessoas se obrigam a contribuir com bens ou serviços para o exercício em comum de certa actividade económica, que não seja de mera fruição, a fim de repartirem os lucros resultantes dessa actividade".

O Código Comercial trata as sociedades comerciais igualmente no capítulo dedicado aos contratos (art.104º e ss.).

O art.104º enuncia os requisitos para que uma sociedade seja considerada comercial:

- a) ter por objecto a prática de um ou mais actos de comércio;
- b) ter-se constituído de harmonia com os preceitos do Código, o mesmo é dizer, ter adoptado um dos tipos previstos no Código Comercial.

Para além das sociedades comerciais, a lei comercial regula as denominadas sociedades civis sob forma comercial - aquelas que adoptaram uma das formas previstas para as sociedades comerciais, apesar de não terem por objecto a prática de actos de comércio.

A lei sujeita estas sociedades ao regime das sociedades comerciais, excepto no que respeita à falência (art.106º do C. Comercial).

2. Características principais

Como características principais das sociedades comerciais podemos apontar as seguintes:

- a) São constituídas por contrato (as sociedades unipessoais não são admitidas);
- b) Estão sujeitas ao princípio da *tipicidade* - as partes não podem criar outros tipos societários para além dos previstos na lei;
- c) São todas elas dotadas de personalidade jurídica, constituindo um ente diferente das pessoas dos sócios.

3. Tipos societários

A legislação comercial prevê cinco tipos societários, quatro deles previstos no Código Comercial e um outro em legislação avulsa - Lei de 11 de Abril de 1901 (Lei das Sociedades por Quotas - LSQ):

- a) Sociedades em nome colectivo;
- b) Sociedades anónimas;
- c) Sociedades em comandita simples;
- d) Sociedades em comandita por acções;
- e) Sociedades por quotas

3.1. Sociedade em nome colectivo

Tem como principais características as seguintes;

- a) Responsabilidade ilimitada e solidária dos sócios, mas subsidiária em relação à sociedade;
- b) Pequeno número de sócios, como regra;
- c) Participação activa de todos os sócios na administração, como regra;
- d) Regem-se, em alguns casos, por normas societárias do Código Civil, nomeadamente no que respeita à administração e à fiscalização;

É um tipo perfeito de sociedade de pessoas, com influência predominante da confiança e crédito pessoais. Atendendo ao tipo de responsabilidade, foram utilizadas predominantemente para exploração de negócios familiares e são hoje muito raras.

3.2. Sociedade anónima

Tem como principais características as seguintes:

- a) Responsabilidade dos sócios limitada ao valor das acções subscritas;
- b) Capital dividido em acções, nominativas ou ao portador, facilmente negociáveis;
- c) Capital social normalmente elevado, realizado com ou sem apelo à subscrição pública, com realização obrigatória, no momento da constituição, de, pelo menos, 10%;
- d) Número mínimo de sócios - 10 - e, em regra, com grande número de sócios (accionistas);
- e) Existência de três órgãos distintos: Assembleia Geral, Direcção e Conselho Fiscal*;
- f) Participação na administração de um número diminuto de sócios;
- g) Podem emitir obrigações.

* A fiscalização das sociedades anónimas (e por quotas) está sujeita ao regime do Decreto-Lei nº 49 381, de 15 de Novembro de 1969;

É o tipo perfeito de sociedades de capitais, destinada às grandes explorações económicas, por permitir a fácil concentração de elevados capitais. Tem sido utilizada pelo Estado para privatizar empresas antes públicas.

3.3. Sociedade em comandita

Podem ser de dois tipos: comandita simples, se o seu capital não se encontra dividido em acções; comandita por acções no caso contrário.

Tem como características principais as seguintes:

- a) Dois tipos de sócios: os *comanditados*, com responsabilidade igual á dos sócios da sociedade em nome colectivo, e os *comanditários*, com responsabilidade igual à dos accionistas;
- b) Regime aplicável: o das sociedades em nome colectivo às comanditas simples e o das sociedades anónimas às comanditas por acções;
- c) Só os sócios comanditados podem exercer a administração da sociedade;

São um misto de sociedades de pessoas e de capitais. Tiveram historicamente grande importância, por permitirem a junção de sócios de indústria e sócios capitalistas, permitindo, ademais, o anonimato destes últimos, mas não têm hoje grande utilização.

3.4. Sociedade por quotas

Tem como características essenciais as seguintes:

- a) Responsabilidade limitada de cada sócio ao valor da sua quota, se o capital social estiver integralmente realizado; se o não estiver, cada sócio responde ainda pelas prestações que os outros não satisfizeram;
- b) Capital mínimo de 50.000\$00, dividido em quotas de valor mínimo de 5.000\$00 cada, com obrigatoriedade de realização mínima de 50% de cada quota no momento de constituição da sociedade;
- c) Livre cessão das quotas, com necessária notificação à sociedade. O pacto social pode fazer depender a cessão do consentimento da sociedade;
- d) A sociedade é administrada pelos gerentes, que podem ou não ser sócios;
- e) Só haverá Conselho Fiscal se tal for determinado no pacto social;

- f) Podem emitir obrigações.

É uma espécie de transição entre as sociedades de pessoas e as sociedades de capitais. Tem certas semelhanças com as sociedades em nome colectivo quando constituídas por poucos sócios, todos ou quase todos participando da gerência da sociedade (sócios-gerentes); tem certas semelhanças com as sociedades anónimas quando constituídas por muitos sócios, participando só algum, ou alguns deles, na gerência da sociedade. É o tipo social mais frequente.

4. Requisitos de constituição

Há aqui que estabelecer uma nítida distinção entre, por um lado, as sociedades em nome colectivo e as comanditas simples, e, por outro, as sociedades anónimas, comanditas por acções e sociedades por quotas.

A constituição do 1º grupo de sociedades é sujeita aos seguintes requisitos:

- a) Contrato celebrado por escrito particular;
- b) Obrigatoriedade de registo comercial;
- c) Não obrigatoriedade de publicação do acto constitutivo:

A constituição do 2º grupo de sociedades está sujeita a requisitos muito mais restritivos:

- a) Contrato celebrado obrigatoriamente por escritura pública;
- b) Obrigatoriedade de registo comercial;
- c) Obrigatoriedade de publicação do acto constitutivo, no Jornal Oficial e em um dos jornais mais lidos;
- d) Registo da denominação social.

5. Análise crítica

Ao regime descrito das sociedades comerciais podem ser apontadas diversas críticas, a saber:

- a) Apresenta muitas lacunas, nomeadamente no que respeita às sociedades anónimas;
- b) Tais lacunas geram posições doutrinárias divergentes, num campo em que a segurança é essencial;
- c) De entre as lacunas mais relevantes, salientamos:
 - acordos parassociais;
 - regime dos vícios do contrato constitutivo;
 - grupos societários;
- d) Rigidez de regime, o que contraria a actual tendência para a supletividade, nomeadamente no campo das sociedades por quotas;

- e) Deficiente regulamentação de alguns aspectos considerados hoje essenciais, de que salientamos:
- direitos dos sócios, mormente direito à informação;
 - regime da sociedade com processo formativo incompleto (vulgarmente designada "sociedade irregular");
 - causas e regime a dissolução;
 - sanções penais.

6. Sociedades cooperativas

O Código Comercial prevê ainda as sociedades cooperativas. Não se trata propriamente de um novo tipo societário, visto estas sociedades terem de adoptar um dos tipos acima indicados e serem reguladas pelas disposições aplicáveis ao tipo que adoptarem, salvo no que especialmente para elas se encontra previsto no Código.

São caracterizadas pelas seguintes notas:

- a) variabilidade do capital social;
- b) ilimitação do número de sócios, que são admitidos livremente, mediante a sua assinatura no livro de sócios da sociedade;
- c) número mínimo de sócios - 10;
- d) princípio um sócio, um voto;
- e) não têm por objectivo acumular lucros no seu património, mas antes possibilitar ganhos ou evitar despesas no próprio património dos sócios;
- f) sujeição a um regime fiscal mais favorável do que as restantes sociedades.

Annex I - REGISTO COMERCIAL

Ana Maria Peralta

Março 1993

ANNEX I

REGISTO COMERCIAL

1. FONTES

A matéria do registo comercial era primitivamente regulada pelo C.Comercial - arts. 45º a 61º.

Posteriormente foi regulada pelo Dec.-Lei nº 42 644, de 14/11/59 e pelo Dec.-Lei 42645, da mesma data, que contém o Regulamento do Registo Comercial. São estes os diplomas em vigor na Guiné-Bissau.

Os dois diplomas não contém uma regulamentação completa do registo comercial, remetendo-se (art.1º do DL 42644) para o Código de Registo Predial.

2. FINALIDADE

Art.1º do DL 42 644 - Publicidade:

- da qualidade de comerciantes das pessoas singulares e colectivas; - de certos factos jurídicos referentes a comerciantes e navios.

3. ÂMBITO

- matrícula de comerciantes em nome individual
- " de sociedades comerciais
- matrícula de navios
- inscrição de factos jurídicos e acções judiciais (enunciados nos artºs. 3º a 5º do DL 42 644).

4. PROCESSO DE REGISTO

- a) Conservatórias competentes: 2º, 3º e 4º do Regulamento
 - comerciantes individuais: a da área do estabelecimento principal;
 - sociedades: a da área da sede;
 - navios: a da área da capitania ou delegação marítima
- b) Sistema de registo: livros - 1º e ss do Regulamento
- c) Princípio da instância - o registo é feito a pedido do interessado. Só em casos excepcionais é feito officiosamente (art.º 34º do Regulamento)

A matrícula das sociedades é obrigatória;

A matrícula dos comerciantes individuais é facultativa - art.º do DL 42 644

- d) **Documentos:**
- comerciante em nome individual (art.44º do DL 42 644)
 - declaração assinada pelo próprio, com a sua identificação, indicação da firma, se usar, espécie de comércio que exerce, localização do estabelecimento principal, etc.
 - declaração fiscal
 - sociedades (art.46º e 47º do DL 42 644)
 - acto constitutivo (escritura pública ou documento particular)
 - declaração fiscal
 - publicações (só para Sociedades anónimas, comandita por acções e sociedades por quotas)
 - documento comprovativo da autorização necessária, sempre que a mesma seja necessária.

5. EFEITOS DO REGISTO

- a) **Presuntivo** - o registo constitui presunção da qualidade de comerciante - art.7º Dec-lei 42 644. A presunção é ilidível - 350º,2 do C.Civil e 403º,3 do C.P.C.
- b) **Declarativo** - sociedades: só as matriculadas poderão prevalecer-se da qualidades de comerciantes perante terceiros.

6. SANÇÃO PARA A FALTA DE REGISTO

- sociedades: as não matriculadas não podem prevalecer-se da qualidade de comerciantes perante terceiros, mas não podem invocar a falta de matrícula para se subtraírem às responsabilidades e obrigações inerentes a essa qualidade (art.º 9º do DL 42 644); além disso, são consideradas sociedades irregulares.
- navios: não podem navegar (art.º 10º do DL 42 644).

Annex J - ACESSO À ACTIVIDADE COMERCIAL

Ana Maria Peralta

Março 1993

ANEX J

ACESSO À ACTIVIDADE COMERCIAL

1. Noção

Por força do Decreto nº 29/88, de 12 de Setembro, um conjunto de actividades comerciais está sujeito ao regime de inscrição prévia no Registo Nacional de Comerciantes, da Direcção de Comércio Interno, inscrição comprovada pela emissão do cartão de comerciante.

2. Âmbito de aplicação

Delimitação subjectiva:

- a) Pessoas singulares;
- b) Sociedades comerciais;
- c) Empresas públicas;
- d) Cooperativas.
- e) Gestores e mandatários das entidades antes referidas e sócios das sociedades de responsabilidade limitada (inscrição no Ministério do Comércio e Turismo);

Delimitação objectiva:

- a) Exportação;
- b) Importação;
- c) Armazenagem;
- d) Venda a retalho;
- e) Venda ambulante;
- f) Agência comercial.

3. Requisitos de inscrição

- a) Ter capacidade para o exercício do comércio;
- b) Não ter sido declarado falido ou insolvente;
- c) Não ter sido condenado, nos últimos 5 anos, a pena de prisão efectiva por crimes contra a propriedade, contra a saúde pública ou a economia nacional;
- d) Ter cumprido as obrigações fiscais;
- e) Quando se tratar de pessoa colectiva, estar matriculado definitivamente na Conservatória do Registo Comercial;
- f) Para importadores/exportadores, a prévia prestação de caução de 10 milhões de pesos;
- g) Ter alvará das instalações onde a actividade comercial vai ser exercida.

4. Licenciamento da unidade industrial

A abertura de estabelecimentos comerciais para o desenvolvimento das actividades referidas em 2., depende de autorização do Ministro do Comércio e Turismo.

5. Sanções

O não cumprimento das obrigações de inscrição e a abertura ou funcionamento de unidades comerciais sem que tenha sido obtida a autorização respectiva dá origem ao crime de desobediência, punido nos termos gerais, com perda de mercadorias.

O exercício de quaisquer actividades sujeitas a licenciamento, nos termos do diploma, não abrangidas pela inscrição daquele comerciante no RNC, bem como o exercício de actividades sujeitas a licenciamento em unidades comerciais cujo alvará as não inclua, será punido com multa e perda das mercadorias.

6. Apreciação crítica

O presente regime de acesso à actividade comercial está de acordo, de uma forma geral, com os regimes modernamente vigentes para estas actividades. Não se trata de um regime de condicionamento, visto o exercício da actividade não estar dependente de autorização, mas de um regime de inscrição, que pretende conciliar o princípio do livre acesso ao exercício das actividades económicas com outros princípios igualmente importantes, como o de evitar práticas de concorrência desleal e racionalizar a distribuição de recursos.

O regime do licenciamento comercial procura conciliar o princípio do livre exercício da actividade comercial com outros princípios susceptíveis de por ele serem postos em causa, como a saúde pública, o enquadramento urbanístico, etc. No entanto, o presente diploma só abrange os estabelecimentos comerciais, quando é relativamente aos estabelecimentos industriais que os maiores problemas se colocam, mormente os ambientais, de segurança, etc.

O adequado funcionamento de regimes deste tipo está directamente dependente da forma de funcionamento dos serviços públicos que os fazem actuar. Ora, a limitação de meios dos serviços públicos guineenses, nomeadamente humanos, deixam supor que se tratará de um sistema moroso, o que certamente entrava o acesso à actividade económica.

Annex K - FALENCIA

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Março 1993

ANNEX K

FALÊNCIA

Ana Peralta

Março 1993

1. Noção e Objectivos

Falência é o estado do comerciante impossibilitado de solver os seus compromissos.

A falência tem de ser declarada por sentença judicial, sendo o respectivo processo regulado no Código de Processo Civil (art.113^o e ss.).

A falência tem 3 objectivos fundamentais:

- a) protecção dos credores, pagando os seus créditos e evitando novas dívidas;**
- b) sancionar criminalmente certas falências**
- c) preservar a empresa.**

No sistema falimentar guineense apenas se encontram assegurados os dois primeiros objectivos, visto não existirem normas protectoras da empresa nem qualquer processo visando a sua recuperação.

2. Índices da Falência

Dada a dificuldade em se apurar directamente o estado de falência, a lei enumera um conjunto de circunstâncias, que considera índices reveladores desse estado (art.117^o):

- a) cessação de pagamentos;**
- b) fuga do comerciante;**
- c) dissipação ou extravio de bens;**
- d) insuficiência manifesta do activo para satisfação do passivo, nas sociedades de responsabilidade limitada.**

A falência pode ainda ser declarada quando não forem aprovados os meios preventivos da mesma, ou , tendo sido homologados, não forem cumpridos, ou ainda se vierem a ser anulados.

- b) *Acordo de credores* - constituição de uma sociedades por quotas, para continuação do comércio do comerciante, sendo o valor das quotas dos credores o correspondente ao valor dos seus créditos.

D - Fase suspensiva

Quando, já após a declaração de falência, é aceite pelos credores a concordata ou o acordo de credores.

E - Fase penal

A falência é qualificada, segundo as circunstâncias, como casual, culposa ou fraudulenta. Nos dois últimos casos é punida criminalmente.

5. Efeitos da Falência

A - Efeitos relativamente ao falido

- a) Inibição de administrar e dispor dos seus bens;
- b) Proibição do exercício do comércio.

B - Efeitos relativamente aos credores

- a) Encerramento das contas do falido, imediato vencimento de todas as dívidas e a suspensão da contagem de juros, salvo se cobertos por garantia real;
- b) Manutenção dos contratos bilaterais, que serão ou não cumpridos conforme decisão do administrador da falência;
- c) Apensação ao processo de falência de todas as ações judiciais em que o falido seja parte, desde que nelas se debatam interesses relativos à massa falida.

C - Efeitos relativamente aos actos praticados pelo falido

- a) Os actos gratuitos anteriores à declaração de falência, celebrados dentro do período de suspeição - 2 anos anteriores à declaração da falência - são resolúveis, desde que prejudiciais para a massa;
- b) Os actos posteriores à declaração de falência são ineficazes em relação à massa, mas podem ser ratificados pelo administrador.

Annex L - TÍTULOS DE CRÉDITO

Ana Maria Peralta

Março 1993

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ANNEX L

TÍTULOS DE CRÉDITO

1. NOÇÃO e CARACTERÍSTICAS

A - O título de crédito é, em primeiro lugar um documento - é sempre um escrito, que contém obrigatoriamente determinados elementos:

- letra: art.1º da LULL
- livranças: art.7º da LULL
- ações: art.16º do C. Comercial
- obrigações: 19º do C. Comercial

A falta destes elementos determina, como regra, a ineficácia do documento como título de crédito.

O documento incorpora um direito, que pode ter naturezas diferentes: direito de crédito na letra e livrança, direito social na ação, etc.

O documento é essencial para a constituição do direito e para a sua circulação. Aliás, todo o regime dos títulos é construído com vista a facilitar a sua circulação ou transmissibilidade. É ainda essencial para o exercício do direito: é o portador do título quem tem legitimidade para exigir a quantia representada na letra, por exemplo.

B - O documento incorpora um direito com determinadas características:

- 1 - Literalidade
- 2 - Autonomia

- 1 - **Literalidade:** o conteúdo do direito, extensão e modalidade são as que constam do escrito;
- 2 - **Autonomia:** 2 modalidades - autonomia do direito do portador: a posição de cada portador é independente da dos anteriores, pelo que não padece com os seus possíveis vícios; - autonomia do título: em regra, as exceções decorrentes das relações subjacentes ao título não são oponíveis ao seu portador.

É a autonomia do título a principal nota de regime que facilita a transmissão do direito incorporado no título, visto ser precisamente a inversa da prevista no C. Civil para a vulgar cessão de créditos.

2. MODALIDADES

2.1. Títulos públicos e privados

Trata-se de uma distinção relativamente à entidade emitente: Estado ou outros entes públicos no exercício de uma actividade pública (títulos da dívida pública, notas de Banco, etc.) ou particulares (letra, cheque, acção, etc).

2.2. Títulos de crédito em sentido restrito, representativos e de participação

Trata-se de uma classificação atendendo ao tipo de direito incorporado no título, respectivamente, direito de crédito (letra, cheque), direito real (guias de transporte) ou direito social (acções das sociedades).

2.3. Títulos nominativos, à ordem e ao portador

Classificação que atende à forma de circulação dos títulos, transmitindo-se os nominativos através da entrega do título, o averbamento no competente livro da sociedade e a declaração de pertence no próprio título, em nome do novo possuidor (por ex. acção da sociedade), os à ordem através do endosso (declaração de transmissão subscrita pelo portador no título, indicando ou não o nome da pessoa a quem transmite - por ex. a letra) e os ao portador através da simples entrega (por ex. cheque ao portador).

3. VANTAGENS

As principais vantagens apontadas aos títulos de crédito são:

- Maior segurança na transmissão dos direitos, pois quem os adquire não fica sujeito aos vícios das anteriores relações;
- Maior rapidez no exercício dos direitos, visto os títulos de crédito em sentido restrito serem títulos executivos, permitindo a utilização imediata da acção judicial executiva, sem necessário reconhecimento do direito por anterior sentença;
- Maior facilidade na transmissão dos direitos, atendendo à forma como a mesma é feita (dispensa de formalidades, como a escritura pública, por exemplo).

Annex M - INSTITUIÇÕES FINANCEIRAS

Carlos Pinto Pereira

Março 1993

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ANNEX M
INSTITUIÇÕES FINANCEIRAS

Carlos Pinto Pereira

Março 1993

FONTES

A constituição e o funcionamento de instituições Financeiras é regulado pelo decreto nº 31/89 de 27 de Dezembro, publicado no B.O. nº52, 2º suplemento.

