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**A NEW LAND LAW FOR GUINEA BISSAU:
NEEDS AND OPPORTUNITIES**

A Report Prepared for USAID/Guinea Bissau

by

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EXECUTIVE SUMMARY

1. The Agricultural Development Context

While agricultural policy in the current period of structural adjustment has recognized the importance of smallholder agriculture in the **tabancas**, there is reason for concern that the actual and potential contributions of this sector to commercial agricultural development are being underestimated.

The **ponta/tabanca** distinction is misleading in that it disguises a broad range of situations within each category, and the categories themselves are not consistently defined in policy discussions.

2. The Current Land Law

The dualism in agricultural structure is paralleled by a legal dualism originating in the colonial era, which has been little altered by legal changes since independence, such as the constitutional prohibition of private ownership of land.

The concession process is lengthy, but it is not clear that is thereby fair to villagers from whose area land is taken for concessions.

Earlier reform proposals have been quite modest in their import, involving little basic change in the system.

3. Fieldwork and Findings

There has been a major explosion in applications for concessions and in the size of concessions granted in recent years. Lenders require a concession as evidence of a secure production opportunity, even if they do not formally use it as collateral, and a correlation between applications for concessions and credit availability raises the question of whether the explosion has not been driven by credit rather than production opportunities.

Land dispute levels within the **tabancas** are low, and customary legal systems appear to be operating well there.

Expansion of the **ponta** sector has caused an alarming growth in **ponta/tabanca** disputes. These disputes have diverse immediate sources, but there are underlying structural reasons for them, the most important of which are state ownership of land and the consequent neglect of the rules and institutions of customary land law.

4. Comparable Experiences and Policy Lessons

a) Concession Systems

The performance of concession ('state leasehold') systems in Africa has been poor. Their large scale has produced major management inefficiencies, and they are commonly misused by national elites to grab land from rural populations, without the ability or intention to increase production.

Concession systems have proved to allocate land less efficiently than would a land market, and attempts to enforce development through contractual requirements have failed due to problems in defining 'development', lack of resources for monitoring, and a lack of political will to terminate concessions. And they have encouraged environmentally damaging clearing of natural forests, as evidence of use.

Such misuse of concession systems is the norm rather than the exception, and has been responsible for broad resentment and sometimes serious conflict in rural areas, often with an ethnic dimension.

b) Customary Tenure Systems

Customary land tenure systems have been shown to evolve fairly readily toward stronger individual rights under the influence of markets and growing population pressure. These tenure systems are in fact developing systems of private property rights and appear to provide adequate security of tenure for agricultural production in most cases.

The results of attempts to replace customary tenure systems broadly with Western forms of property have proved disappointing. They have been costly and difficult to maintain.

Recent tenure policy recommendations by research projects sponsored by the World Bank and the U.S. Agency for International Development have stressed the cost-effectiveness of relying on tenure evolution rather than costly interventions.

Such evolution requires clear recognition of customary rules as the operative law, and provisions of appropriate dispute settlement mechanisms and local land administration institutions, especially for the effective management of resources used as commons.

5. Recommendations

The report recommends:

A constitutional amendment to permit the creation of private property in land.

Review and updating the Civil Code provisions on property rights.

An expansive definition of the property rights of *tabancas*, recognizing communal rights in areas based on custom, even where use is sporadic and light, thereby reducing dramatically the amount of land regarded as available for allocation by the state.

Provision for the evolution of the customary private land rights toward greater security of tenure and most extensive rights for households and individuals.

Clear recognition of customary rules as the controlling law for land in the *tabancas*, and the same constitutional protection for customary property rights as property rights under statute.

A subsequent law to define (or recognize) an institutional basis for land administration at *tabanca* level, including dispute settlement, amendment of customary rules, and management of commons areas.

Continued availability of land for commercial farmers by grants from government or from *tabancas*, but with (a) land distributed in ownership, by public auction; (b) more rigorous requirements for local consent; and (c) maximum sizes along the lines recommended by the Bula Seminar.

Creation of a Land Commission to make grants and grant policy, including in which areas further grants are or are not appropriate. This interministerial commission should either be an independent agency or located administratively in the Ministry of Agriculture.

Studies should be initiated to assess: (1) the relative efficiency of *ponta* and *tabanca* agriculture, and the appropriate future roles for them; (2) processes of change in customary land law, and means of facilitating those processes; and (3) gender issues in both customary and statutory land law.

A NEW LAND LAW FOR GUINEA BISSAU: NEEDS AND OPPORTUNITIES

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1. INTRODUCTION

The purpose of this consultancy has not been to provide a new land law for Guinea Bissau, but to examine the present law in light of the experiences with comparable legal models elsewhere in Africa; to suggest some critical policy considerations which deserve thought in shaping a new law; and to indicate in a very preliminary way some desirable characteristics of such a law.

Chapter 2 reviews the place of *tabanca* and *ponta* agriculture in agricultural strategies, examining the history of the discussion of the relative merits of the two sectors. Chapter 3 examines the land law of Guinea Bissau, approaching the topic from a historical perspective and noting a remarkable continuity in concession law in spite of the shift in the ideological basis of governance at independence. Chapter 4 summarizes the findings of the fieldwork. Chapter 5 reviews the experience of other African countries which have utilized similar legal models. Chapter 6 relates Guinea Bissau's experience to that more general experience, and seeks to draw lessons from it for a new land law. Finally, in Chapter 7, recommendations are summarized.