A presente Lei aplica-se a instituições constituídas e estabelecidas na Guiné-Bissau, bem como as Instituições financeiras estrangeiras que exerçam no país as suas actividades, através de filiais ou sucursais, sejam elas instituições Bancárias, Sociedades de Investimentos ou Bancos de Desenvolvimentos

NOÇÕES

Por Instituição Bancária entende-se a empresa cuja actividade consista em receber do publico depósitos ou outros fundos reembolsáveis e em conceder crédito por sua própria conta.

Por Sociedade de Investimento entende-se a instituição que visa canalizar capitais nacionais e estrangeiras para o financiamento da produção, através da colocação de acções, obrigações e outros títulos de dívida negociáveis emitidos por si mesmo ou por terceiros, concluir convênios e créditos, tomar firme valores mobiliários de qualquer tipo, por sua conta ou em nome de terceiros, com ou sem a sua garantia ou aval, e conceder crédito a medio e longo prazos para a promoção de actividades produtivas.

Por Banco de Desenvolvimento entende-se a instituição financeira cujos objectivos se dirigem fundamentalmente ao financiamento e a orientação investimento. No que diz respeito ao dominio da resistência financeira, tem por objecto a pratica de operação bancárias e financeiras e, em especial, a concessão de crédito a médio e longo prazo, com vista ao desenvolvimento económico e financeira do país e, de modo geral, colaborar com o Governo na execução da política económica e financeira por este definida . Poderá ainda outorgar créditos de campanha à agricultura, pesca, e outros sectores de produção, financiar exportações de produção nacional e conceder créditos para o desenvolvimento de toda a classe de actividades artesanais, de produção de bens e de serviços profissionais.

Por filiar entende-se a instituição financeira datada de personalidade peiódica contituida em conformidade com a Lei de determinado país e cuja dominio seja assegurado por uma

instituição Bancária com sede noutra país em virtude de participação desta no capital ou em consequência de disposição estatutárias ou contratais.

Por sucursal entende-se o estabelecimento desprovido de personalidade periódica que, pertencente a uma instituição bancária com sede no estrangeiro, efectua directamente operações próprias da actividade desta.

CONSTITUIÇÃO E FINANCIAMENTO

Vigora neste domínio o princípio de especialidade e da autorização prévias, bem com o da tipicidade. Assim, não pode ser constituída nenhuma instituição financeira no país, sem a devida autorização, e uma vez obtida esta, a instituição não pode realizar operações não abrangidas pela autorização.

A autorização é concedida pelo o Governador do Banco Central, obtido o acordo do Governo em conselho de Ministros. A instituição tem de adoptar um dos tipos previstos na Lei.

As instituições financeiras têm que se constituir sob a forma de sociedades anónimas de responsabilidade limitada - SARL.

As alterações estatutárias, especialmente as fusões e cisões, estão sujeitas, com as devidas alterações, as normas de autorização e aprovação do Banco Central.

PRAZO

Requerida a autorização a decisão deve ser proferida no prazo máximo de 6 meses, a contar de data de entrega do pedido, e, excepcionalmente, quando sejam solicitados informações complementares, no prazo de 12 meses.

Na falta de decisão dentro dos prazos, presume-se que o pedido foi indeferido. Por outro lado, a autorização concedida caduca se no prazo de 6 meses a instituição se não constituir formalmente ou no prazo de 12 meses se não iniciar a actividade

INSTRUÇÃO DO PEDIDO

O pedido de autorização será apresentado no Banco Central, acompanhado dos seguintes elementos:

- a) Exposição fundamentada das razões de ordem económica-financeira justificativas da constituição da instituição;

- b) **Caracterização do tipo de instituição a constituir, sua implantação geográfica e respectiva estrutura orgânica com especificação dos meios materiais, técnicas e humanas a utilizar;**
- c) **Projecto de estatutos, contendo o objectivo do tipo de instituição a constituir;**
- d) **Balanço previsional para cada um dos primeiros três anos de actividade.**
- e) **Quitação comprovativa de cumprimento da exigencia de garantia de capital constante do nº 3 do artigo 162 do Código Comercial;**
- f) **Identificação pessoal e profissional dos accionistas fundadores, com especificação de numero de acções por cada um subscritas ;**
- g) **Certificado de registo criminal dos accionistas fundadores quando pessoas singulares, e dos seus administradores, Directores ou Gerentes, quando pessoas colectivas;**
- h) **Declaração de que nem os accionistas fundadores nem sociedades ou empresas cujo controlo tenham assegurado ou de que tenham sido administradores, Directores ou Gerentes foram declarados em estado de falência.**

A estes elementos haverá que acrescer ainda outros para o caso de os accionistas fundadores serem instituições financeiras as outras pessoas colectivas.

CAPITAL E RESERVAS

O capital mínimo exigido para a criação de uma instituição financeira é de 3.000.000.000,00 (três bilhões de pesos). No caso de instituições Bancárias, 10.000.000.000,00 (dez bilhões de pesos). No caso de sociedades de investimentos e 20.000.000.000,00 (vinte bilhões de pesos) no caso de Bancos de Desenvolvimento.

Nenhuma pessoa singular ou colectiva ou entidade pública pode, directamente ou por interposta pessoa, deter participação superior a um 1/5 do capital social, salvo se participação mais elevada for autorizada pelo Banco central, mediante acordo do Governo.

Para além do Fundo de Reserva Legal constituído por 10% dos lucros líquidos anuais até que o saldo do mesmo atinja o montante equivalente ao capital autorizado, as instituições devem constituir outras reservas especiais e provisões, destinadas a prevenir riscos de depreciação ou prejuízos.

As instituições financeiras estão ainda sujeitas a limites de liquidez mínima, a fixar pelo Banco Central.

SUCURSAIS

As sucursais são obrigadas a dispor de um capital afecto que não pode ser inferior ao mínimo legal previsto para instituições financeiras do mesmo tipo com sede no país e as instituições estrangeiras de que dependem ou a que pertencem, respondem pelas operações realizadas por elas.

O capital e reservas das sucursais só respondem pelas operações realizadas na Guiné-Bissau, excepção feita aos activos aplicados, que beneficiam de regime diverso, de investimento. Porém, só respondem por obrigações assumidas em outros países depois de satisfeitas todas as obrigações assumidas na Guiné-Bissau

ANNEX N

INVESTIMENTO

Carlos Pinto Pereira

Março 1993

FONTES

O Código de Investimento aprovado pelo Decreto-Lei nº 4/91 de 14 de Outubro, publicado no B.O. nº41, regula o investimento privado guineense e estrangeiro no nosso país.

Antes da sua aprovação vigorava o Decreto-Lei nº 2/85 de 13 de Junho e os Decretos nº 25 - E/85 e nº 25 -F/85 ambos de 13 de Junho, regulando apenas o investimento estrangeiro.

A novidade principal reside no facto de o novo Código regular também o investimento realizado por nacionais.

NOÇÕES

Para o Código, investimento é qualquer contribuição susceptível de avaliação pecuniária realizado no território nacional quer por exercício de actividade empresarial própria, quer para associação com sociedades já constituídas ou a constituir, através de participação no respectivo capital. Poderá revestir uma das seguinte formas: moeda livremente convertível, maquinárias e materiais importados e transferência de tecnologia.

Por investimento estrangeiro considera todo o investimento realizado por pessoas singulares ou colectivas não domiciliadas ou sediadas em território nacional, com fundos provenientes do estrangeiro.

O investimento realizado por cidadãos estrangeiros residentes no país, com fundos proveniente do exterior é considerado investimento estrangeiro. Por pessoas singulares ou colectivas, não domiciliadas ou sediadas em território nacional, entendem-se, respectivamente, os indivíduos, incluindo cidadãos guineenses, com residencia habitual no estrangeiro, e as entidades colectivas de qualquer natureza sediadas no estrangeiro.

A novidade principal reside no facto de a avaliação depender da proveniência dos fundos pouco importando a nacionalidade ou a residência do investidor. Assim, são contemplados os Emigrantes guineenses e os cidadãos estrangeiros residentes.

LIMITES

O código consagra, logo no seu artigo 1º, o princípio da liberdade de acesso e de exercício em qualquer ramo de actividade económica lucrativa.

Aconselha a harmonização do investimento com a estratégia de desenvolvimento com os planos definidos pelas autoridades competentes, e, muito em especial, com os regulamentos relativos à protecção da saúde, salubridade, da defesa do ambiente e da desertificação.

DIREITOS E GARANTIAS

Os principais direitos têm que ver com o acesso a todos os incentivos previstos no Código nomeadamente:

- a) Transferência para o exterior dos dividendos ou lucros distribuídos;
- b) Transferência para o exterior do produto de venda ou liquidação do investimento;
- c) Transferência para o exterior dos montantes necessários à liquidação dos serviços de dívida;
- d) Pagamentos no exterior de importâncias devidas por assistência técnica, comissões, fornecimentos etc.

Os projectos aprovados gozam ainda do direito de dispôr de uma conta Bancária em moeda estrangeira em qualquer dos Bancos comerciais, existente no país, que poderão utilizar nos termos da legislação em vigor.

Os projectos de investimentos realizados por nacionais não gozam dos direitos consagrados nas alíneas a) e b) atrás referidos.

As garantias prendem-se com a segurança e protecção dos bens e direitos resultantes do investimento, e, em especial:

- a) Protecção contra a nacionalização e expropriação;
- b) Justa e pronta indemnização nos casos previstos nas alíneas anterior, quando autorizados por Lei. A indemnização pode ser fixada por arbitragem;
- c) Acesso à garantia do MVGA - AGENCIA multilateral de garantia de Investimento;

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Aconselha a harmonização do investimento com a estratégia de desenvolvimento com os planos definidos pelas autoridades competentes, e, muito em especial, com os regulamentos relativos à protecção da saúde, salubridade, da defesa do ambiente e da desertificação.

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- c) Acesso à garantia do MVGA - AGENCIA multilateral de garantia de Investimento;

- d) Não interferência na vida dos projectos;
- e) Sigilo profissional, bancário e comercial;
- f) Tratamento não desfavorável face aos nacionais;
- g) Recurso à convenção de 18 de Março de 1965 para a resolução de conflitos relativos a investimentos entre Estados e nacionais de outros Estados Membros, estabelecida sob ÉGIDE do BIRD.

Para além destes direitos e garantias, o Código possibilita a negociação e conclusão de acordos bilaterais, como o que existe com Portugal, e em negociação com a França e a Rep. da China, que estabeleçam condições particulares mais vantajosas para as partes.

INCENTIVOS

Todos os projectos aprovados gozam;

- a) De isenções ou reduções fiscais, que incidirão sobre a Contribuição Industrial, o Imposto de Capitais e o Imposto Complementar;
- b) Isenção de Direitos Aduaneiros sobre:
 - i) A importação, quer temporária quer definitiva de bens de equipamento;
 - ii) A importação de matérias primas e subsidiárias necessárias à produção, durante os 2 primeiros anos de execução.

Não tem acesso aos incentivos, que têm aplicação selectiva, os projectos dos seguintes ramos de actividade:

- a) Comercio grossista e retalhista;
- b) Comercio de exportação de produtos primários tradicionais - castanha de cajá, coconote, mancarra, óleo de palma, madeira etc.;
- c) Aluguer de viaturas;
- d) Construção, excepto na importação de equipamentos e sobressalentes;
- e) Cafés, cervejarias, dancings etc.;

- f) Jogos de fortuna e azar.
- g) Unica entidade competente para contratar com o promotor e estabelecer o diálogo com os departamentos do estado interessados no projecto.

Os demais serviços, P.C. manutenção, consultoria, etc. poderão beneficiar de isenções aduaneiras, até um limite de 50% do respectivo valor. Para além destes incentivos, de regime comum, o Ministro das Finanças pode propor ao Governo um regime especial, chamado contratual para projectos de grande interesse economico para o país

APLICAÇÃO DOS INCENTIVOS

Na aplicação dos incentivos tomam-se em consideração os resultados produzidos pelos projectos. Processa-se pela dedução, na matéria colectável de uma percentagem certa, 10%, quer sobre o volume das exportações, quer sobre a produção total anual; pela dedução, na matéria colectável, do dobro das despesas efectuadas com formação; pela dedução das despesas efectuadas com reflorestação, etc.

INSTRUÇÃO DO PEDIDO

Para além de especificar os objectivos do projecto e os incentivos requeridos, o promotor deve instruir o processo com:

- a) Tratando-se de pessoas singulares.
 - Curriculum Vitae do requerente
 - Sua experiência profissional.
- b) Tratando-se de pessoas colectivas.
 - Exemplar dos estatutos ao projecto
- c) Estudo de viabilidade técnica económica e financeira em 7 exemplares.

Para os projectos cujo valor de investimento seja superior a 250.000.000.00 (Duzentos e cinquenta milhões de pesos), o estudo de viabilidade referido em c) deverá respeitar um modelo próprio, fixado por despacho conjunto do Ministro das Finanças e do Governador do Banco Central.

A entidade competente para a apreciação e aprovação dos pedidos de regime comum é o GAI-Gabinete de Apoio ao Investimento, que funciona sob a dependência do Ministro das Finanças, única entidade competente para contratar com o promotor e estabelecer o diálogo com os departamentos do estado interessados no projecto.

Annex O - SEGUROS

Carlos Pinto Pereira

Março 1993

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ANNEX O

SEGUROS

Carlos Pinto Pereira

Março 1993

O contrato de seguro vem regulado no decreto nº 16/79 de 24 de Setembro, publicado no B.O. nº 38.

Este diploma embora não revogue expressamente o título XV do Código comercial em vigor, considera-o desactualizado, e por isso, procurou adaptá-lo à evolução da prática e do direito dos seguros. Assim, o código comercial só se mantém em vigor naquilo que não contrariar o presente decreto.

De acordo com artigo 5 do decreto nº 16/79 de 24 de Setembro o seguro garante à pessoa ou entidade que efectuou o contrato com a seguradora, ou a terceiros lesados, a indemnização dos prejuízos sofridos em consequência de acontecimentos fortuitos.

No mesmo diploma, três podem ser o objecto do contrato de seguro:

- a) Coisas, pelo risco da sua danificação, destruição, perda, furto, roubo ou quando atingíveis por qualquer outro risco, segurável;
- b) Responsabilidade civil, pelos danos causados a outrem ou aos seus bens;
- c) Pessoas, pelo risco de lesões, morte ou outros acontecimentos a ele relativos.

Para regulamentar os diversos tipos de seguro atrás referidos são aprovados os decretos 17/79, 18/79, 19/79, 20/79, 21/79 todos de 24 Setembro, relativos, respectivamente, a acidente pessoais, seguro de viagem, acidente de trabalho e seguro de coisas (incêndio, cristais, furto ou roubo, montagens, perdas de exploração, aeronaves, marítimo, transportes de mercadorias (aéreos, terrestres e marítimos), automovel etc.

Ainda neste quadro se insere a aprovação dos decretos nº 4/80, 5/80 e 6/80 todos de 9 de Fevereiro, regulamentando o seguro obrigatório de acidente de trabalho e doenças profissionais e responsabilidade civil automovel respectivamente, bem como a Tabela Nacional de Incapacidade pelo decreto nº 15/80 de 15 Março.

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Annex P - PROPRIEDADE INTELECTUAL E INDUSTRIAL

Carlos Pinto Pereira

Março 1993

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ANNEX P

PROPRIEDADE INTELECTUAL E INDUSTRIAL

Carlos Pinto Pereira

Março 1993

Pela resolução nº 4/88 de 16 de Março, publicado no B.O. nº11, 2º suplemento o Conselho de Estado ratificou a convenção que institui a organização mundial de propriedade intelectual OMPI, assinada em Estocolmo a 14 de julho de 1967.

Igualmente por resolução do Conselho de Estado a nº 5/88 de 16 de Março publicado no mesmo B.O. a Guiné-Bissau ratifica a Convenção de Paris para a protecção de propriedade Industrial, de 20 de Março de 1883.

Por propriedade intelectual entende-se, no termos da convenção, os direitos relativos as obras literárias, artísticas e científicas, as interpretações dos artistas intérpretes e as execuções dos artistas executantes, aos fonogramas e as emissões de radiodifusão, as invenções em todos os domínios da actividade humana; as descobertas científicas, os desenhos e modelos industriais, as marcas industriais, comerciais, e de serviço, assim como as firmas comerciais e denominação comerciais, a protecção contra a concorrência desleal e todos os outros direitos inerentes à actividade intelectual nos domínios industrial, científico, literário e artístico.

FINS DA OMPI

São fins da organização:

- a) Promover a protecção da propriedade intelectual em todo o mundo, pela cooperação dos estados, em colaboração, se for caso disso, com qualquer outra organização internacional.
- b) Assegurar a cooperação administrativa entre as uniões, nomeadamente as uniões de Paris e Berna.

Annex Q - LEI DA PROPRIEDADE LITERÁRIA, CIENTÍFICA E INTELECTUAL

Armando da Silva Procel

Março 1993

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LEI DA PROPRIEDADE LITERARIA CIENTIFICA

E INTELECTUAL

Dec. Nº 13.725

I. NOÇÃO E AMBITO:

Entende, o presente diploma, que o "trabalho literário ou artístico, compreende todas as produções intelectuais do domínio literário, científico e artístico, qualquer que seja o modo ou forma da publicação".

Abrange-se, assim os livros, folhetos, revistas e outros escritos; obras literárias, musicais; obras destinadas a instrução, cultura ou simples audição musical; obras coreograficas ou pantomimas; obras de desenho, pintura, gravura e outros.

O presente decreto abrange toda a propriedade intelectual, quer a original, quer a equiparada, na vertente de tradução, adaptação etc, ou na vertente de publicação de manuscritos antigos existentes nas bibliotecas ou arquivos públicos ou particulares.

II. LEGISLAÇÃO COMPLEMENTAR

1. Artº 1303º Código Civil de 1966.
2. Resolução nº 4/88 que ratifica, para a adesão, a convenção que institui a Organização Mundial da Propriedade Intelectual (OMPI), assinada a 14 de julho de 1967, em Estocolmo.
. Esta resolução foi publicada no B.O. 11/16/3/88

III. CARACTERISTICAS:

O presente diploma é constituído por 137 artigos sistematizados em oito (8) capítulos:

- I. Disposições Gerais
- II. Do Contrato da Edição
- III. Dos Contratos de Assinatura Literária e Bibliográfica.
- IV. Do Contrato de Representação
- V. Disposições Especiais sobre a Propriedade Artística
- VI. Das Transmissões, onerações e Registos
- VII. Do Nome Literário ou Artístico e dos Títulos das obras
- VIII. Da Violação e Defesa dos Direitos de Autor.

IV. REGIME JURIDICO:

Procurou-se no presente diploma, "regular com a possível minuciosidade os contratos de edição e representação a defesa de nome literário a artístico e do título das obras, a repressão da contrafacção ou usurpação aproveitando-se tudo o que de mais útil se encontra..."

Assim:

- A) Em relação ao contrato de edição de que reza o artº 41º e seguintes, só pode ser celebrado e provado por escrito, presumindo-se que a publicação de quasquer obra são - no pôr contra dos autores. A exigência daquelas formalidades e esta presunção, embora ilidível, são factores de segurança e garantia, pois vem o artº 44º no seu parágrafo 1º, dar ao autor a possibilidade de "apreender e apropriar-se dos exemplares que o editor tirar a mais do número estipulado ou presumido, perdendo o editor o respectivo preço".

E, finalmente, proibe-se ao editor, a transmissão a outrem do direito e a correlativa obrigação de fazer edição sem expresso consentimento do autor.

No artº 69º e seguintes, versa-se sobre o contrato de representação nos moldes do qual se presume transmitir-se, esse direito, em separado dos demais direitos do autor, artº 70º bem como a sua onerabilidade e a exigência basilar do consentimento do autor, artº 72º.

- B) Vem consagrado no artº 108º e seguintes do diploma a defesa "do nome literário ou artístico e dos títulos de obras", nos termos do qual aqueles primeiros são propriedades perpétuas de quem primeiro os usou, acompanhando-o para a toda a parte. E mais, a usurpação fraudulenta é punido, criminalmente, além da apreensão e destruição dos exemplares da obra em causa, artº 110º e seguintes.

Em segundo lugar consagra-se o registo dos nomes literários ou artísticos, para a melhor defesa destes nomes.

Em terceiro e último lugar, consagra-se a possibilidade de registo dos títulos ou denominações das obras literárias científicas ou artísticas, quando sejam originais.

- C) Finalmente, o artº 126º e seguintes vêm estabelecer o mecanismo de reacção contra a violação dos direitos do autor. Reacção essa que vai desde perda, em benefício do autor ou proprietário da obra, de todos os exemplares apreendidos, à prisão, passando por pagamento de uma justa indemnização.

V. ANALISE CRITICA:

O diploma enferma de vícios próprios dos anos e das mutações históricas sociais. Sobre ele já desfilaram sessenta e seis anos.

Daf que no seu artigo primeiro se aceite a censura prévia como um dado adquirido e que hoje num país em democratização é inaceitável.

A remissão que faz, quer para o código civil, quer para o código penal está, completamente desatualizada. E não admira, o presente diploma é de 1927 e o código civil e penal, respectivamente, de 1966 e 1886.

Em terceiro lugar, e a acrescer ao atrás exposto oferece-se-me dizer que pese embora a preocupação do diploma em abranger tudo, no seu tempo, novas realidades se emergiram na área da propriedade intelectual que importa tutelar, assim como a não menos importante necessidade de harmonizar o diploma com a nossa realidade constitucional Guineense.

Bissau, 12 / Março DE 1993



ARMANDO SILVA PROCEL

Director do Gabinete de Estudos, Legislação
e Documentação (GELD) do M. da Justiça.

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Annex R - SISTEMA FISCAL

Carlos Pinto Pereira

Março 1993

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ANNEX R

SISTEMA FISCAL

Carlos Pinto Pereira

Março 1993

O Sistema Fiscal Guineense é caracterizado pela existencia de diversos impostos, sendo por isso parcelar. Segundo a natureza da realidade considerando como objecto do imposto, podem ser classificados da seguinte forma:

a) Impostos sobre o rendimento

i) Impostos reais parcelares

Contribuição predial urbana,

Contribuição Industrial,

Imposto Profissional,

Imposto de Capitais,

Imposto de mais Valias

Imposto de Reconstrução Nacional,

ii) Imposto Pessoal

Imposto Complementar,

b) Imposto sobre o Capital

c) Imposto sobre o consumo ou sobre a despesa

Imposto de Transações

Imposto de consumo sobre a gasolina

d) Impostos sobre a transmissão de patrimónios

Impostos sobre sucessões e doações

Sisa

e) Impostos sobre o valor de certos actos ou documentos

Imposto de Selo

FONTES

A grande maioria dos impostos existentes são criados e regulamentados pelo governo, através de Decretos. Excepcionalmente a própria Assembleia Nacional Popular criou também alguns impostos.

Vejamos, em particular, alguns dos impostos existentes.

CONTRIBUIÇÃO INDUSTRIAL

O código de contribuição industrial foi aprovado pelo Decreto nº 39/83 de 30 de Dezembro, publicado no B.O. nº 52, 2º suplemento. Sofreu alterações em 1988, pelo Decreto nº 24/88 de 13 de Junho, publicado no B.O. nº 24, suplemento e, mais recentemente pelo despacho nº 3/90 de 8 de Fevereiro, as suas taxas e escalões foram revistas.

De acordo com o Decreto nº 39/83 a contribuição industrial é um imposto directo e incide sobre os rendimentos atribuíveis ao exercício de actividades de natureza comercial ou industrial, com carácter permanente ou accidental.

São sujeitos passivos deste imposto as pessoas singulares ou colectivas titulares dos rendimentos provenientes das actividades acima referidas e que sejam exercidas no território da Guiné-Bissau. Vigora Assim o princípio de territorialidade.

Entende-se que exercem as suas actividades no território da República da Guiné-Bissau as pessoas singulares ou colectivas que tenham no País a sua sede social ou alguma forma de representação permanente, e tem assim os que, residindo no estrangeiro, desenvolvam no País quaisquer acções pelas quais lhe sejam devidos pagamentos ou créditos por entidades residentes no País.

Para efeitos de determinação da matéria colectável os contribuintes são classificados em três grupos a saber, A, B e C.

Nos termos do despacho nº 3/90 de 8 de Fevereiro, publicado no B.O. nº 8 , suplemento, os escalões e as taxas da contribuição industrial são os seguintes:

- a) Para lucros tributáveis até 6.000.000,00 PG..... 20%
- b) Para lucros tributáveis entre 6.000.000,00 PG e 50.000.000,00 PG.....30%
- c) Para lucros tributáveis acima de 50.000.000,00 PG....35%

CONTRIBUIÇÃO PREDIAL URBANA

O Código da Contribuição Predial Urbana foi aprovado pelo Decreto nº 43/88 de 15 de Novembro, publicado no B.O. nº 46.

A contribuição Predial Urbana é um imposto directo que incide sobre o rendimento de prédios Urbanos no território nacional.

São sujeitos passivos deste imposto os titulares do rendimento dos prédios, presumindo-se como tais as pessoas em nome de quem se encontram inscritos na matriz ou em que estejam na sua posse efectiva.

As taxas progressivas deste imposto são os seguintes:

- a) Rendimento colectável até 1.500.000,00pg ... 15%
- b) Parte excedente a 1.500.000,00pg 20%

IMPOSTO PROFISSIONAL

O Código do imposto profissional foi aprovado pelo Decreto nº 23/83 de 6 de Agosto, publicado no B.O. nº 32, suplemento tendo revogado toda a legislação anterior relativa a matéria.

O imposto profissional incide sobre os rendimentos do trabalho, em dinheiro ou espécie, que resultem de relação de trabalho subordinado, de contrato de prestação de serviço ou do exercício de uma profissão literal por conta propria, nomeadamente:

- a) Vencimentos, ordenados, salários, soldadas, gratificações as outras formas de retribuição, dos funcionarios públicos, dos empregados de empresas públicas, mistas e privadas, dos trabalhadores das cooperativas, ainda que sejam socios dos mesmos, e dos empregados de quaisquer outras entidades:

- b) As remunerações pagas a cientistas, artistas ou técnicos pela prestação de qualquer serviço de natureza permanente acidental, designadamente os "cachets" pagos pela participação em conferência, espectáculos, exposições ou outras manifestações de carácter técnico, científico ou artístico.
- c) Os direitos do Autor.

Não são considerados rendimentos de trabalhos, os abonos de família, as pensões de aposentação, os subsídios de doença, as ajudas custo, despesas de deslocação de viagem, indemnização por despedimento etc.

São sujeitos passivos todos os indivíduos que recebam rendimento de trabalho no território nacional, ainda, que não tenham a sua residência permanente, desde que essas remunerações sejam pagas no país por trabalho aqui prestado pelo exercício, ainda que acidental de qualquer profissão liberal.

Os escalões e as taxas de imposto, de acordo com o Decreto nº12/88 de 22 de Fevereiro que alterou o artigo 27º de Código, são os seguintes:

- a) Rendimentos anuais até 275.000.pg0%
- b) Rendimentos entre 275.000 e 450.000.pg.....5%
- c) Rendimentos entre 450.000.pg e 900.000.pg10%
- d) Rendimentos entre 900.000.pg e 1.500.000.pg15%
- e) Rendimentos entre 1.500.000.pg e 2.500.000.pg ..20%
- f) Rendimentos entre 2.500.000.pg e 4.500.000.pg ..25%
- g) Rendimento superior a 4.500.000.pg30%

IMPOSTO DE CAPITAIS

O Código de imposto de capitais foi aprovado pelo Decreto nº 8/84 de 3 de Março publicado no B.O. nº 9, 2º suplemento. A sua entrada em vigor apenas se verifica em Dezembro do mesmo ano com a publicação do Decreto nº 38/84 de 29 de Dezembro -B.O. nº 52, suplemento.

O imposto de capitais incide sobre os seguintes rendimentos de aplicação de capitais:

- a) Juros de capitais montuados em dinheiro ou géneros, sob qualquer forma contratual;
- b) Rendimentos originados pelo diferimento no tempo de uma prestação, ou pela mora no cumprimento de uma obrigação, ainda que devidos a título de indemnização;
- c) Lucros ao dividendos atribuídos aos socios das sociedades;
- d) Lucros obtidos nas contas de participação ;
- e) Lucros de depósitos confiados a quaisquer entidades legalmente autorizadas a recebê-los;
- f) Lucros de suprimentos ou abonos feitos pelos socios as sociedades;
- g) Lucros apurados em conta corrente;
- h) Lucros de obrigações emitidas por quaisquer entidades, públicas ou privadas;
- i) Rendimentos originados pela cessão temporária da exploração de estabelecimentos comerciais ou industriais;
- j) Rendimentos provenientes da cessão ou cedência de patentes de invenção, licenças de exploração modelos de utilidades, desenhos e modelos industriais, marcas, nomes e insígnias de estabelecimentos etc.

São sujeitos passivos os beneficiários dos rendimentos acima referidas, e a taxa é de 25%. Porém, quando os rendimentos resultam dos casos previstos nas alíneas c), d) e j) a taxa será de 10% .

IMPOSTO COMPLEMENTAR

O Código do Imposto Complementar foi aprovado pelo Decreto nº 7/84 de 3 de Março, publicado no B.O. nº9, suplemento, tendo revogado toda a legislação anterior, nomeadamente o diploma legislativo nº 1755 de 8 de Maio de 1961.

O imposto complementar incide sobre os rendimentos globais das pessoas singulares e colectivas produzidas no território da Guiné-Bissau em cada ano civil, e sujeitos aos seguintes impostos parcelares, ainda que dela isentos:

- a) Contribuição Industrial;
- b) Contribuição Prédial Urbana;
- c) Imposto profissional;
- d) Imposto de Capitais;

São sujeitos passivos do imposto todas as pessoas singulares e colectivas titulares dos rendimentos acima referidos, desde que tenham domicílio, residência efectiva, sede ou outra forma de representação permanente à qual sejam imputáveis os rendimentos, no território da Guiné-Bissau.

Entende-se que as pessoas têm o domicílio, residência efectiva, sede ou outra forma de representação quando residam no país ou se estabeleçam por períodos superiores a 6 meses por ano.

Os rendimentos a englobar para efeitos de liquidação do imposto complementar das pessoas singulares são os respeitantes ao agregado familiar, sendo este o conjunto formado pelos conjugues e filhos ou enteados menores a cargo do casal.

Os escalões e as taxas deste imposto fixados pelo Decreto nº 12/88 de 22 de Fevereiro, publicado no B.O. nº 8, suplemento, são os seguintes:

a) Para pessoas singulares:

Até 350.000.pg	5%
Mais de 350.000.pg até 1.500.000pg	10%
Mais de 1.000.000pg até 1.500.000	20%
Mais de 1.500.000pg até 2.300.000pg	35%
Superior a 2.300.000pg	50%

b) Para pessoas colectivas

Até 5.000.000pg	5%
Mais de 5.000.000pg até 10.000.000pg	15%
Superior a 10.000.000pg	25%

IMPOSTO DE RECONSTRUÇÃO NACIONAL

O imposto de reconstrução nacional foi criado em 1975 por uma lei da Assembleia Nacional Popular, a lei nº 1/75 de 10 de Maio, publicado no B.O. nº 19. Vem a substituir em parte o imposto domiciliário e o imposto de trabalho, todos da era colonial.

São contribuintes deste imposto todos os indivíduos de idade igual ou superior a 16 anos residentes no país e as empresas em actividade no território nacional. Deste imposto estiveram isentos os habitantes das antigas zonas libertadas, continuando ainda a sé-lo os estudantes.

A taxa do imposto, fixada pela lei nº 5/87 de 9 de Junho é de 5.000pg e, para sexo feminino, casados ou com idades igual ou superior a 18 anos, é de 2.000pg.

CONTRIBUIÇÃO DE REGISTO

Por contribuição de registo entendem-se as matérias hoje designadas por sisa e imposto sobre sucessão e doação.

O regulamento para a liquidação e cobrança da contribuição de registo ainda em vigor, foi aprovado pela Portaria nº 160-B, e 30 de Abril de 1920.

Os valores do referido regulamento foram actualizados pelo Decreto nº 26/88 de 20 de Junho, e estão a ela sujeitos os actos que importam transmissão perpétua ou temporária de propriedade imobiliária de qualquer valor, espécie ou natureza, por título gratuito (sucessões e doações) ou oneroso (Sisa), qualquer que seja a denominação ou título.

IMPOSTO SOBRE VEICULOS AUTOMOVEIS

O Imposto sobre veículos automóveis também conhecido por imposto de circulação, foi criado pelo Decreto nº 27/80 de 31 de Maio, publicado no B.O. nº 22. Na mesma data e Decreto, foi aprovado o respectivo regulamento, que faz incidir este imposto sobre todos os veículos ligeiros de passageiros ou mistos e motociclos com ou sem carro, matriculados ou registados no País. Vide Decreto nº 27/88 de 13 de Junho, publicado no B.O. nº 24, suplemento.

IMPOSTO DE TURISMO

O Imposto de Turismo, regulamentado pelo Decreto nº 33/89 de 27 de Dezembro, publicado no B.O. nº 52, 3º suplemento, incide sobre o preço dos alojamentos, alimentação, bebidas e outros serviços prestados nos estabelecimentos da Industria Hoteleira ou similar,

como sejam Hotéis, Pensões, Residenciais, Restaurantes, Casas de Pasto, Pastelarias, Cafés, Casas de Chá, Snack-Bares, Cervejarias, Boites, Discotecas, bem como sobre as actividades exercidas por Agencias de Viagens, Rent-A-Car etc.

As taxas são de 8%, 6% e 3% respectivamente, para os contribuintes pertencentes aos grupos A, B e C da Contribuição Industrial.

IMPOSTO DE SELO

O Regulamento do Imposto de Selo foi aprovado pelo Decreto nº 20/80 de 10 de Maio, publicado no B.O. nº 19, suplemento.

O Imposto de Selo incide sobre todos os documentos, livros, papéis, Actos e produtos designados na tabela anexa ao regulamento, é arrecadado por meio de papel selado, estampilha fiscal, selo de verba e selo especial. As taxas frequentemente alteradas.

IMPOSTO DE CONSUMO SOBRE A GASOLINA

Foi criado pelo Decreto nº 9/87 de 4 de Maio, e incide sobre a venda ao público de gasolina. Pelo Decreto nº 13/88 de 22 de Fevereiro, publicado no B.O. nº 8 suplemento, a taxa passou a ser de 30% Ad valorem.

IMPOSTO DE TRANSACÇÕES

O Imposto de Transações foi aprovado pelo Diploma Legislativo nº 1846 de 17 de Dezembro de 1966 publicado no B.O. nº 51, incidindo sobre a transmissão de Viaturas Automóveis, Embarcações, Ciclomotores e Motociclos, Avões, Avionetas e Barcos de recreio, variando a taxa entre os 3% e os 10%.

Para além destas, existem ainda toda uma série de outros impostos e taxas, bem como direito de importação e exportação. De entre aqueles podemos destacar, o imposto sobre Hidrocarbonetos líquidos e gasosos, o imposto sobre cabeça de gado, o imposto extraordinário sobre a castanha de cajú, o imposto de tonelagem, o imposto de comércio marítimo, o imposto de consumo e fabrico de aguardente, o imposto de pilotagem e de farolagem, o imposto de justiça, os emolumentos gerais aduaneiros, etc.

Annex S - DIREITO DAS OBRIGAÇÕES

Ana Maria Peralta

Março 1993

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Annex S

DIREITO DAS OBRIGAÇÕES

Ana Peralta

Março 1993

1.- Noção, fontes e âmbito

O Direito das Obrigações regula as situações pelas quais uma pessoa está vinculada a realizar em benefício de outra uma prestação.

A núcleo central de regras do Direito das Obrigações encontra-se no Livro II do Código Civil, que se encontra assim dividido:

- Das obrigações em geral - fontes
 - modalidades
 - transmissão de créditos e dívidas
 - garantia geral das obrigações
 - garantias especiais das obrigações
 - cumprimento e não cumprimento
 - outras causas de extinção
- Dos contratos em especial

Os dois principais domínios do Direito das Obrigações são:

- contratos
- responsabilidade civil

2.- Contratos

2.1. Contratos em geral

O art.40^º do C.Civil enuncia o princípio da liberdade contratual -faculdade que as partes têm de fixar livremente o conteúdo dos contratos, celebrar contratos diferentes dos previstos na lei (contratos atípicos) incluir nestes as cláusulas que lhes aprouver, bem como reunir elementos de dois ou mais contratos (contratos mistos).

O contrato, uma vez validamente celebrado, tem força obrigatória entre as partes - é lei entre elas.

Os contratos podem ter *eficácia obrigacional* - constitutivos de obrigações - ou *eficácia real* - constitutivos de direitos reais. O princípio regra em matéria contratual é o de a constituição ou transferência de direitos reais se dar por mero efeito do contrato (sem necessidade de entrega, registo, etc.).

A lei prevê dois contratos preparatórios:

- *contrato-promessa* - ambas as partes, ou apenas uma delas, obrigam-se a celebrar um certo contrato, dentro de certo prazo ou verificados certos pressupostos;
- *pacto de preferência* - uma das partes obriga-se a, em igualdade de condições, escolher outra pessoa como seu contraente, no caso de celebrar determinado contrato.

Toda a matéria contratual é dominada pelo *princípio da boa-fé* - no cumprimento das obrigações, assim como no exercício do respectivo direito, devem as partes proceder com correção, nos termos correntes entre cidadãos honestos.

O incumprimento do contrato, o atraso no cumprimento (*mora*), o cumprimento defeituoso e a impossibilidade da prestação por causa imputável ao devedor constituem este na obrigação de indemnizar (responsabilidade civil obrigacional).

2.2.- Contratos em especial

O Código Civil prevê e regula os seguintes contratos:

- a) **compra e venda** - contrato pelo qual se transmite a propriedade de uma coisa, ou outro direito, mediante um preço. São efeitos essenciais da compra e venda: a transmissão da propriedade da coisa; a obrigação de entrega da coisa; a obrigação de pagamento do preço.

A transferência da propriedade pode, porém, não ser um efeito imediato do contrato, nomeadamente quando for acordada pelas partes a *reserva de propriedade* .

- b) **comodato** - contrato gratuito pelo qual uma das partes entrega à outra certa coisa, móvel ou imóvel, para que se sirva dela, com obrigação de a restituir.
- c) **mútuo** - contrato pelo qual uma das partes empresta à outra dinheiro ou outra coisa fungível, ficando a segunda obrigada a restituir outro tanto do mesmo género ou qualidade.

Para que o contrato se conclua validamente é necessário a entrega da coisa. Pode ser gratuito ou oneroso (juros).

- d) **trabalho** - contrato pelo qual uma pessoa se obriga, mediante retribuição, a prestar a sua actividade intelectual ou manual a outra pessoa, sob autoridade e direcção desta.

O regime do contrato de trabalho encontra-se previsto em legislação avulsa.

- e) **prestação de serviços** - contrato pelo qual uma das partes se obriga a proporcionar à outra certo resultado intelectual ou manual, com ou sem retribuição.

Constituem modalidades deste contrato:

- **mandato** - contrato pelo qual uma das partes se obriga a praticar um ou mais actos jurídicos por conta da outra; pode haver *mandato com representação* - o mandatário age em nome e por conta do mandante - e *mandato sem representação* - o mandatário age em nome próprio, embora por conta do mandante.
- **depósito** - contrato pelo qual uma das partes entrega à outra uma coisa, móvel ou imóvel, para que a guarde e a restitua quando for exigida.
- **empreitada** - contrato pelo qual uma das partes se obriga em relação à outra a realizar certa obra, mediante um preço.
- f) **locação** - contrato pelo qual uma das partes se obriga a proporcionar à outra o gozo temporário de uma coisa, móvel (*aluguer*) ou imóvel (*arrendamento*), mediante retribuição.

O Código estabelece regimes diferenciados para o arrendamento de prédios urbanos e arrendamento de prédios rústicos. Relativamente aos 1ºs estabelece ainda regimes diferenciados para o arrendamento para habitação, comércio ou indústria e profissões liberais.

É no capítulo reservado ao arrendamento para comércio e indústria que se encontram previstos dois contratos geralmente qualificados como comerciais, por respeitarem ao estabelecimento comercial:

- a) **trespasse** - transmissão onerosa, definitiva e entre vivos de um estabelecimento comercial;
- b) **cessão de exploração** - transmissão onerosa e temporária de um estabelecimento comercial.

3.- Responsabilidade civil

3.1.- Noção e modalidades

A responsabilidade civil consiste na obrigação de reparar os danos sofridos por alguém. Traduz-se, pois, na obrigação de indemnizar.

A indemnização pode consistir na reconstituição natural, isto é, na restituição do lesado à situação material em que se encontrava antes do evento lesivo (*indemnização in natura*) ou, sempre que esta não seja possível, não repare integralmente os danos ou seja excessivamente onerosa para o devedor, na indemnização em dinheiro (*indemnização pecuniária*).

A lei prevê duas modalidades de responsabilidade civil:

- responsabilidade obrigacional - supõe a falta de cumprimento de uma obrigação (por exemplo, incumprimento de um contrato);
- responsabilidade extraobrigacional - quando a obrigação de indemnizar não resulta do incumprimento de qualquer outra obrigação.

3.1.1.- Responsabilidade extraobrigacional

Há três tipos de responsabilidade obrigacional:

- a) Responsabilidade por actos ilícitos - quando alguém viola um direito alheio. Pode ser *subjectiva* - quando se exige que o autor da lesão tenha actuado com culpa - ou *objectiva* - quando há obrigação de indemnizar independentemente da culpa -, se a lei, excepcionalmente assim o estatuir.
- b) Responsabilidade por actos lícitos - apesar de a lei consentir na prática do acto, o agente que com ele causar prejuízos fica obrigado a indemnizar.
- c) Responsabilidade pelo risco - quando alguém responde pelos prejuízos de outrem em atenção ao risco criado pelo primeiro, mesmo que este proceda sem culpa ou até lícitamente e mesmo que, inclusive, os danos não provenham de acto seu e sim de acontecimento natural, de acto de terceiro ou até de acto do próprio lesado (responsabilidade civil automóvel, etc.).

3.1.2.- Responsabilidade civil obrigacional

Se o devedor deixa de realizar pontualmente a prestação a que estava adstrito, pode ficar constituído em responsabilidade perante o credor. Mas não basta o mero facto da não realização da prestação para que isto aconteça. Com este requisito têm de se cumular outros:

- a) acto ilícito - consiste na inexecução da obrigação;
- b) culpa
- c) prejuízos
- d) causalidade - é necessário que os prejuízos que o credor invoca e pretende ver ressarcidos hajam sido causados pela falta de cumprimento.

4.- Garantias especiais das obrigações

4.1.- Noção e modalidades

Para além da garantia geral das obrigações, representada pelo património do devedor, podem as partes estabelecer uma garantia específica. A garantia pode ainda resultar da lei ou ser baseada numa decisão judicial.

Podemos agrupar as garantias especiais em duas grandes modalidades:

A - garantias pessoais - aquelas em que outra ou outras pessoas, além do devedor, ficam responsáveis com os seus patrimónios pelo cumprimento da obrigação. A *fiança* representa a figura-tipo.

B - garantias reais - por virtude delas o credor adquire o direito de se fazer pagar, de preferência a quaisquer outros credores, pelo valor ou pelos rendimentos de certos bens do próprio devedor ou de terceiros, ainda que esses bens venham a ser posteriormente transferidos.

As garantias reais dividem-se em:

- *legais - hipoteca legal, privilégios creditórios e direito de retenção.*
- *convencionais - hipoteca, penhor e consignação de rendimentos.*

4.2.- Fiança

A fiança consubstancia-se no facto de um terceiro assegurar com o seu património o cumprimento de obrigação alheia, ficando pessoalmente obrigado perante o respectivo credor.

Tem como características essenciais:

- *acessoriedade* - característica que se traduz sobretudo em a fiança ser inválida se a obrigação também o for, em a fiança não poder exceder a dívida principal, nem ser contraída em condições mais onerosas e em a fiança estar submetida à forma da obrigação principal.

- *subsidiariedade* - o cumprimento da fiança só pode ser exigido quando o devedor não cumpra nem possa cumprir a obrigação a que se encontra adstrito.

Esta regra não se aplica à fiança comercial - a que garante o cumprimento de obrigações comerciais - vigorando nesse domínio o princípio da solidariedade - o credor escolhe qual dos dois, devedor ou fiador, vai responder em primeira linha.

4.3.- Consignação de rendimentos

Através desta garantia assegura-se o cumprimento de uma obrigação com o rendimento de certos bens. assume reduzida importância prática. Pode ter origem convencional ou judicial.

4.4.- Penhor

O penhor confere ao credor o direito à satisfação do seu crédito, com preferência sobre os demais credores, pelo valor de certa coisa móvel (*penhor de coisas*) ou pelo valor de créditos ou outros direitos não susceptíveis de hipoteca (*penhor de direitos*).

É, conjuntamente com a hipoteca, uma das principais garantias especiais, sendo muito utilizada na área comercial e industrial (penhor de máquinas, de mercadorias, etc.). Importante é ainda o penhor de quotas e ações de sociedades comerciais. Salvo casos especialmente previstos, como o penhor a favor de instituições de crédito, a coisa objecto do penhor tem de ser entregue ao credor para que o penhor esteja validamente constituído. O exercício judicial do penhor é feito através de um processo especial - venda judicial de penhor.

4.5.- Hipoteca

A hipoteca é uma garantia semelhante ao penhor, mas que dele se distingue por três aspectos:

- a) A hipoteca incide sobre coisas imóveis, ou móveis sujeitos a registo (navios, automóveis e aeronaves);
- b) A hipoteca tem de ser registada o Registo Predial, sob pena de ineficácia;
- c) Não é requisito da hipoteca que os bens saiam da posse do autor da garantia.

A lei prevê três modalidades de hipoteca:

- a) hipoteca legal - as que resultam imediatamente da lei, sem dependência da vontade das partes; são estabelecidas para protecção de determinados credores, como o Estado, para garantia de pagamento de impostos;

- b) hipoteca judicial - têm como fundamento uma sentença judicial, que condene o devedor à realização de uma prestação em dinheiro ou outra coisa fungível;
- c) hipoteca voluntária - a que nasce de contrato ou declaração unilateral.

4.6.- Privilégios creditórios

Traduzem-se numa faculdade que a lei, em atenção à causa do crédito, concede a certos credores, de, independentemente do registo, serem pagos com preferência a outros.

A lei prevê duas modalidades:

- a) **mobiliários** - abrangem todos os móveis (gerais), ou parte deles (especiais), existentes no património do devedor;
- b) **imobiliários**, que são sempre especiais.

Gozam de privilégios o Estado e as autarquias locais, por dívidas fiscais, os tribunais, por despesas de justiça, etc.

O privilégio prefere sobre qualquer outra garantia real, ainda que de constituição anterior.

4.7.- Direito de retenção

O direito de retenção depende de três requisitos:

- a) **detenção lícita** de uma coisa que deve ser entregue a outrem;
- b) **que o detentor se apresente, por sua vez, credor da pessoa com direito à entrega;**
- c) **que entre os dois créditos exista umnexo** - tratar-se de despesas feitas por causa dessa coisa ou de danos por ela causados.

Consoante recaia sobre coisa móvel ou imóvel, assim está, respectivamente, sujeito ao regime do penhor ou da hipoteca.

Annex T - CONSELHO NACIONAL DAS ÁGUAS

Armando da Silva Procel

Março 1993

CONSELHO NACIONAL DAS AGUAS

Decreto n.º.52/92

I- NOÇÃO:

" O Conselho Nacional das Aguas (C.N.A.) é o órgão encarregado de formular as orientações gerais da politica dos recursos em águas (República da Guiné-Bissau) e de mobilizar todas as forças activas da nação, quer públicas como privadas, art.º.10 do diploma."

II- DIPLOMAS ATINENTES:

Os sucessivos diplomas que sobre as águas versaram são os que seguir se indica:

- Decreto de 17/09/1901, Supl.B.O.n.º.48/1902. Aprova o Regulamento para aproveitamento das nascentes das águas minero-medicinal;
- Decreto n.º.35498, de 09 de Fevereiro de 1946, Supl.B.O.n.º.12. Concessão do aproveitamento de águas públicas nas colónias.
- Decreto n.º.35592, de 11 de Abril de 1946, B.O.n.º.22. Regula a participação do Estado no aproveitamento de águas públicas nas colónias, quando destinadas a produção de energia.

III- CARACTERISTICAS:

O presente decreto é constituído por dezasseis (16) artigos, sistematizáveis em três capítulos:

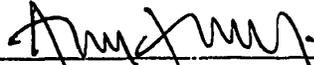
- Da natureza, composição e competências do C.N.A., art.º.10 e segs.
- Do Comité Interministerial das águas (C.I.M.A.), art.º.40 e segs.
- Do Comité Técnico das águas (C.T.A.), art.º.90 e segs.

IV- ANALESE CRITICA:

Pese embora a importância que se revestem os recursos em águas, não nos parece aconselhável acrescer ao primeiro magistrado de uma nação bem como o governo mais um encargo, como seja o de presidir e integrar o órgão definidor da sua política. Nos quer parecer que bem poderia ser constituído por técnicos da área e outros afins, imputando-se a presidência ao Ministro de tutela.

- Também nos parece exagerado dois órgãos políticos versando sobre as águas (C.N.A. e C.I.M.A.). Parece-nos bastante o C.N.A. com a composição acima figurada e o C.T.A. como órgão, puramente, técnico.

Bissau, 8 de Março de 1993



Armando da Silva Procel

Director do Gabinete de estudos do Min. da Justiça (GELD)

Annex U - LEI FLORESTAL

Armando da Silva Procel

Março 1993

27/03

LEI FLORESTAL

I. NOÇÃO: Entende o diploma por "Floresta, os sistemas naturais cujas formações vegetais são classificadas como mangal, palmar, floresta de galeria e as incluídas nos seguintes tipos fisiográficos de floresta; sub-húmida densa, medianamente densa, semi-seca densa, semi-seca clara, sempre-verde subtropical, em regeneração e ainda savana arborizada e savana muito aberta", artº 1º/3 a)

II. LEGISLAÇÃO COMPLEMENTAR: Os sucessivos diplomas que sobre a floresta versaram, são os que a seguir se indica;

Dec. 40 040/20/01/1955. --- Que no mesmo diploma congrega preceitos destinados a proteger, o solo, a Flora e a Fauna.
B.O. 17/1955

PORTARIA Nº 1557/29/06/1963, Que aprova o Regulamento Florestal.

PORTARIA Nº 1611/28/12/1963, Que versa sobre a distribuição de receita proveniente da cobrança de taxas.

• Dec. 35/75/07/06/1975, --- Que versa sobre a afectação das receitas provenientes da cobrança da Taxas de Exploração Florestal.

• A L 4/78/20/05/1978, ----- Que sanciona os autores das queimadas das Florestas e Matas.

• Dec. 5/81/11/04/1981, ----- Que institui, regulamentarmente, o Fundo de Fomento Florestal.

Dec. 4/82/15/05/1982, ----- Que determina a concessão do direito de abate, Serração e Comercialização interna de Madeira.

III. CARACTERÍSTICAS: A Lei Florestal é constituído por 66 artigos sistematizados em oito (8) Títulos a saber:

I- Disposições preliminares; II.- Instituições Florestais; III.- Regime Florestal; IV.- Florestas Comunitárias; V.- Gestão Florestal; VI.- Fiscalização Florestal e VII.- Disposições finais.

IV. REGIME JURIDICO:

1. De Protecção Florestal

O regime Juridico de protecção florestal consagrado no presente diploma pode se analisado em duas vertentes, a saber:

- Protecção contra elementos naturais e,
- Protecção contra acção humana. E o que resulta do artº 11º e 12º e seguintes e do artº 13º e 42º e seguintes do diploma.

Aqueles preceitos, embora se refiram as queimadas, debruçam-se essencialmente, sobre a erosão resultante da actuação de vários agentes naturais sobre as florestas e o solo.

Desta forma, fixam, os preceitos, vinculativamente o regime florestal de protecção: às áreas afectadas por queimadas; as margens dos rios; o redor dos lagos e reservatórios naturais ou artificiais; as nascentes; os topos dos montes; bem como a fixação de dunas, faixas de protecção contra as queimadas.

Estes preceitos - atinente a protecção contra a acção humana - corporizados nos artºs 13º e 42º e seguintes do diploma, versam, essencialmente, sobre a proibição do abate de árvores nas áreas protegidas bem como a proibição de queimadas

- O Primeiro preceito, que versa sobre o proibição de abate de árvores em áreas protegidas, abre algumas excepções, que além de limitadas, ainda são submetidas ao pagamento de uma taxa a crescer a outros requisitos exigidos.
- O segundo preceito, refere-se à prevenção e luta contra as queimadas das florestas e terrenos de aptidão florestal que se sintetiza na:
 - Proibição de ateamento de fogo ou queimada,
 - Limitação do ateamento do fogo e,
 - No estabelecimento de meios de prevenção de luta contra as queimadas

2. De Exploração Florestal

O Regime Juridico de exploração florestal vem consagrado nos artºs 25º e seguintes do presente diploma, nos termos dos quais:

- O abate de árvores situadas em terrenos agrícolas ou circundando habitações e outros edifícios pode ser efectuado com simples dispensa da autorização da Direcção Geral da Floresta e Caça e sem pagamento de qualquer taxa, desde que se destina a utilização próprio;
- Destinando-se a "utilização por terceiros", além da autorização prévia para o abate, deve o interessado proceder ao pagamento de taxas em vigor e efectuar a venda em conformidade com as tabelas em vigor (artº 26º).
- São livres as actividades florestais acessórias como sejam, a colheita de plantas medicinais, alimentares, lenhas (artº 28º)
- Proibe-se ainda, o abate, a recolha e transporte de produtos florestais do pôr ao nascer do sol, como seja o abate de árvores, espécies faurísticas e cinegéticas, corte de madeira (Artº 29º)
- O aproveitamento comercial da madeira, e a venda de árvores bem como a sua exportação carece do consentimento da D.G.F.C. que para efeito além da exigência do pagamento de taxas, delimita no tempo a autorização (artº 31º e SS).

V. ANALISE CRITICA:

O preâmbulo do diploma, desde logo, merece reparo. Quer-me parecer que, desnecessariamente, se o alongara com considerações mais de character pedagógico -social do que, verdadeiramente, técnico-juridicas.

- Quer-me parecer, ainda, que o título V se deveria fundir-se ao título II, posto se tratarem senão do mesmo assunto, pelo menos, de materia tão conexas que não faz sentido desligá-las.

- Também me parece que não faz sentido o título IV apenas com três preceitos.
- A técnica redactorial, em muitos casos, não parece a mais aconselhável, hodiernamente, havendo artºs que chegaram a ocupar quase meia ou uma página (artºs 1º; 2º; 37º, 40º ...)
- Em último lugar, não me parece oportuno a inclusão no presente diploma das lei das queimadas, posto que tem vindo, este diploma a merecer um tratamento puramente criminal, podendo vir a colidir as suas disposições com as do código Penal já em projecto.

Bissau 12 / Março DE 1993



ARMANDO SILVA PROCEL

Director do Gabinete de Estudos, Documentação e legislação do Ministério da Justiça. (GELD)

Annex V - LEI GERAL SOBRE PESCA

Armando da Silva Procel

Março 1993

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LEI GERAL SOBRE PESCA

Dec.-Lei nº 2/86

I. NOÇÃO E AMBITO:

- Entende o presente diploma, bem como sua legislação regulamentar, por pesca, a tentativa de captura, a captura ou qualquer outra actividade de que possa, razoavelmente, resultar na captura, embarque ou recolha de peixe, bem como as actividades prévia, posteriores e de apoio logístico e de transbordo de capturas que tenham por finalidade directa a pesca ou sobre as especies extraídas, capturadas ou mortas, nos termos do seu artº 1º.
- As disposições do presente decreto-lei são aplicáveis à zona Económica exclusiva, ao Mar Territorial e às águas Interiores da República da Guiné-Bissau, em conformidade com o artº 6º.

II. DIPLOMAS COMPLEMENTARES

1. Dec. nº 27560/11/03/1937 - B.O. 19/1937 Regula o exercício da pesca em águas Territoriais do Império Colonial Português;
2. Portaria Ministerial nº 12611/04/11/1948 - B.O. 52 Cria a missão de Estudos de Pesca no Ultramar.
3. Decreto nº 49.081/25/06/69 - Sup. B.O. 31/69 Extingue a Comissão Central de Pescaria e cria no Ministério da Marinha a Comissão Consultiva de Pescas.
4. Decisão 14/31/12/1974 - B.O. 2/1975 Proíbe a pesca no interior das águas Territoriais.
5. Lei nº 3/17/05/1985 - Sup. B.O. 19/1985 Proíbe a pesca na Zona Económica Exclusiva.
6. Decreto nº 10/26/04/1986 - 2º Sup. B.O. 17/86 Regulamenta a Lei geral sobre a pesca

7. Resolução nº 2/04/06/91 - 2ª Sup. B.O. 22/91 Institut o Projecto de Pesca Artesanal Avançada.

III. CARACTERISTICAS:

A) O presente diploma é constituído por 57 artigos sistematizados em sete (7) títulos, a saber:

- I - Disposições preliminares;
- II - Disposições Gerais;
- III - Gestão e aproveitamento das pescas;
- IV - Procedimento de fiscalização e de constatação das infracções
- V - Infracções
- VI - Competência e Procedimento Administrativos e Judiciais.
- VII - Disposições finais.

B) TIPOLOGIA DE PESCAS:

a) Caracterizando a tipologia de pescas, em função da sua finalidade, vem o artº 2º dizer que pode ser de subsistência, comercial, de investigação e recreativa, conforme, respectivamente, tiver sido feita.

- Para obtenção de espécie, comestíveis para a subsistência do pescador e da sua família;
- Com fins lucrativos;
- Para o estudo e o conhecimento dos recursos;
- A título, meramente, desportivo ou de lazer.

b) Quanto a embarcações e técnicas empregues os tipos de pescas podem, ainda, classificar-se em artesanal, semi-industrial e industrial, consoante, respectivamente, seja praticada:

- "(...) com canoas ou embarcações até doze metros de comprimento total (...), por meio de redes ou outros artefactos ou a pé."
- "(...) com embarcações até trinta toneladas de arqueação bruta, propulsionadas por motor interior e podendo utilizar gelo ou refrigeração própria para a conservação das suas capturas", ou;

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-"(...) com embarcações de mais de trinta toneladas de arqueação bruta".

Di-lo o artº 3º do diploma em análise

IV. - REGIME JURIDICO:

Pretende o mecanismo de tutela legal do presente diploma, fundamentalmente, facilitar a realização do objectivo de exploração dos recursos vivos marinhos Guineenses; a fiscalização, o controle e o enquadramento legal dos navios de pesca, estrangeiros autorizados para o exercício de pesca em águas Guineenses.

Assim:

- A) A legitimidade para pescar em águas Guineenses é conseguida através de autorização administrativa.

Através de actos individuais e concretos a administração concede, quer a nacionais, quer a estrangeiros, a referida autorização é o que consagram as disposições dos artºs 6º; 7º; 8º e 9º do presente diploma.

E mais, proíbe-se a pesca por parte de navios de pesca industrial quer no Mar territorial, quer nas águas interiores (artº 10º).

E os artº 11º e 12º proíbem o uso de engenhos e explosivos e de substâncias tóxicas para a pesca.

- B) Em consequencia do atrás exposto, relativamente, a legitimidade para pescar nas águas Guineenses, o diploma instituiu, no artº 21º e seguintes o regime de licenças, segundo o qual "os navios de pesca só poderão exercer actividade de pesca (...) se forem titulares de uma licença passada pela Secretaria de Estado das Pescas". Licença essa a que os armadores são obrigados a conservar permanentemente, a bordo do navio.

A emissão da licença acima referida cuja duração é doze meses só se faz, quer para navios Nacionais ou Estrangeiros, mediante pagamento pelo armador do chamado "direito de pesca" cujo montante está fixado no regulamento.

Excepcionalmente, podem as licenças serem suspensas ou revogadas se tal se tornar necessário para garantir uma gestão adequada dos recursos vivos, nos termos do artº 27º do presente diploma.

Finalmente, pode o Secretário de Estado das pescas, autorizar, por escrito, operações de Pesca de investigação científica em águas territoriais Guineenses sem pagamento de licença. Porém uma duração temporária de três meses, conforme preceitua o artº 30º.

- C) Em tutela da economia nacional e da forma marinha Guineense estabeleceu-se mecanismo de fiscalização de cujo agentes dispõe de poderes que vão desde "dar ordens a qualquer navio de pesca que se encontre em águas sob jurisdição Guineense", à intervenção armada, passando por visitas a navios de pescas; a solicitação de exibição de licenças; redes, capturas, recolha de amostras de peixe a bordo de navios, apreensão de capturas, perseguição de navios etc, etc, de acordo com o artº 31º e seguintes do presente diploma.

As infracções aos preceitos do diploma além da sanção pecuniária - multas - também dão origem à sanções criminais, artº 41º e seguintes

V. ANALISE CRITICA:

A parte algumas questões formais que adiante se irá considerar, quer-nos parecer bem concluído o diploma, quer técnica, quer substancialmente. Bem sistematizado e os assuntos, devidamente, organizados e encadeados. A linguagem é simples e acessível.

Por isso, nos quer parecer que qualquer revisão ou revogação, breve, do diploma deverá prender-se mais com a necessidade de introduzir novas práticas e novas direcções para fazer face ao crescimento exponencial daquela instituição Estatal.

Diziamos merecerem reparo algumas questões formais, são elas:

1. O título Iº e IIº que são perfeitamente fundíveis, atento ao conteúdo de ambos.
2. Relativamente ao título IV, me quer parecer poder ser reduzido, basta: "Da fiscalização". E mais, poderia fundir-se com o título V, atentos

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os conteúdos de ambos os títulos.

3. Finalmente, bastava, o título VI, ter por base "Procedimento Administrativo e Judiciais"



Armando Silva Procel

Director do Gabinete de Estudos, Legislação e Documentação (GELD) do Ministério da Justiça 16.03.93

Annex W - MARITIME LIENS AND MORTGAGES

Ivon d'Almeida Pires Filho

Source: "Priority of Maritime Liens in the Western Hemisphere: How Secure Is Your Claim?", The University of Miami Inter-American Law Review, volume 16 (Spring 1985).

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PRIORITY OF MARITIME LIENS IN THE WESTERN HEMISPHERE: HOW SECURE IS YOUR CLAIM?*

IVON D'ALMEIDA PIRES-FILHO**

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** International Marine Policy Fellow, Marine Policy and Ocean Management Center, Woods Hole Oceanographic Institution.

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I. INTRODUCTION

The primary function of a maritime lien is to ensure that credit is given to a vessel so that she can be adequately furnished to proceed on her voyage, while concurrently providing security to the suppliers of services and materials. The unsettled issue is the security of these liens when the vessel leaves port and enters the jurisdiction of other countries. Will these claims have the same status whether or not they are recognized as liens abroad? If so, what priority will they receive?

The Western Hemisphere's maritime practices offer a microcosmic view of the complex legal web that affects international navigation. National legal systems deriving from different legal families vary structurally and procedurally and this paper seeks to explore how this systemic variation may lead to results that defeat the uniformity of rules desired in maritime commerce. Maritime liens and their priority will be viewed from this comparative perspective. An analysis of every national legal system is not necessary to show the peculiarities of the two supranational *legal families* in existence on the American continent: the Anglo-American common law system, exemplified by Canada and the United States; and the Latin-American civil law system, exemplified by Argentina, Brazil, Mexico, Panama and Venezuela. These five Latin-American countries represent the five largest merchant marine fleets in the region and, as a group, account for over 90 percent of the regional tonnage.¹

1. Merchant Shipping Fleets, [1981] 1 U.N. STATISTICAL Y.B. 1012 (merchant marine tonnage: Panama 24,191,000; Brazil 4,534,000; Argentina 2,546,000; Mexico 1,006,000; Vene-

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As a standard for comparison, the maritime law terminology throughout this article is primarily that of U.S. admiralty law. The reader should be aware that the maritime and admiralty terms in Latin-American jurisdictions, such as *privilegios marítimos* (maritime privileges), *hipoteca naval* (naval hypothecations) and *embargo* (attachment), which in U.S. admiralty law correspond to maritime liens, ship mortgage and arrest, respectively, are not totally synonymous to the American terms in concept or procedure.

II. PERSONIFICATION OF THE VESSEL

Since maritime liens are privileged claims upon a maritime property or *res* for service done to it or injury caused by it, they are a right acquired by one over a thing belonging to another- a *jus in re aliena*, a subtraction from the absolute property of the owner.² A maritime *res* can be the vessel, the cargo, or its freight.³ For a maritime lien to exist in the United States, the vessel must be engaged in a maritime venture or transaction and be within admiralty jurisdiction of the federal courts.⁴ In order for admiralty jurisdiction to exist over a maritime claim against a vessel, the vessel must be under navigation in interstate or international waters,⁵ or be capable of navigation if temporarily out of water in drydock. A shipbuilding mortgage, for example, is not considered to be a maritime transaction, and therefore, is not subject to the admiralty jurisdiction of United States courts.⁶ Under United States law, a structure does not become a ship, in the legal sense, until it is completed and launched.

Under the personification of the vessel theory, the vessel herself becomes a jural person whose liability is independent of the liability of her owner. In fact, the U.S. rule is that personal liability

zuela 846,000. The total tonnage in 1980 for Latin America was 33,125,000.

2. See Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381, 382 (1930); See, e.g., G. PRICE, *LAW OF MARITIME LIENS* 1 (1940) [hereinafter cited as PRICE].

3. These have been defined as *freight* being the sum of money paid for the carriage of the cargo; *cargo* concerning the goods carried by the vessel; and *vessel* referring to practically any floating object capable of being propelled for the purpose of carriage of goods, including all equipment and appurtenances aboard her, even if not belonging to her owner. Longenecker, *Developments in the Law of Maritime Liens*, 45 TUL. L. REV. 574, 574 (1971).

4. Burke, *Maritime Liens: An American View*, 1978 LLOYD'S MAR. COM. L. Q. 269, 270 (1978).

5. In the U.S. Merchant Shipping Act of 1920, 46 U.S.C. §788 (1976), vessels operated by states for public noncommercial services were excluded.

6. See *North Pacific S.S. Co. v. Hall Bros. Co.*, 249 U.S. 119 (1919); 1 BENEDICT, *ADMIRALTY* 162 (7th ed. 1981).

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of the owner is not essential to the existence of a lien against his vessel.⁷ The vessel can be liable for damages caused by the negligence of a crew employed by a bareboat charterer,⁸ or by negligence of a compulsory pilot even when the shipowner was not at fault.⁹

Civil law countries in Latin America do not recognize the fiction of personification of the vessel, and therefore, are not troubled by the distinctive, substantive, and procedural features it creates. In these countries, a maritime lien or privilege is a right in the property, a *jus in re*, but this real right¹⁰ does not disassociate the vessel from her owner. The privilege is essentially against the owner as a debtor and, for this reason, does not impede the existence of liens on unborn ships for shipbuilding contracts and mortgages.¹¹

Despite this fundamental difference in the legal status of the vessel, maritime liens or privileges enjoy similar characteristics in both systems. The terms themselves are *sui generis* in both common law and civil law, as Mr. Justice Story states so well:

It is certainly true, that by the common law a lien imports, that the party, who claims it, is in possession of the thing, and his lien is neither more nor less than a right to detain it, until his claim is satisfied. So that, where there is no possession, actual or constructive, there can be no lien.

[T]he doctrine of lien, founded on and accompanying the possession of the thing, cannot be applicable to claims, which neither presuppose, nor originate in possession. Indeed, such claims are not, in strict sense, liens, though that term is commonly used in our law to express, by way of analogy, the nature of such claims. Language is in this way perpetually deflected

7. *The Barnstable*, 181 U.S. 464 (1901). *But see* 46 U.S.C. § 972 (1976) (no person unlawfully in possession of a vessel may bind her). For a discussion of the personification theory, see Grayson, *Maritime Arrest and Rule C: A Historical Perspective*, 6 MAR. LAW. 265 (1981).

8. *The Barnstable*, 181 U.S. 464 (1901).

9. *The China*, 74 U.S. (7 Wall.) 53 (1868).

10. *Real* is used here in the civil-law terminology, as relating to a movable or immovable thing, as distinguished from a person.

11. *Ley de la Navegación*, Law No. 20.094, art. 490, January 15, 1973, *Anales de Legislación Argentina* [1973] C *Anales* (Argentina); *Código Civil Brasileiro*, Law No. 3.071, art. 825, January 1, 1916, *Coleção das Leis, Atos do Poder Legislativo, Coleção 1* (Brazil); Decree No. 15.788, arts. 2, 11, November 8, 1922, *Coleção* (Brazil); *Ley de Navegacion y Comercio Marítimo* art. 104, January 10, 1963, *Diario Oficial D.O.* (Mexico); *Código Comercial*, art. 1518, (Panama); *Ley de Privilegios e Hipotecas Navales*, art. 24, August 9, 1983, (Venezuela).

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from its original meaning, and applied to things, which have a strong similitude but not a perfect identity.

Now a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it, and is often called a tacit hypothecation. . . . It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors . . . this privilege was strictly personal, and gave only a preference against simple contract creditors, and has no effect against those who were secured by express hypothecations. . . .¹²

This semantic debate leads to the essence of the law of maritime liens—that such claims do not include or require possession, but instead, attach to the *res* and travel with it, even in the hands of a bona fide purchaser.¹³ This is a very important point. While a common law lien is simply a right to retain, the maritime lien is analogous to a proprietary interest in the vessel,¹⁴ giving a right to proceed against her to recover that interest. The same holds true under codified civil law in Latin America, whether it is termed a tacit hypothecation or a maritime privilege.

As indicated above, a maritime lien is not only nonpossessory, but indelible and nonconsensual as well. It attaches to the vessel and travels with her, even if the vessel is sold and the new purchaser is unaware of the lien.¹⁵ Secrecy is yet another feature of the maritime lien, except in the cases of a ship mortgage and a few other Latin American liens, such as the shipbuilding contract in Argentina and Brazil, which must be recorded at the National Vessel Register or the Commercial Register, respectively, before they are considered a maritime privilege.¹⁶

12. *The Nestor*, 18 F. Cas. 9 (1831).

13. *The John G. Stevens*, 170 U.S. 113 (1898).

14. A ship's lien against the cargo, however, is similar to the common law possessory lien, since it disappears with delivery. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 641 (2d ed. 1975). A shipbuilding contract in Argentina is also a possessory lien. *Ley de la Navegación*, Law No. 20.094, art. 490, January 15, 1973, C Anales (Argentina).

15. *The John G. Stevens*, 170 U.S. 113 (1898); *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867); *The Floridian*, 389 F. Supp. 25 (E.D.Va. 1974). *Ley de la Navegación*, Law No. 20.094, arts. 484, §c, 491, January 15, 1973, C Anales (Argentina); *Código Comercial Brasileiro*, Law No. 556, art. 470, June 25, 1850 (Brazil).

16. *Ley de la Navegación*, Law No. 20.094, art. 490(b), January 15, 1973, C Anales (Argentina); *Código Comercial Brasileiro*, Law No. 556, arts. 471, 472, June 25, 1850 (Brazil).

III. THE IN REM PROCEDURE

Foreclosure of a maritime lien in Canada¹⁷ and in the United States¹⁸ is reached by the peculiar in rem proceeding. In *The Resolute*, the court held that the right to proceed in rem was not a matter of procedure but a substantive right.¹⁹ The admiralty in rem jurisdiction exists to enforce the maritime lien, and the maritime lien does not exist at all except to the extent that it can be enforced in rem.²⁰ A nonadmiralty court cannot determine or extinguish a lienor's right.²¹ In the United States, therefore, the maritime lien is the foundation of the in rem proceeding in admiralty and there is no right to this proceeding unless a maritime lien exists; substance and procedure are bound as one.

The main characteristic of admiralty in rem jurisdiction is that it operates directly upon the res itself as a separate personality and as the particular respondent of the suit.²² The property is seized without judicial supervision or prior notice to the owner²³ and the suit proceeds against the thing itself, with the court as its custodian. If the claim prevails, the property is sold, the proceeds of the sale are distributed among the lienors,²⁴ and the title is transferred to the purchaser free of all liens.

This procedure was found to be unconstitutional in the United States when a court also has in personam jurisdiction over the vessel's owners. The emerging rule seemed to be that deprivations of property without prior notice, hearing, judicial intervention, or

17. *Stone, Let the Boat Buyer Beware*, 12 OSGOOD HALL L.J. 643, 647 (1974).

18. For a detailed discussion of this procedure in the U.S., see Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767 (1973); McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST. L. J. 19 (1967).

19. 168 U.S. 437 (1897).

20. *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867). See Walker, *Due Process and Rule C: The Constitutionality of the Admiralty in Rem Action*, 6 MAR. LAW. 249, 251 (1981).

21. *The Nestor*, 18 F. Cas. 9 (1831); "[I]t is settled that the admiralty courts have exclusive jurisdiction over maritime liens, and that as other courts are without power to establish and enforce such liens, so they are without power to displace them." *The Philomena*, 200 F. 859, 861 (D. Mass. 1911).

22. The in rem jurisdiction is strictly geographical. It depends absolutely on the presence of the res within the geographical limits of the district in which the court exists. See Toy, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559, 562 (1973); FED. R. CIV. P. SUPP. C. (2).

23. FED. R. CIV. P. SUPP. C. (3), (4).

24. Liability in the admiralty proceeding in rem is limited to the value of the vessel. See Olson, *Arrest Process: The Necessity for Swift Seizure in Admiralty*, 6 MAR. LAW. 285, 288 (1981); see also GILMORE & BLACK, *supra* note 14, at 624.

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some other procedural safeguards would violate basic concepts of due process protected by the fifth amendment.²⁵ U.S. circuit courts of appeals, however, have recently upheld the constitutionality of the admiralty in rem procedure.²⁶ These decisions emphasize the historical significance of the maritime action in rem and pointed out that the procedure is not governed by the due process requirements related to land-based in personam attachments. The issue of whether traditional in rem admiralty procedures will continue to have different due process standards from those of other areas of the modern common law system remains to be tested in the Supreme Court of the United States.

In Latin American civil law countries, maritime liens have the nature of a real right; however, the procedure is in personam and does not distinguish the vessel as a separate entity from her owner. An arrest of a vessel in these countries is analogous to an in personam attachment in the United States; to compel the appearance of the owner and to cause him to furnish security as a condition for the release of his property.²⁷

IV. PRIORITY OF MARITIME LIENS IN NATIONAL SYSTEMS

The ranking and prioritization of maritime liens against a vessel are necessary whenever the proceeds from her judicial sale are insufficient to satisfy all claims.²⁸ Maritime liens are therefore grouped vertically by classes and further ranked horizontally within each class by general maritime law and specific legislation. The priority of liens within a class may be based upon their chronological occurrence, with priority going either from the first lien to the last lien or in the reverse order. In Latin American civil law jurisdictions, maritime liens are created by statutes which also de-

25. *The Acadian Valor*, 485 F. Supp. 287 (E.D. La. 1980), *overruled in*, *The General Gillespie*, 663 F. 2d 1338 (5th Cir. 1981). Two other U.S. District Courts have also held Rule C unconstitutional, *see The Susan*, 1980 A.M.C. 2062 (S.D. Fla. 1980), and *The Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981); *contra*, *The Alexandros T*, 664 F. 2d 904 (4th Cir. 1981). For a discussion of these cases, *see Walker*, *supra* note 20; *see also Grayson*, *supra* note 7; and *Olson*, *supra* note 24.

26. *The Alexandros T*, 664 F.2d 904 (4th Cir. 1981); *The General Gillespie*, 663 F.2d 1338 (5th Cir. 1981). In the latter case, the Fifth Circuit Court of Appeals overruled the previous decision of the Louisiana district court in *The Acadian Valor*, 485 F. Supp. 287 (E.D. La. 1980).

27. Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952, Part Two*, 1964 DUKE L. J. 70, 79 (1964).

28. Varian, *Rank and Priority of Maritime Liens*, 47 Tul. L. Rev. 751, 751 (1973).

termine their priority.

A. Canada

In Canada, there are no clear statutory provisions which establish maritime liens and their order of priority, and the general principles of maritime law as applied by the Canadian courts are still nebulous and subject to various exceptions.²⁹ Nevertheless, there are six categories of claims that may attach to the ship, the cargo, and the freight: (i) costs for bringing the ship to sale;³⁰ (ii) maritime liens;³¹ (iii) possessory liens;³² (iv) ship mortgages;³³ (v) statutory liens;³⁴ and (vi) non-lien claims.³⁵

The first category refers to the costs incurred by the plaintiff resulting from the arrest and sale of the ship to bring the fund into court. These costs include the clerk's and marshal's fees and expenses, but do not include judicial costs.³⁶ Court costs are placed below ship mortgages as statutory liens.

Seamen's wages, salvage, and damages for collision constitute separate classes of maritime liens.³⁷ The lien for wages of the master and of "every person employed or engaged in any capacity

29. Shipping in Canada is almost entirely governed by the extensive Canada Shipping Act of 1970, CAN. REV. STAT. 6721, Vol. VII, C.S-9, (1970), which does not contain any chapter on maritime liens. Isolated sections refer to specific liens, such as § 198 which provides that "a seaman does not by any agreement forfeit his lien on the ship" for wages, § 214(1) which equates a master's lien for wages to that of a seaman, and § 214(2) which establishes a master's lien for disbursements. Stevedores have the right to arrest the ship for their charges for stowing or discharging the cargo, but § 702 of the Act does not say whether those charges are entitled to a lien on the ship. Leading cases on priorities appear to be *The Terry*, 1948 Can. Exch. 27 (1948); *The Astoria*, 1931 Can. Exch. 195 (1931); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

30. *The Borzone*, 35 Can. Abridgement 464 (2d ed. 1974); PRICE, *supra* note 2, at 103.

31. See PRICE, *supra* note 2, at 103; Stone, *supra* note 17, at 643; 31 CANADIAN ENCYCLOPEDIA DIGEST title 135, §§ 181, 182, at 147 (3d ed. 1981) [hereinafter cited as CAN. ENC. DIG.].

32. See PRICE, *supra* note 2, at 103. The registered mortgage does not have priority over the possessory lien of a ship repairer or the holder of a maritime lien. See CAN. ENC. DIG., *supra* note 31, at 85, 151.

33. Mortgage claims placed above statutory liens for necessities. See *The Astoria*, 1931 Can. Exch. 195 (1931); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980); PRICE, *supra* note 2, at 103.

34. PRICE, *supra* note 2, at 103. A statutory lien for building, equipping or repairing a ship cannot take priority over a lien for seamen's wages. See *The Aurora*, 17 Can. Exch. 203 (1914).

35. PRICE, *supra* note 2, at 103.

36. *The Lowell Thomas Explorer*, 1 Can. F. C. 339 (1980).

37. Stone, *supra* note 17, at 643; CAN. ENC. DIG., *supra* note 31, at 149.

on board of a ship" ranks the highest in this category.³⁸ However, the "lien of a master for wages cannot be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the master."³⁹ The master has the same lien for disbursements or liabilities that he incurred on behalf of the vessel as for the recovery of his wages.⁴⁰ A collision lien as a claim *ex delicto*, usually outranks all contractual claims since it is desirable to prevent careless navigation. It is doubtful, however, whether damages would rank before wages, principally wages accruing subsequent to the claim for damages; and salvage is certainly considered prior to earlier collision damages, for the salvors have preserved the res for the benefit of all interested parties.⁴¹ Contractual liens of the same class, as a general rule, rank in the inverse order of accrual, while delictual liens of the same class share *pro rata* in the proceeds available to that class.⁴²

A common law possessory lien on a vessel usually arises from repairs and lasts for as long as the vessel remains in the repairman's possession.⁴³ The shipowner has possessory liens on the cargo for unpaid freight, general average contributions, and for expenses incurred protecting the cargo.⁴⁴ Statutory liens rank immediately after ship mortgages in priority and are preferred to non-lien claims. Unlike maritime liens, statutory liens do "not constitute a charge on the ship until 'in rem' proceedings are instituted, and such proceedings are not sustainable unless the person who incurred the debt was owner of the ship at that time and remains so at the time the proceedings are instituted."⁴⁵ These claims do not affect bona fide purchasers. Ship construction, repairs that are not possessory, supplies and other necessaries, personal injuries, damage to cargo, and court costs are included in this category. Statutory repair liens have no preference over claim categories (i)

38. A seaman's lien for wages comes from the general maritime law. He has "a right to cling to the last plank of his ship in satisfaction of his wages." *The Aurora*, 17 Can. Exch. 203 (1914). Canada Shipping Act of 1970, 214(1), CAN. REV. STAT. 6721, Vol. VII, C.S-9 (1970). "The master of the ship, so far as the case permits, has the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom." See *The Lowell Thomas Explorer*, 1 Can. F. C. 339 (1980).

39. *The Rochepoint*, 21 Can. Exch. 143, 144 (1921).

40. Canada Shipping Act of 1979, § 214(2), CAN. REV. STAT. 6721, Vol. VII C.S.-9 (1970); *The Terry*, 1948 Can. Exch. 27 (1948).

41. PRICE, *supra* note 2, at 104-06.

42. *Id.*

43. *Hackett v. Coghill*, 2 Ont. L. R. 1077 (1903), *aff'd* 3 Ont. L. R. 827 (1904).

44. CAN. ENC. DIG., *supra* note 31, at 151.

45. Stone, *supra* note 17, at 644 n.6.

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to (iv) above, even when they increase the market value of the ship.⁴⁶

When a foreign vessel is arrested in Canadian ports for maritime liens of any origin, Canadian courts apply foreign law to substantively recognize liens on the res. The order of priority, however, is determined by the *lex fori*.⁴⁷ In any case, a maritime lien cannot be enforced against a vessel owned or operated by a foreign state for public purposes.⁴⁸

B. *The United States of America*

No clear-cut statute has established an order of priority for maritime liens on vessels in the United States. Independent district and circuit court decisions, without much guidance from the Supreme Court, have established a complex system of priorities under the general maritime law, which has caused confusion and lack of precision in the classification of liens. Moreover, maritime liens and their priority are subject to a variety of limitation statutes. At present, however, the following general order of preference seems to be commonly supported by the courts: (i) court expenses while the vessel is in *custodia legis*; (ii) seamen's wages; (iii) salvage and general average;⁴⁹ (iv) tort claims;⁵⁰ (v) ship mortgages;⁵¹ (vi) repairs, supplies, necessaries, and other contract claims;⁵² (vii) state-created liens of maritime nature; (viii) tax liens; (ix) nonmaritime liens; and (x) non-lien maritime claims.

Court costs, seamen's wages, salvage, general average, and tort claims outrank a ship mortgage whether arising before or after the

46. See *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

47. "[R]ecognized and applied the maritime lien for necessaries given by American law though it was unknown to Canadian law. I have no doubt that the converse must be equally true, viz., that the court will refuse to enforce a maritime lien not given by American law though valid under Canadian law." *The Terry*, 1948 Can. Exch. 27 (1948); "It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered . . . the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold." *The Astoria*, 1931 Can. Exch. 195 (1931). See also, *Todd Shipyards Corp. v. Altama Compania Maritima S.A.*, 32 D. L. R. 3d 571 (1973).

48. CAN. ENC. DIG., *supra* note 31, at 151.

49. For further discussion of these liens, see Richards, *Maritime Liens in Tort, General Average, and Salvage*, 47 TUL. L. REV. 569 (1973).

50. See *id.*

51. Smith, *Ship Mortgages*, 47 TUL. L. REV. 608 (1973), provides a useful update on the subject.

52. See Ray, *Maritime Contract Liens*, 47 TUL. L. REV. 587 (1973).

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mortgage's recording.⁵³ Although maritime liens arising from charges for repairs, supplies, and other necessities⁵⁴ rank sixth in the above list, they may outrank the preferred ship mortgage if they arise before the mortgage is recorded.⁵⁵ When a ship mortgage is recorded, it operates as a dividing line for these contract claims: the ones that preceded the mortgage will become first rank security and those later in time will be under lower rank.⁵⁶ A subsequent contract claim may have its rank elevated if it is converted into a tort lien, thus establishing priority over a mortgage. Breaches of contracts of carriage, affreightment, and towage have been classified as tort liens.⁵⁷

Outside the statutory exception created by the Ship Mortgage Act, the general rule has always been that liens of the same class take precedence in the inverse order of their time of accrual, the later prevailing over the earlier. This is exactly the opposite of the common law lien rule:

[I]n this country two theories exist as the basis of this admiralty doctrine. They are, first, that each person acquires a 'jus in re', and becomes a sort of coproprietor in the 'res', and therefore subjects his claim to the next similar lien which attaches; and, second, that the last beneficial service is the one that continues the activity of the ship as long as possible, and therefore should be preferred. . . .⁵⁸

Under the proprietary interest rule a maritime lienor becomes a part-owner and must bear, to the extent of his lien, the risk of any loss that may follow.⁵⁹ Failure to arrest the vessel and satisfy his lien stops him from asserting that his charge against the vessel should receive priority over a lien of a later date. The beneficial service rule takes into consideration that subsequent additions will not deprive the earlier lienors of any interests which they would have had if no such services had been rendered.⁶⁰ Later liens are preferred because they have kept the vessel in operation, thus ben-

53. 46 U.S.C. §§ 953, 974 (1976).

54. 46 U.S.C. § 971 (1976).

55. *The Eastern Shore*, 24 F.2d 443, 1940 A.M.C. 388 (D. Md. 1940).

56. *The Home*, 65 F. Supp. 94, 1946 A.M.C. 585 (W.D. Wash. 1946).

57. *The Faith*, 252 F. Supp. 54, 1966 A.M.C. 71 (N.D. Ohio 1965). See Varian, *supra* note 28, at 757.

58. *The William Leishear*, 21 F.2d 862, 863, 1927 A.M.C. 1770, 1772 (D. Md. 1927).

59. *The John G. Stevens*, 170 U.S. 113 (1898); *The Young Mechanic*, 30 F. Cas. 872 (C.C.D. Me. 1855).

60. *The William Leishear*, 21 F.2d 862, 1927 A.M.C. 1770 (D. Md. 1927).

efitting prior lienors. This theory has greater support when considering contract liens. For practical reasons, however, this rule of the last in time being the first in right is limited in its application to certain time periods; otherwise lien holders would be constantly suing the vessel not to risk losing their priority the next day. These time periods may vary according to local needs and specific conditions. In general, all claims of the same rank within the specified time period are treated equally, share *pro rata* with and are preferred to claims of equal rank from an earlier time period. Illustrative cases are: the voyage rule applying to overseas voyages,⁶¹ the season rule on the Great Lakes,⁶² the calendar rule,⁶³ the New York Harbor 40-day rule,⁶⁴ and the 90-day rule for vessels making daily or weekly trips to and from the Seattle harbor.⁶⁵ Although some courts may adhere to some of these rules, their application is not rigid and may differ from one case to another within the same court. These periods should be sufficiently long "to permit the owners of vessels to make all reasonable arrangements and adjustments with relation to the earnings in their business, but which would also afford a reasonable safety to persons extending credit to the vessels."⁶⁶ These rules can fundamentally change the priority of equally ranked liens and liens that are in different classes.

Foreclosure of maritime liens against a foreign vessel seized in the United States proceeds in the same manner as in Canada. Thus the applicable order of priority is determined in accordance with U.S. admiralty law and not the law of the nationality of the vessel.⁶⁷

C. *Argentina*

In Argentina, the 1973 Law of Navigation⁶⁸ has restructured

61. *Todd Shipyards Corp. v. The City of Athens*, 1949 A.M.C. 572 (D. Md. 1949).

62. *The Oswego No. 2*, 23 F. Supp. 311, 1938 A.M.C. 980 (W.D.N.Y. 1938); *The City of Tawas*, 3 F. Supp. 170 (E.D. Mich. 1880).

63. *The Home*, 65 F. Supp. 94 (W.D. Wash. 1946). *The Penobscot*, 1940 A.M.C. 1217 (D. Mass. 1940).

64. "[T]hose liens accruing within 40 days of libel filed take priority by analogy to the theory of voyages; and all claims of the same class (as these are) beyond the 40-day period must share 'pro rata'." *The Oregon*, 1925 A.M.C. 1271, 1273 (2d Cir. 1925).

65. *The Edith*, 217 F. Supp. 300 (W.D. Wash. 1914).

66. *Id.* at 302.

67. "The recognition of liens, and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*." *The Trenton*, 4 F. Supp. 657, 664 (1880).

68. *Ley de la Navegación*, Law No. 20.094, art. 1-630, January 15, 1973, C Anales (Ar-

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the system of maritime liens taking into account existing international conventions, particularly the 1967 Brussels Convention on Maritime Liens and Mortgages.⁶⁹ This approach has certainly been a step forward and may set the pattern for other Latin American countries to create their own comprehensive maritime statutes,⁷⁰ separate from the often outdated commercial codes, and to enact more uniform maritime lien legislation.

Maritime liens are explicitly given priority over any other claim that attaches to a vessel (even if undergoing construction), the freight and the cargo.⁷¹ Liens on the freight must arise during the same voyage on which the freight is due.

There are two groups of liens on the vessel. The first order consists of: (i) judicial costs incurred in the common interest of the creditor; (ii) master's and crew's wages; (iii) taxes and dues arising from the commercial operation of the vessel; (iv) maritime personal tort; (v) maritime property tort; and (vi) salvage, wreck removal, and general average. Ship mortgages receive a lower priority than the above listed types of liens, as well as any liens that attach to the unborn vessel.⁷² Ranked below ship mortgages, is a second set of liens with the following order of priority: (vii) cargo damages; (viii) contracts; (ix) supplies and necessaries; (x) expenditures incurred by the master for equipment and dry dock; (xi) expenditures incurred by the master, carrier, charterer, or ship's husband on behalf of the vessel or her owner; and (xii) the price for the acquisition of the vessel, plus interest.

There is no longer a maritime lien for repairs, but the contractor that provides such services has the right to retain possession

gentina). No amendments have been made to this law as of January 1984. Personal communication with Mr. Jose Domingo Ray, Asociación Argentina de Derecho Marítimo, Buenos Aires (Argen.), (Feb. 7, 1984) [hereinafter cited as J. D. Ray].

69. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels), May 27, 1967, text reproduced in 6A BENEICT, ADMIRALTY doc. 8-3 (7th ed. 1981) [hereinafter cited as the 1967 Brussels Convention]. This convention has not yet entered into force. 1980-81 I.M.C. 8E Y.B. 104.

70. The Argentinian Law of Navigation is divided in five parts and is comprised of 630 articles. Title I defines general maritime terminology. Title II deals with administrative regulations. Title III includes the bulk of the previous law, with a full chapter on maritime liens or privileges. Titles IV and V take care of procedural and conflict of jurisdiction matters, respectively.

71. Ley de la Navegación, Law No. 20.094, arts. 471, 476, 478, 490, 494 January 15, 1973, C Anales (Argentina).

72. *Id.*, art. 511.

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over the vessel as security, until payment is made.⁷³ In this sense, the repairman's right to retain possession of the vessel is similar to a common law lien, which also disappears if possession is lost. First-degree liens cannot be prejudiced by this right of retention which, nonetheless, is given priority over ship mortgages.

Liens from later voyages have preference over those which arose during previous voyages,⁷⁴ even when liens from previous voyages are of a higher rank. The order of priority listed above is applicable to liens that occur along the same voyage. Liens of the same class share *pro rata*, except items (vi), (viii), (ix), and (x), which follow the inverse order of accrual.⁷⁵ A general one-year limitation period limits the effect of the voyage rule, since maritime liens lose their preferential priority after the limitation period.⁷⁶

There are only two liens which may attach to an unborn vessel: (i) court costs; and (ii) the credit due its builder, as long as the contract has been recorded at the National Vessel Register.⁷⁷ The shipbuilder surrenders his lien by delivering the vessel to the owner.⁷⁸

Liens on the cargo⁷⁹ are also few in number: (i) customs duties; (ii) court costs; (iii) salvage and general average; (iv) freight and other contractual costs related to the cargo; and (v) principal plus interest from loans taken out by the master on the cargo. Classes (iii) and (v) are preferred according to the inverse time of accrual, while the remaining ones share *pro rata* following the port rule.⁸⁰ In any case, liens on cargo have a limited period during which they may be enforced since action must be brought within 30 days of the date the cargo was unloaded and prior to the transfer of title to third parties.⁸¹

Arrest of a foreign vessel to satisfy maritime liens and non-lien claims for credit extended to a vessel may occur in Argentina independently of whether the transaction took place there.⁸² The claimant may seek to have the vessel arrested under the jurisdic-

73. *Id.*, art. 486.

74. *Id.*, art. 482.

75. *Id.*, art. 480.

76. *Id.*, art. 484, §§ a-c.

77. *Id.*, art. 490, §§ a-b.

78. *Id.*, art. 492.

79. *Id.*, art. 494, §§ a-e.

80. *Id.*, art. 496.

81. *Id.*, art. 498.

82. *Id.*, art. 532, §§ a-c.

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tion of any port where the vessel is found. The order of priority in these cases will follow that of the vessel's nationality.⁸³

D. *Brazil*

The priority of maritime liens in Brazil can only be understood by separately comparing commercial and civil law legislation. First, the Brazilian Commercial Code of 1850, still in force today, lists the following order of priority: (i) fees for service rendered to the ship, including salvage and pilotage; (ii) wharfage and navigation duties; (iii) custodian's fees and necessary expenses for her keep, including warehouse rent to store her fittings and equipment; (iv) all maintenance expenses after her last voyage and while in *custodia legis*; (v) wages of master, officers, and crew earned on her last voyage; (vi) bottomry and *respondentia* loans from her last voyage; (vii) master's disbursements for repairs and supplies during her last voyage; (viii) general average; (ix) debt originating from the shipbuilding contract, that are within three years of the end of construction; (x) expenses originating from ship and equipment repair, that are within two years of when the repair was completed; and (xi) debt from vessel acquisition, that are within three years of the acquisition.⁸⁴

Although some of these liens may be secret, the ones listed under items (iv), (vi), (vii), (ix), (x) and (xi) must be recorded at the Commercial Register, within fifteen weekdays of their occurrence,⁸⁵ to be considered privileged credits.⁸⁶ Liens of the same nature will be given priority in the inverse order of accrual only if contracted in different ports; otherwise they should share *pro rata*.⁸⁷

Secondly, the preferred status of ship mortgages originated under civil law with the enactment of the Civil Code of 1916.⁸⁸ Subsequently, the Maritime Mortgage Statute of 1922⁸⁹ significantly altered the order of priority established by the Commercial

83. J.D. Ray, *supra* note 68.

84. Código Comercial Brasileiro, Law No. 556, arts. 470, §§ I-IX; 471, §§ I-II; 474, June 25, 1850 (Brazil).

85. *Id.*, art. 10, § 2.

86. *Id.*, arts. 472, 474.

87. *Id.*, art. 473.

88. Código Civil Brasileiro, Law No. 3.071, arts. 810, § VII, 825, January 1, 1916, Coleção 1 (Brazil).

89. Decree No. 15.788, art. 20, Nov. 8, 1922, Coleção (Brazil).

Code. The statute placed ship mortgages above all liens, with the exception of court costs and expenses, and federal taxes; seamen's wages, including the master's; salvage and general average; repairs, supplies, and necessities contracted by the master outside the vessel's home port; and collision and torts.

Finally, in 1966, the National Tax Code⁹⁰ placed federal, state, and municipal taxes, in that order, above claims of any nature or time of accrual, except those created by labor legislation. The priority of court costs and expenses, however, was not affected by this uniform ranking for tax credits.⁹¹ As costs of the procedure itself, they are satisfied prior to any amount distributed to creditors. Tax credits, therefore, rank third in the above list of priorities.

Another order of priority exists since Brazil ratified the 1926 Brussels Convention on Maritime Liens and Mortgages⁹² (as discussed below). This lien order of priority does not differ much from the one above and only applies to ships whose flag states are parties to the convention.⁹³

E. Mexico

Maritime liens are concisely regulated by the 1963 Mexican Law of Navigation and Maritime Commerce⁹⁴ and consist of (i) labor credits; (ii) taxes; (iii) salvage; (iv) general average; (v) torts; (vi) repairs, supplies, and necessities; and (vii) insurance premiums.⁹⁵

Liens which attached during the vessel's latest voyage will receive preference over those from earlier voyages.⁹⁶ There is no last voyage limitation, nor any mention of a port rule for *pro rata* shar-

90. Law No. 5.172, arts. 186, 187, October 25, 1966, Coleção (Brazil).

91. Law No. 6.355, September 8, 1976, Coleção (Brazil).

92. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels), April 10, 1926, 120 L.N.T.S. 187 [hereinafter cited as The 1926 Brussels Convention].

93. Decree No. 351, Oct. 1, 1935, Coleção (Brazil).

94. Ley de Navegación y Comercio Marítimo, January 10, 1963 [1963] D.O. (Mexico), as amended by Decreto de Reformas y Adiciones a la Ley de Navegación y Comercio Marítimo, December 15, 1982. This recent amendment created a section (arts. 121 to 126) on ship mortgages and removed them from the maritime lien category, thus lowering its status one class below the previous order. Ship mortgages used to have priority over insurance premiums.

95. Ley de Navegación y Comercio Marítimo, art. 116, §§ I-VII, January 10, 1963, D.O. (Mexico).

96. *Id.*, art. 117.

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ing among liens within the same class. Priority within each class will be given in the inverse order of accrual. Maritime liens do not disappear in the event of a change in ownership.⁹⁷

Although ships are considered movable property, rules related to the sale of immovables and mortgages apply to them.⁹⁸ Ship mortgages receive a priority immediately below maritime liens and are limited to a three-year foreclosure period.⁹⁹ A mortgage contract for ship construction is permitted.¹⁰⁰

In general, all maritime liens are limited to the value of the ship,¹⁰¹ but wages and taxes seem to be clearly exempt from this limitation. Vessels can only be seized as a result of maritime claims and not for any personal debt of the owner.¹⁰² A suit to foreclose a maritime lien against a vessel must be brought at her port of registry.¹⁰³ Foreign vessels may also be arrested in Mexico for maritime liens, including liens originating elsewhere. The choice of Mexican jurisdiction also implies the application of its national legislation to determine the priority of maritime liens.¹⁰⁴

F. Panama

The Panamanian Commercial Code of 1916¹⁰⁵ classifies ship mortgages as liens and determines that the civil law regulation of mortgages could also be applied to ship mortgages as long as it did not conflict with the rules of commercial law.¹⁰⁶ The Panamanian Code is *sui generis* for its time because it provided for the creation of shipbuilding mortgages.¹⁰⁷ It also declared maritime liens to be

97. *Id.*, art. 118.

98. *Id.*, arts. 106, 111, 121-26.

99. *Id.*, art. 126.

100. *Id.*, art. 104.

101. *Id.*, art. 134, §§ I-VIII.

102. *Id.*, art. 131.

103. *Id.*, art. 120.

104. Personal communication with Mr. Ignacio L. Melo, Melo & Melo Abogados, Mexico City, Mexico, (Feb. 20, 1984).

105. Promulgated by Law No. 2, August 22, 1916 (Panama) and Decree No. 95 [1917] (Panama). U.S. District Court jurisdiction over the Canal Zone has returned to Panama since September 1982. A special maritime jurisdiction was created by Law No. 8 of March 8, 1982, which seems to have significantly departed from the traditional Panamanian civil procedure in an effort to expedite the adjudication of maritime cases. Foreclosure of ship mortgages, originally within the jurisdiction of the civil courts, is now heard by the new Maritime Court. This court also enforces maritime liens.

106. Código Comercial, art. 1512 (Panama).

107. *Id.*, art. 1518.

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superior to any other claims,¹⁰⁸ that they would be preferred by class, and that within the same class, later liens would outrank earlier ones.¹⁰⁹

Liens on the vessel have the following order of priority: (i) court costs incurred in the common interest of the creditors; (ii) salvage from the last voyage; (iii) master's and crew's wages from the last voyage; (iv) stevedores' wages; (v) torts; (vi) general average; (vii) ship mortgages; (viii) repairs, supplies, and necessaries; (ix) bottomry loans; (x) pilotage, custodial fees, and maintenance costs after the last voyage; (xi) indemnification owed to shippers and passengers for loss or damage to cargo during the last voyage, caused by fault of master or crew; and (xii) the price of the last acquisition of the vessel, plus interest, within the last two years.¹¹⁰

The order of priority for liens on a vessel's freight¹¹¹ is (i) court costs in the common interest of the creditors; (ii) salvage from the last voyage; (iii) master's and crew's wages from the trip that originated the freight; (iv) general average; (v) bottomry loans on the freight; (vi) insurance premiums; (vii) principal plus interest due to obligations contracted by the master on the freight; (viii) indemnification owed to shippers for loss or damage to cargo during the last voyage, caused by fault of master or crew; and (ix) any other lien due to loan or ship mortgage on the freight, if it is duly registered.

Finally, the priority of liens on a vessel's cargo¹¹² consist of: (i) court costs in the common interest of the creditors; (ii) salvage from the last voyage; (iii) taxes on the cargo at the port of destination; (iv) transportation and cargo costs; (v) storage of the cargo; (vi) general average; (vii) *respondentia* loans and insurance premiums; (viii) principal plus interest due to obligations contracted by the master on the cargo; and (ix) any other loan with a lien on the cargo.

Vessels of any nationality, with or without cargo, can be seized at the request of a maritime creditor.¹¹³ Panamanian law does not require the claim to be a lien to execute the arrest, nor that it have any connection to an ongoing voyage, only that it be related to

108. *Id.*, art. 1502.

109. *Id.*, art. 1505.

110. *Id.*, art. 1507, §§ 1-12.

111. *Id.*, art. 1510, §§ 1-9.

112. *Id.*, art. 1511, §§ 1-9.

113. *Id.*, art. 1527, 1529.

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maritime commerce.

G. Venezuela

Inspired by the 1967 Brussels Convention and the 1973 Argentinian Law of Navigation, Venezuela has recently enacted a new law concerning maritime liens and ship mortgages.¹¹⁴ Venezuela's 1983 law brought substantial modifications to the priority of maritime liens previously established by the Code of Commerce. It created two groups of liens and, for the first time, recognized mortgage of ships.¹¹⁵

The first group of Venezuelan maritime liens is composed of liens for: (i) master's and crew's wages; (ii) obligations to the National Treasury arising from the operation of the vessel, port charges, and pilotage dues; (iii) maritime personal tort; (iv) maritime property tort; and (v) salvage, wreck removal, and contributions in general average.¹¹⁶ These liens are followed by a "right of retention" for repairs,¹¹⁷ similar to the common law possessory lien for repairs in Canada. If not lost by the delivery of the vessel to the owner, this right of retention prevails over a ship mortgage and the second group of liens, which include liens arising from the construction of the vessel, supplies and necessaries, and other privileged credits.¹¹⁸

Ship mortgages rank above this second group of liens.¹¹⁹ Vessels of national registry and navigation accessories may be mortgaged. Vessels and accessories under construction may also be mortgaged. Under the new law, the mortgagee may "assert his rights over the vessel although it may have passed to the hands of

114. *Ley de Privilegios e Hipotecas Navales*, August 9, 1983 (Venezuela). This law revoked the pertinent provisions previously regulated by the Commercial Code of Dec. 19, 1919, as modified by the Law of Partial Reform of July 26, 1955 (Venezuela).

115. Ship mortgages were not foreseen by either the commercial or the civil code. Mortgages in the latter (art. 1,881) were strictly applied to *immovables* while ships were considered to be movable or personal property. The ship mortgage was essentially treated as a pledge, thus the pledgee did not have any *real right* in the property and could not pursue it into the hands of a new purchaser. A naval pledge ranked last in the previous lien order of priority as other liens on the ship.

116. *Ley de Privilegios e Hipotecas Navales*, art. 4, §§ 1-5, August 9, 1983 (Venezuela).

117. *Id.*, art. 14. Personal communication with Mr. Luis Cova Arria, Luis Cova Arria & Asociados, Caracas Venezuela, Jan. 10, 1984 [hereinafter cited as Arria].

118. *Ley de Privilegios e Hipotecas Navales*, art. 5, August 9, 1983, (Venezuela).

119. *Id.*, arts. 16, §§ 1-3, 24.

third parties,"¹²⁰ and fraud against the rights of a mortgagee is punishable by imprisonment from one to five years.¹²¹ Ship mortgages must be registered at the Real Estate Register in the jurisdiction of the vessel's home port, and subsequently filed at the Port Captainty of the port of registry within 30 consecutive days after registration.¹²²

Maritime liens and ship mortgages are preferred over all non-maritime liens or other claims against the vessel's owner.¹²³ Maritime liens of the same class share in proportion to their value,¹²⁴ except for salvage and general average which follow the inverse order of accrual and have preference over all earlier liens.

According to the new law, foreign vessels can be seized in Venezuela for any debt, lien or non-lien, and whether or not the credit creating the claim against the vessel originated there.¹²⁵ It is unclear in these cases, which order of priority (e.g. Venezuelan law, law of the flag, etc.) would be applied by Venezuelan courts.

V. APPLICABLE INTERNATIONAL CONVENTIONS

A. *The Brussels Convention of 1926*

Although Argentina,¹²⁶ Brazil,¹²⁷ and Uruguay,¹²⁸ are the only countries in this hemisphere that have accepted the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, this convention has caused a significant impact in numerous national legal systems on the American continent. It has limited the number of maritime liens or privileges, furthered uniform recognition of ship mortgages or hypothecations, provided uniform rules on priority questions, and

120. *Id.*, art. 27.

121. *Id.*, art. 33.

122. *Ley de Privilegios e Hipotecas Navales*, art. 20, August 9, 1983, (Venezuela). "[Mortgages take effect as of the date of their registration. . . . If various mortgages are registered on the same day, the one first presented shall have priority." *Id.*, arts. 21, 22.

123. *Código Comercial*, art. 619 (Venezuela).

124. For most liens, the new law kept the proportionality rule of the revoked article 615 *in fine* of the Commercial Code. *Ley de Privilegios e Hipotecas Navales*, art. 9, August 9, 1983, (Venezuela).

125. Arria, *supra* note 117.

126. Accession on April 19, 1961.

127. Ratification on April 23, 1931.

128. Accession on September 15, 1970.

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to a great extent, reduced the differences between the types of liens under common law and civil law systems.¹²⁹

The convention created two categories of liens. The first category includes: (i) legal costs and other expenses incurred for the preservation of the vessel, tonnage, port and pilotage dues, and other charges from the time of the entry of the vessel into the last port; (ii) wages of master and crew; (iii) salvage and general average; (iv) collision, damage to harbors and canals, personal injury to passengers or crew, loss or damage to cargo or baggage; and (v) repairs, supplies, and other master's expenditures.¹³⁰ Ship mortgages rank immediately after these five classes and are superior to liens of the second category,¹³¹ which consists of liens created by domestic legislation governing the contracting parties and not necessarily entitled to international recognition.

Article 8 of the Convention explicitly extends to any claim secured by a lien, which includes ship mortgages, the right to follow the vessel and to assert the lien against her into whatever hands she may pass, including a bona fide purchaser. Claims secured by a lien and related to the same voyage rank in the order set out above. Otherwise, those from the last voyage have priority over the ones attaching to previous voyages, even liens that rank in a higher class.¹³² Liens of the same class and voyage share ratably in the event that the fund available is not sufficient to pay the claims in full, except salvage, general average, repair and supply, which rank inversely to the order in which they arose.

B. *The Bustamante Code*

The 1928 Convention on Private International Law, or, as it is

129. See Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952, Part One*, 1963 *Duke L. Rev.* 671, 674 (1963). In Argentina, prior to the enactment of the most recent Law of Navigation, the Ship Mortgage Statute of 1958 (Decree No. 3.115, March 20, 1958) drastically modified the hierarchy of liens established by the 1889 Commercial Code to conform with the order of the 1926 Brussels Convention. Amendments to the Brazilian Commercial Code, introduced by the Maritime Mortgage Statute of 1922, *supra* note 89, also exemplify the trend toward some degree of uniformity in this area. Statutory and case law in both Canada and the United States have produced results analogous to the priority of liens set in the convention, even though neither country is a party to it.

130. The 1926 Brussels Convention, *supra* note 92, art. 2.

131. *Id.*, art. 3 at 1-2.

132. *Id.*, arts. 5, 6.

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more widely known, the Bustamante Code,¹³³ was widely ratified by almost all American nations at the time of its passage except Argentina, Colombia, Mexico, Paraguay, Uruguay, and the United States.¹³⁴ Although Argentina is not a member of this treaty, identical provisions were incorporated into its recent law of navigation.¹³⁵

The treaty basically sets two standards by which to resolve conflict of jurisdiction problems in international maritime law. It gives extraterritorial application to the law of the nation where the vessel was registered to determine what liens and mortgages can be claimed against the vessel.¹³⁶ It also provides for the law of the ship's nationality to regulate change of ownership, creditors' rights on the vessel after her sale, and laches or limitation periods.¹³⁷ The procedure for arresting the ship is controlled by the law of the court's jurisdiction where the vessel is arrested.¹³⁸

C. *Conflict of Laws*

There are three basic steps to be followed to determine the correct choice of law to apply in a maritime lien case. First, if the countries of the litigants are signatories to the 1926 Brussels Convention, the court should apply the rules of the Convention for lien recognition and priority. Second, if instead of belonging to the Brussels Convention, the litigants are parties to the Bustamante Convention on Private International Law, then the principles of the Bustamante Code will control what substantive and procedural laws will be used by the court. Normally, the law of the ship's nationality will determine what liens attach to her, and the law of the forum will provide for the procedural remedy. Finally, for cases in the American admiralty courts, because the United States is not a signatory to either of these conventions, the law most closely connected with the transaction or occurrence is applied to lien recognition, either the *lex loci contractus* or the *lex loci delictus*. The

133. 86 L.N.T.S. 111 [hereinafter cited as The Bustamante Code]. For background on the Bustamante Code, see A. GOLBERT & Y. NUN, *LATIN AMERICAN LAWS AND INSTITUTIONS* 408-18 (1983).

134. Information provided by the U.S.D.O.S. (November 1981).

135. *Ley de la Navegación*, Law No. 20.094, arts. 598, 611, January 15, 1973, C Anales (Argentina).

136. The Bustamante Code, *supra* note 133, art. 278.

137. *Id.*, arts. 275, 277.

138. *Id.*, art. 176.

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law of the flag applies on the high seas. The legal remedy in all these cases, which includes the priority of the claims, is provided by the *lex fori*.¹³⁹

Canadian courts have also adopted the same principle.¹⁴⁰ In *the Marquis v. The Ship Astoria* the court held that:

It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered. . . . [T]he creation of liens for service on the high seas, as for seamen's wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of the proceeds is adjusted by the law of the forum at which the vessel is libelled and sold.¹⁴¹

A similar result was reached in the *Todd Shipyards Corp. v. Altama Compañia Maritima. S.A.*:

It must . . . be remembered that it is the right, and not the remedy, which is regulated by the *lex loci* . . . but the further question to be determined in this case is whether that lien takes precedence over the respondent's mortgage claim, and in my view this question must be determined according to the law of Canada [i.e., the '*lex fori*'].¹⁴²

VI. INTERNATIONAL MARITIME LIENS COMPARED

A comparison of the ranking of maritime liens and ship mortgages within the above national legal systems vis-a-vis the 1926 Brussels Convention is presented in this section.¹⁴³ Table 1 summarizes the information contained in the following discussion,

139. "Priorities among maritime liens have traditionally been regarded as governed by the law of the forum." *Payne v. S.S. The Tropic Breeze*, 423 F.2d 236 (C.A. Puerto Rico 1970).

140. See, e.g., *The Acrux*, 1 Lloyd's List L. R. 405 (1962); "[T]he holder of a maritime lien against a ship under the law of the United States of America in respect of the costs of necessary repairs to the ship effected in that country is entitled to enforce the lien in Canada, and according to Canadian law takes priority over a mortgagee of the ship." *Todd Shipyards Corp. v. Altama Compañia Maritima S.A.* D.L.R. 3d 571 (1973).

141. 1931 Can. Exch. 195 (1931).

142. 32 D.L.R. 3d 571 (1973).

143. Even though the 1967 Brussels Convention has influenced recent developments of the law on maritime liens in Argentina and Venezuela, this convention is not applicable in this hemisphere. No American state has yet ratified or acceded to it. Information provided by the U.S.D.O.S. Foreign Treaty Office (Mar. 28, 1984).

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which focuses on liens of first ranking and the ship mortgage.

Legal Systems	Priority of Liens	Judicial costs and other expenses	TABLE 1				
			Seaman's Wages	Salvage and General Average	Tort	Repairs Supplies and Necessaries	Ship Mortgage
Canada	1(a)	2	3(b)	4	5(c)	6	
ANGLO-AMERICAN States	United States	1	2	3	4	5(d)	6
	Argentina	1	2	6(e)	4,5(f)	8,9(g)	7
	Brazil	1	2	4(h)	6	5	7
LATIN-AMERICAN States	Mexico	—	1	3,4(i)	5	6	8(j)
	Panama	1	3(k)	2,6(l)	5	8	7
	Venezuela	—	1	5(m)	3,4	6(n)	7
1926 Brussels Convention		1(o)	2	3	4	5	6

Order of priority of maritime liens and ship mortgages within national systems in relation to liens of first order as set out in the 1926 Brussel Convention.

- (a) Clerk's and marshal's fees only.
- (b) General average ranks below salvage, as a common law possessory lien.
- (c) Common law possessory lien for repairs only.
- (d) These liens must arise prior to the ship mortgage.
- (e) Tax liens and navigation dues rank third.
- (f) Personal and property tort, respectively.
- (g) Contracts for repairs have priority over supplies and necessities.
- (h) Tax liens rank third.
- (i) Salvage and general average, respectively. Tax liens rank second.
- (j) Insurance premiums rank seventh.
- (k) Stevedores' wages rank fourth.
- (l) Salvage and general average, respectively.
- (m) Tax liens, port charges, and pilotage dues rank second.
- (n) Right of retention for repairs only, similar to a possessory lien.
- (o) Tonnage dues, harbor dues, pilotage dues, and other public taxes and charges are included.

A. Judicial Costs and Other Expenses

Although not a maritime lien *stricto sensu*, foremost priority is given to the judicial costs and other expenses incurred by the parties to arrest the vessel and to preserve her while in *custodia*

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legis. Generally, no lien can arise while a vessel is held in custody of the court in the United States,¹⁴⁴ but the courts have the power to create rights of reimbursement from the general fund for costs and administrative expenses. As a rule, services performed for the common benefit of all concerned parties are taxable as costs.¹⁴⁵ Canada places only the registrar's and marshal's fees and expenses above maritime liens; court costs per se are ranked below ship mortgages.¹⁴⁶

Under the Brussels Convention of 1926, a wider range of expenses were included in the court costs category, comprised not only of "law costs due to the state, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale," but also "tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues, the costs of watching and preservation from the time of the entry of the vessel into the last port,"¹⁴⁷ some of which would have occurred prior to the actual seizure of the vessel. Such detailed expansion of the notion of judicial costs and expenses has not been followed by national legislation in Latin America. Argentina, Brazil, and Panama have limited this category to actual costs of the judicial procedure, whereas Mexico and Venezuela have disregarded these costs as maritime liens.

B. Seamen's Wages

Seamen's wages have historically been considered a sacred lien by the General Maritime Law. This class includes "claims arising out of the contract of engagement of the master, crew, and other persons hired on board."¹⁴⁸ Masters in the United States were not entitled to a maritime lien for their wages until 1968 on the premise that they were agents of the shipowner and not seamen.¹⁴⁹

144. GILMORE & BLACK, *supra*, note 14, § 9-11 at 497.

145. *N.Y. Dry Dock Co. v. The Steam Ship Poznan*, 274 U.S. 117 (1927).

146. *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

147. The new Brussels Convention of 1967 eliminates the class of legal costs and other expenses altogether, ranking wages as the most privileged claim upon the vessel. Port, canal, and other waterway dues and pilotage dues immediately follow in rank. Brussels Convention, art. 4, § 1 (i)-(ii) (1967).

148. The 1926 Brussels Convention, *supra* note 92, art. 2, § 2. Panama limits this lien to be exercised only by the master and the crew for wages earned on the last voyage, *supra* note 110. Stevedores' wages rank fourth in Panamanian law, *id.*

149. "The master of a vessel documented, registered, enrolled, or licensed under the

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Now, temporary help, longshoremen, bartenders, waitresses, and even entertainers have a lien for wages.

Wages rank second highest in priority in the Brussels Convention of 1926¹⁵⁰ and in the national laws compared in this article,¹⁵¹ except in Mexico and Venezuela where they rank first, and in Panama where they rank third. In some circumstances, salvage may precede wages earned prior to the time of the salvage operation. The basis for the high priority enjoyed by salvage liens is the salvor's close connection with the preservation of the vessel or cargo. In the United States, a salvage lien may also "outrank all prior wage liens where, but for the service, the security of the seamen might have been lost."¹⁵² However, in *The Rainbow Line*,¹⁵³ a more recent case, the court held that salvage takes priority over all liens except for wages.¹⁵⁴

C. *Salvage and General Average*

Success is a key element for a salvage lien to exist, whether performed voluntarily or under contract, "no lien attaches for attempted salvage where the services rendered produce no result and in no way contribute to the subsequent saving of the boat."¹⁵⁵ Additionally, the owner of the vessel or cargo cannot be held liable in personam for voluntary salvage unless he claims the property. He can completely avoid personal liability by simply abandoning the property.¹⁵⁶

Ranking with equal priority, general average has become one

laws of the United States shall have the same lien for wages against such vessel and the same priority as any other seaman serving on such vessel." 46 U.S.C. 606 (1976).

150. The preferred hierarchy of wages under the 1926 Brussels Convention is cosmetic only, since the first class, legal costs and expenses, is comprised of other categories with lower ranking in several countries.

151. In the reclassification of maritime liens that took place in Argentina, seaman's wages were raised from seventh place, which was the priority set forth in the Commercial Code of 1889, to second place. See Código Comercio, Law No. 2.637, art. 1.377, § 7, October 9, 1889, (Argentina); Ley de la Navegacion, Law No. 20.094, January 15, 1973, C Anales (Argentina). See *supra* notes 70, 71.

152. *The Nika*, 1923 A.M.C. 409 (W.D. Wash. 1923); *The Athenian*, 3 F. Supp 248 (E.D. Mich. 1877).

153. *Rainbow Line, Inc. v. M/V Tequila*, 341 F.Supp. 459, *aff'd*, 480 F.2d 1024, 1972 A.M.C. 1540 (S.D.N.Y. 1972).

154. Compare 2 BERNEDICT, *supra* note 19, at § 51 L. 23: "Fault subordinates wage to collision lien."

155. *The Mike Corry*, 19 Can. Exch. 61 (1917).

156. *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1906).

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of the least litigated areas of admiralty, primarily because the highly technical work in this area has been ably performed by general average adjusters and marine surveyors.¹⁵⁷

The Brussels Convention of 1926 and the law in the United States rank salvage and general average liens equally giving them third priority, but tax liens and dues related to the commercial operation of the vessel have received priority over them in Argentina, Brazil, Mexico, and Venezuela. In Argentina and Venezuela, the status of salvage and general average liens in the new laws has fallen below liens originating from personal and property torts. Like possessory liens in Canada, general average liens rank below the superior maritime salvage lien. Panama also gives general average a lower ranking, in great contrast to the preferential position afforded to salvage, which are classified above wage liens.

D. *Tort*

A new pattern of raising the priority and separating tort liens into personal and property torts, in that order, is under way in civil law jurisdictions. Personal and property tort liens have already been given priority over salvage and general average in the 1973 Argentinian Law of Navigation and in the 1983 Venezuelan Law of Maritime Liens and Ship Mortgages,¹⁵⁸ which indicates the impact of the model set forth by the 1967 Brussels Convention.¹⁵⁹ These liens are further preferred over those for repairs, supplies, and necessaries in Argentina, Mexico, Panama, and Venezuela, as well as in Canada and the United States.

The maritime tort lien resulting from a collision is not absolute in Canada. "The foundation of the lien is the negligence of the owners or their servants at the time of the collision and, if that is not proved, no lien comes into existence and the ship is not liable."¹⁶⁰ In the United States the personification of the vessel theory has caused the liability of a vessel to be considered separate from that of her owner, "the offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the

157. *Cia. Atlantica Pacifica v. Humble Oil & Refining Co.*, 274 F. Supp. 884, 1967 A.M.C. 1474 (D. Md. 1967).

158. *Ley de la Navegación*, Law No. 20.094, art. 476, §§ d-e, January 15, 1973, C. Anales (Argentina); *Ley de Privilegios e Hipotecas Navales*, art. 4, §§ 3-5, August 9, 1983, (Venezuela).

159. *Supra* note 69, art. 4, §§ 1 (iii)-(iv).

160. CAN. ENC. DIG., *supra* note 31, at 149.

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wrong done,"¹⁶¹ "the ship itself is to be treated in some sense as principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer."¹⁶²

Collision claims against the vessel may take priority over pre-existing tort and salvage liens, and even the wage liens of the seamen of the vessel.¹⁶³ The rule that only collision and personal injury could give rise to a maritime tort lien has been rejected in *The Bournemouth*,¹⁶⁴ in which a broader test was substituted (i.e., whether the vessel was the offending thing). In this decision, the vessel was held subject to a maritime lien in favor of the State of California by virtue of having discharged oil while moored at Long Beach. Latin-based law extends the vessel's liability to any accident of navigation as well, including loss or damage to cargo or baggage. Personal injury or loss of life in Argentina, as in the United States, gives rise to a claim whether occurring on land, on board the vessel, or in the water, if the injury is directly related to the operation of the ship.¹⁶⁵

E. Repairs, Supplies, and Necessaries

These claims result from contracts that are necessary for the preservation of the vessel or the continuation of the voyage, usually made by the master while away from the vessel's home port. The home port doctrine adopted by the Brussels Convention of 1926 is still in force in Brazil,¹⁶⁶ but it was abrogated in the United States in 1910, when Congress passed the Federal Maritime Lien Act that superseded all state statutes on this subject. This Act provides that "any person furnishing repairs, supplies, towage, use of dry dock or marine railway or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner or a person authorized by the owner shall have a maritime lien upon the vessel."¹⁶⁷ Prior to the Maritime Lien Act, general maritime

161. *The John G. Stevens*, 170 U.S. 113, 122 (1898).

162. *The Barnstable*, 181 U.S. 464, 467 (1901); 46 U.S.C. 972 (1976).

163. *The Daisy Day*, 40 F. Supp. 538 (W.D. Mich. 1889).

164. 307 F. Supp. 922 (C.D. Cal. 1969).

165. *Ley de la Navegación*, Law No. 20.094, art. 476, § d, January 15, 1973, C Anales (Argentina); *The Scow Joan R.*, 294 F.2d 272, 1960 A.M.C. 419 (S.D.N.Y. 1959).

166. Decree No. 15.788/22, art. 20, § d, Coleção (Brazil).

167. 46 U.S.C. 971 (1983). Shipowners, therefore, have the right to prevent charterers and other persons from creating consensual liens against the vessel, by including an express prohibition of lien clause in the contract. This has no effect whatsoever on delictual obligations, such as maritime torts. See e.g., *The Lucie Schulte*, 343 F.2d 897 (2d Cir. 1965).

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law provided maritime liens for repairs, supplies, and necessaries furnished to the vessel in a foreign port,¹⁶⁸ but not if the vessel was in her home port.¹⁶⁹ This distinction was based on the premise that while the vessel was in her port of registry, the owner's credit was being extended and not that of the vessel.¹⁷⁰

Under Canadian law repairs to a vessel create a possessory lien, which is lost when the lien holder loses possession of the vessel. Providing supplies and necessaries to a vessel in Canada creates a mere statutory lien, which ranks below mortgages.¹⁷¹ In the United States these contractual liens rank higher than a subsequent ship mortgage lien. The preferred ship mortgage, however, is superior to later liens for repairs, supplies, and necessaries. A small dosage of protectionism in the Act provides for American repairmen's liens to be considered above those of preferred foreign ship mortgages.¹⁷²

The United States Maritime Lien Act seems to create a presumption that practically any services or supplies furnished on the credit of the vessel, even when requested by the shipowner in the vessel's home port, are entitled to a lien, except material furnished for the construction of the ship.¹⁷³ These liens do not extend to contracts that do not aid the vessel, such as insurance contracts, which are made for the personal benefit of her owner.¹⁷⁴

This test is more stringent in Latin American-based systems. Providers of supplies and repairmen must prove that the supplies and repairs were indeed necessary for the preservation of the vessel or the continuation of her voyage. This class of lien does not include breach of affreightment contract or charter-party, pilotage,

168. *The Nestor*, 18 F. Cas. 9 (1831). "Foreign port" is any port located in a state which is not the vessel's port of registration.

169. *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819).

170. *The Lottawana*, 88 U.S. (21 Wall.) 558 (1875); *The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824).

171. *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, 32 D.L.R. 3d 571 (1973); *The Terry*, 1948 Can. Exch. 27 (1948); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

172. *The Glenrock*, 268 F. Supp. 7, 1968 A.M.C. 507 (S.D. Fla. 1968). The Foreign Ship Mortgage Act, 46 U.S.C. 951 (1976), provides that "such preferred mortgage lien in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, performed or supplied in the United States."

173. Hebert, *supra* note 2, at 399.

174. Virtually every state has enacted statutes protecting this lien, which is enforced by Admiralty courts. Longenecker, *supra* note 3, at 599.

or insurance premiums, which often have specific lower priorities.

Under Brazilian and Mexican law and the Brussels Convention of 1926, liens for repairs, supplies, and necessaries rank above ship mortgages. In Venezuela, only the right of retention for repairs, which is equivalent to a possessory lien in common law, would be preferred to the ship mortgage, while other contractual liens for repairs, supplies, and necessaries receive an inferior classification.

VII. SHIP MORTGAGES

The 1926 Brussels Convention provides for the uniform recognition of ship mortgages or hypothecations, whereby the validity of a ship mortgage is determined by the law of the flag, rather than the *lex fori*. This convention has also elevated the status of mortgages with respect to maritime liens, placing them above liens created by national laws not included in the preferential category of the convention.¹⁷⁵ In Canada, the United States, Argentina, Panama, and Venezuela, ship mortgages may receive a higher priority than the ascribed priority in the 1926 Convention for repairs, supplies, and necessaries which are considered to be inferior liens. Only the preferred maritime liens¹⁷⁶ and court costs outrank the preferred ship mortgage in the United States.

A mortgage *stricto sensu* is not a maritime contract, which explains its nonexistence under the general maritime law. A lien based on a ship mortgage is wholly a creation of statute.¹⁷⁷ Unlike maritime liens, which are secret and nonconsensual, the ship mortgage must be formally contracted and recorded¹⁷⁸ in order to affect

175. The 1926 Brussels Convention, *supra* note 92, art. 3.

176. "[T]he term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average and or salvage, including contract salvage. . . . [T]he preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court." 46 U.S.C. 953 (1976).

177. Prior to the enactment of the Ship Mortgage Act of 1920, an Admiralty court had no jurisdiction over a suit to foreclose a mortgage on a vessel. See *The Thomas Barlum*, 293 U.S. 21 (1934).

178. The U.S. preferred Ship Mortgage is recorded in the office of the U.S. Coast Guard at the vessel's home port, 46 U.S.C. 921 (1976); in Argentina, it must be recorded at the National Vessel Register, *Ley de la Navegación*, Law No. 20.094, art. 501, January 15, 1973, C. *Anales* (Argentina); in Brazil, at the Maritime Register, Decree No. 15.788/22, art. 21

the rights of third parties. In Latin America, ship mortgages are regulated either by civil codes, commercial codes or by special statutes. Since the personification of the vessel theory is not acknowledged, Latin-based law allows the hypothecation of a ship undergoing construction.

VIII. CONCLUSION

How secure is your claim? Since the security of a maritime lien concerns not only whether a claim for credit to a vessel will be recognized by foreign courts but also what priority will be given to it, this article shows that your claim would be permeated and threatened by uncertainty. Although the 1926 and the 1967 Brussels Conventions created a uniform system for lien recognition and priority, their formal application in the Western Hemisphere is insignificant since only three American States have ratified the earlier international convention, while none has accepted the latter. Indirectly, these conventions have helped reduce extreme differences in consideration of types of liens, ship mortgages, and lien priorities within national legal systems. Overall uniformity, nevertheless, is far from being accomplished.

Without wide acceptance of an international convention on the subject, both lien recognition and lien priority will be significantly affected by the law that would govern them based on a determination by national courts (i.e. the *lex loci*) the law of the ship's flag, the *lex fori*, or any combination of the three. Principles of international comity have established that the recognition of a maritime credit as lien or non-lien must be governed by the law with the greatest contact to the transaction. If the transaction occurred in a jurisdiction other than the one in which the litigation is taking place, then the law from the place of the transaction, the *lex loci*, or the law of the flag would apply. The law of the ship's flag is generally applied for liens arising on the high seas. Lien holders, therefore, should not encounter any difficulty in having their credits recognized as liens in other countries, even in jurisdictions where those credits are not considered to be liens.

The unequal priority granted to these liens by various national courts and statutes, however, complicates this arrangement. The

(Brazil); and in Venezuela, at the Real Estate Register and the Port Captaincy, Ley de Privilegios e Hipotecas Navales, arts. 20, 22, August 9, 1983 (Venezuela).

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application of Panamanian law, for example, would place a salvage lien as second in priority, while lien classification in Argentina would give the same lien an inferior position, namely, sixth. Should the priority be governed by the *lex loci*; what preference would the national courts give to liens that originated from transactions which took place within different national jurisdictions, following different orders of priority? Similarly, if the priority is given according to the *lex fori*, the security of a maritime lien would have very little value since the lien holder would not be able to predict where the vessel's arrest would occur in order to determine the priority of his credit in the future.

Modern choice of law rules employed by admiralty courts in common law jurisdictions have established that foreign law may determine the right, while national law dictates the remedy, to solve conflicts of transnational nature. Under this test, a maritime lien will be recognized by common law national courts if its existence is also recognized by foreign law, but its priority in relation to other liens will follow the order of the national law. This right-remedy test is equivalent to the substance-procedure test used by civil law courts. But the apparent equity of this simple solution is shattered when one realizes that the above legal systems do not equate remedy and procedure. In the common law jurisdictions, remedy includes the priority given to a recognized lien, while procedure in the civil law jurisdictions is usually limited to the arrest and sale of the vessel and the distribution of the proceeds. Consequently, in civil law jurisdictions, priority belongs to the substance and not the procedure of the case. In states that have ratified the Bustamante Code or that have modified their laws accordingly, the national courts would apply the order of priority provided by the law of the vessel's flag.

If one considers that the status of a lien in relation to other liens is as much a part of the creditor's original expectation as is his right to the lien itself, neither the *lex loci* nor the *lex fori*, independently or combined, offers equitable results. Equity can nonetheless be achieved by applying the law of the ship's flag to determine what liens would attach to the vessel and in which priority they should be paid. In the event of litigation anywhere in the world, creditors would know their standing beforehand, thus eliminating the unpredictability associated with the other schemes. International comity, in this manner, would reach beyond the differ-

ences between national and foreign laws to provide a mechanism that would be consistent in different legal systems.

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Annex X - GUINEA-BISSAU 1990 ASSESSMENT OF LEGAL INSTITUTIONS

Ivon d'Almeida Pires Filho

**Source: Guinea Bissau: Legal Sector Assessment
Project Paper Mission, December 1990
[selected chapters]**

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Existing Institutions

• Legal Education (School of Law)

Legal education is limited to the only law school of Guinea-Bissau, located at the capital city of Bissau. Law courses had been discontinued for four years but the school reopened in 1989 under an agreement signed with Portugal that will provide training to permit a full Guinean faculty within five years. The agreement may be extended for another period of five years.

Previously, Guinean law students would have three years of legal education locally and had to study abroad two more years, usually in Portugal or Brazil to receive a baccalaureate-in-law degree (in civil-law jurisdictions, a law degree requires five years of college starting right after high school. Some have also been trained in socialist countries, such as Cuba and the USSR.

As these young and usually well-educated lawyers return to Guinea-Bissau, they often find a position with the Government, as legal advisors or judges. A few of them also teach at the law school. The large majority work both in the government and in private practice.

The first year of the law school began in October 1989 with 40 students. Faculty consists of five Portuguese and three Guinean professors. Guinean participation will increase as new students enter the school, and the first class move up the graduation ladder. The dean is also a Guinean, who is assisted by a Portuguese advisor. The law school might consider providing a bachelor's degree in public administration, which would branch out after the third year of law.

A protocol to the Portuguese-Guinean Agreement of July 5, 1988, was signed in July 1990, establishing the University of Lisbon School of Law as the cooperative institution until the 1993/94 school year. During this time it will provide courses, seminars and training to Guinean teachers in Lisbon, as well as in Bissau whenever possible. A systematic exchange of publications and scientific information is encouraged.

The Portuguese cooperation consists of salaries to the Portuguese professors, the airfare (Lisbon-Bissau-Lisbon), the setting up of a library, and three scholarships each year for Guinean lawyers. The Guinean contribution consists of housing and transportation for the Portuguese staff and the acquisition of books for the students.

Wages between Guinean and Portuguese faculty members vary significantly. A Guinean professor receives the equivalent to US\$50/month paid by the Guinean government while a Portuguese professor receives US\$2,500/month paid by the Portuguese government.

• Legal Practice (Bar Association)

There is presently no lawyers' bar association in Guinea-Bissau. Current attorneys are usually government employees licensed to practice law by the Ministry of Justice. Some attorneys practice law as solicitors, because they never completed legal education abroad.

The practice of law, as conceived by the government, was supposed to be a public service, free of charge to the client. The attorney would send monthly bills to the Ministry of Justice, with a list of cases he assisted, to be paid according to an official fee schedule. This never worked properly, as the government took too long to process the legal bills, often did not have money to make the payments, and the official fee was too low for any lawyer to bother with the paper work involved.

In practice, clients paid their lawyers directly for the requested services. As the "private" practice of law became attractive, providing greater financial returns to practitioners than government service, the Ministry of Justice stopped granting licenses to new lawyers to engage in what is called "popular advocacy". No licenses were given for three years from 1987 until mid-1990, but this did not stop private practice, for those with licenses could not provide all the services required and, thus, requested assistance from lawyers without licenses to draft contracts and other documents. These documents would be signed by licensed attorneys, who, in turn, would share the legal fee with the lawyers who drafted them.

Not issuing licenses, in practice, created a virtually exclusive market for those 14 or so attorneys that were allowed to practice law, while not improving the quality or dedication

of lawyers to their government jobs. Recently, the Ministry of Justice began licensing attorneys to private practice once again. Until November 1990, 27 licenses have been granted.

Most of these lawyers work for the government in the morning and, privately, in the afternoons. The winter work shift, from 7:30 to 14:30, was now implemented all year round, to reduce government cost and employee absenteeism. This permits public servants in general to engage in another activity to supplement the low pay from the government, which is particularly a concern for lawyers, whose salaries range from US\$30 to US\$50 a month. It has been indicated that private practice provides an additional US\$300 to US\$500 per month, in average. Nevertheless, attorneys do not usually abandon public service to a full-time practice in the private sector, as can be seen by the following list.

Because there is no Bar Association and the Ministry of Justice does not keep a list of existing lawyers in Guinea-Bissau, this information was assembled from the recollection of key attorneys in the Ministry of Justice, where approximately 20% of lawyers work.

The analysis of this data shows that 15.8% are female and 84.2% male lawyers. The large majority of them (47.4%) was trained in Portugal, followed by Brazil (13.2%), and USSR (10.5%). Finally, 90% is engaged in government service. This percentage can be even higher, considering that the activity of 3 out of 4 lawyers that were not included in this category was "unknown."

It seems that lawyers, in general, are "pressured" to join the government, as a service to their country for having received the opportunity of higher education. It is a pervasive notion in Guinea-Bissau that one must be linked to the government, either to "serve" one's country or to "move ahead". Most lawyers feel obligated to be in the government but they also realize that there is a limit to patriotism if the government is unable to provide for their "survival". Many of them expect that the government will improve their lot as the country improves with the growth of the private sector. In any case, the government job provides a guaranteed income, a "bonus", and does not hinder their extra activities, outside the government.

All lawyers, invariably, including judges, feel that the private practice of law must be institutionalized, separate from and independent of the government. A professional bar association must be formed and the ties with the Ministry of Justice severed. They understand the importance of an independent bar for the appropriate functioning of the legal system, the stability of democratic institutions and the guarantee of civil liberties. In most developing countries, the Bar provides legal services to the communities, serves as the focal point for the debate and dissemination of the law, provides a check whenever government behaviour deviates from legal provisions, and defends human and civil rights of individuals and communities.

Approximately two years ago, the Ministry of Justice authorized a commission to be formed to study the possibility of an independent bar. Mr. Malal Sarni, Director of the legal department of the Ministry of Fisheries, was elected as president of this Commission. The other two members are Mr. Higino Cardoso, General Director of the Public Function, and Mr. Saico Amadu Junior, the Notary Public of Guinea-Bissau. In April 1990, a draft of the By-Laws (77 Articles) was sent to the Ministry of Justice for review. Article 36 requires members to have an LL.B. degree or a solicitors' certificate, besides civil and criminal requirements. Foreign lawyers with similar qualifications may join the OAGB - Ordem dos Advogados da Guiné-Bissau (Guinea-Bissau Lawyers' Bar Association), as long as there is reciprocity for Guinean lawyers.

Article 37 provided that attorneys could not be members of the government; judges; notary public or register; administrative, police or fiscal authority; or any agent or employee of these offices. The incompatibility proviso, however, do not apply to lawyers in government, that were licensed to practice by December 31, 1987 (Article 77).

The preamble that introduces the by-laws requests its approval by the Council of State, and a three-year government subsidy of approximately US\$33,000/year for setting up and complete implementation of the Bar Association.

These by-laws are expected to be approved by Guinean lawyers at an assembly to take place in December 1990. If this happens, the Bar will need significant start-up technical assistant,

besides equipment and other materials. In order to fulfill its objectives, it is important that the Bar becomes self-sufficient. For this reason, reliance in the government for funds is not recommended.

[...]

• Ministry of Justice (GELD)

GELD (Gabinete de Estudos, Legislação e Documentação), has the mission to provide legal opinions on administrative and legal matters that originate from other ministries or government offices and from within other departments of the Ministry of Justice. This ranges from opinions on treaties and international agreements to reviewing the constitutionality of a proposed law or decree. This office may also initiate legislation. In addition, it must organize and compile legislation, legal doctrine and case-law to promote uniform understanding and application of the law. The GELD is, thus, the focal point where laws converge prior to and after enactment, since its library is the only comprehensive repository of law in the country.

In practice, this office is ill-equipped and understaffed to fulfill its role. It is located in a small room at the upper level of the Ministry of Justice. The library is small and has not been properly indexed. Law books are piled up and are said to be found everywhere within the building, including in the basement and the attic. The catalogue of official legislative publications (from 1973 to present) is incomplete and has been done manually by another expatriate Portuguese lawyer, Ms. Ana Luisa, said to be sponsored by a Portuguese-Guinean Agreement, since the available typist does not seem to be competent to do the work accurately. There is only one old manual typewriter for the office, located at a small adjacent room, which is an extension of the main hall.

In July 1990, a Portuguese-graduate Guinean lawyer, Mr. Armando Procel was, assigned to function as director of GELD (he has not been formally contracted as such yet), and, in September, a Brazilian-graduate Guinean lawyer, Ms. Vera Monteiro, was assigned to GELD as a legal advisor. The remainder legal advisors are the said expatriate Portuguese

lawyers, Mr. Antonio Gravelho and Ms. Ana Luisa, and a Ghanaian lawyer, Mr. Clement. It has been indicated that the contracts with the Portuguese advisors will expire in December 1990.

A foreign language Guinean translator (French/Portuguese) was hired recently since the GELD often has to provide legal opinions regarding documents written in French, and sometimes in English as well.

[...]

There is no clear-cut division of the work to be done by the advisors, except the expatriate lawyer that does the indexing of legal publications. Otherwise the approach is haphazard, according to whomever is available at the moment. If the office is too busy at any single time, the Minister or the Secretary-of-State may assign someone else outside GELD to provide a legal opinion or to draft a bill.

It is significant to say that most key positions in this Ministry is now occupied by lawyers, which reflects the shift from a "state-of-emergency", where the law was interpreted according to the whims of those in power, to a "state-of-law", where the role of lawyers and the status of legal institutions, such as the Ministry of Justice, the Courts, and the Bar Association become prominent. The new Minister of Justice, Mr. Mario Cabral, although not a lawyer himself, has slowly staffed most technical and advisory positions with attorneys.

[...]

It is also significant to note the predominance of western trained lawyers from Portuguese and Brazilian universities in these positions, rather than lawyers with Socialist background, who seem to occupy secondary administrative roles, rather than decision-making, legal-advisory positions.

[...]

Besides the defficiency in accomodation and in the number of Guinean legal advisors in the GELD, no librarian is available to file and locate legal materials properly. A simple request

to verify whether a bill has been enacted, or for a copy of a specific law, is usually not possible to be met without extensive research and, literally, it may last for days. Simple information, such as data on the number of legal opinions that have been issued in any specific time requires many hours or days to be collected and is often unreliable. In general, information is collected based on the memory or individual knowledge of those who work in the offices, and is often an "approximation" of reality.

Because the GELD has functioned inadequately, it has been unable to compile existing legislation, to draft laws to address the new realities of the country, and to review bills that originate from other ministries. But not much can be expected, and often is not demanded, of public servants who make US\$40 per month to provide legal services. The low-pay scale in Guinea-Bissau and particularly for a lawyer, in the public service, leads to the current situation, whereby most lawyers work for the government but make their living as consultants or attorneys in private practice.

A minimum operational GELD would require at least seven lawyers, who would have specific functions, according to each division they would be assigned: codification, legislation and legal opinion. The work from the divisions would be coordinated by a director. Additionally, a librarian and an assistant librarian with foreign language capability, a secretary and two typists, all of whom should have computer skills must be hired. Office accommodations must be expanded to permit the added staff. Their wages must be significantly improved to permit dedicated and quality work.