There are two strands which run through this report and should be noted here because they involve assumptions different from those underlying much of the other legal work done on land policy and tenure issues in Guinea Bissau. They concern, first, a devaluation of customary laws encountered in Guinea Bissau. Those laws are often recognized as the local practices, with the facts of occupancy and use they have created accepted, but rarely as alternative systems of law. There is, we believe, a need for a frank recognition that reality in Guinea Bissau involves many overlapping social spheres, one generated by the state with its law, others generated by ethnic groups with their laws, all of which have legitimate claims to moral authority.

The second strand concerns attitudes about legal modernity. 'Modernity' is not a very meaningful term. It is misleading if taken to suggest that laws from more 'modern' countries can simply be adopted in Bissau or that a state law (however badly conceived in a specific case) is better, because it is more 'modern,' than customary rules. It is a basic axiom of legal sociology that the same set of rules, applied in different circumstances, will produce very different results. The real question is rather

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whether a law fits the circumstances to which it is applied, the particular circumstances of Guinea Bissau.

2. PONTA AND TABANCA IN AGRICULTURAL DEVELOPMENT STRATEGY

Tenure of agricultural land must be evaluated in terms of 'fit' with agricultural development strategy, and so we begin with a review of the rules assigned to **ponta** and **tabanca** agriculture, and how these have evolved.

2.1 Agriculture in the Economy

Agriculture in Guinea Bissau still accounts for more than 50% of GDP and some 90% of employment. Women dominate the rural labor force, and are thus central to both the national and domestic economies. Rice is the principal food crop, with some 56,000 hectares planted to various wet and dry paddy varieties (the former account for 63% of this area); another 65,000 hectares are planted to groundnuts, cereals and root crops. Cashew nuts are the main export crop. Cashew area has expanded to an estimated 10-15,000 hectares in response to domestic policies and world prices in the mid-1980s. Other important export crops include oil palm products (200,000 hectares), cotton, and groundnuts.

While timber and fisheries are also important export earners, it is clear that agriculture is central to future national development. Moreover, agriculture is still heavily dominated by some 86,000 small, **tabanca**-based farms, that produce more than 90% of total production from an average area cultivated of just over 3.5 ha per farm. This compares with an estimated total of 200-300 productive **pontas**, cultivating no more than 5000 hectares (MDRA/IBRD 1991:3-4).

Although a large proportion of **tabanca** production is consumed on the farm, this 'subsistence production' can also be seen as 'unmarketed' wage goods, which underpin **tabanca** production of small surpluses of specific crops. When collected together through a pyramidal network of intermediaries, these accumulated surpluses then represent the major part of national marketed food and export production.

2.2 Colonial Agricultural Antecedents

The historical evolution of export agriculture in Guinea Bissau is clearly reflected in today's production and marketing systems. The associated concepts and terminology also have their roots in this history, which is reflected in prevailing attitudes about **ponta** and **tabanca** farms.

Early plantation agriculture began on the Bijagos Islands, producing palm products. Some plantations were very large. The Companhia Estrela de Farim, for example, had a concession of 25,000 hectares in Oio Region. Newer concessions, however, were less directly involved in production, and were used to establish monopoly buying rights over the producers, large and small, in their respective regions.

Thus most production came from hundreds of small villages (*tabancas*) across the country (Karibe Mendy 1990:23), which had to sell to the concession holder in their area if they were to secure cash for taxes and essential purchases.

The term *ponta* predates the large-scale, mainly European plantations and concessions, and derives from earlier Cape Verdian settlers who arrived on the coast in the latter half of the 18th Century. From the Portuguese word for 'point' or 'tip', implying something quite small or contained, '*ponta*' came to be used to describe the numerous small farms set up by the Cape Verdians along the Cacheu or Farim Rivers (Karibe Mendy 1990:40).

By the 1900s, *pontas* had extended to other regions, producing mostly sugarcane for alcohol (*aguardente*, or *cana*). They traded their *cana* and other consumer goods with local farmers, in exchange for crops and forest products. Credit offered ahead of the harvest also allowed them to extract small surpluses of export crops from the *tabancas*. Significantly, *ponteiros* were barred by the colonial state from directly importing and exporting, and came instead to occupy a niche between the large concessions and the villages. The hundreds of small surpluses accumulated by *pontas* and other traders were sold on through licensed export houses and concession holders, to form the basis of the surplus extracted by the colonial state.

The plantations went into decline during the 1930s and 1940s, hit by the effects of the Recession and World War II. Export crop production consequently 'became totally dependent upon the '*gentios*'¹ who, now more than ever, were obliged to divide their productive activity between subsistence and export crop production' (Karibe Mendy 1990:41).

After the World War, small family farmers remained the production backbone of both the subsistence and export economy. The 1953 Agricultural Census, carried out under the direction of Amílcar Cabral, reinforces the point. Although covering only 'native agriculture', the Census gave a total of 85,478 family farms (*explorações agrícolas*) farming a total of 482,177 hectares (5.6 ha per family) (Cabral 1956:50). Cabral (1956:42) describes groundnuts as the 'principal, and effectively the only export crop', occupying nearly 22% of total area cultivated and becoming 'increasingly integrated into the agriculture of Guineans'.

These *tabanca* farms continued to feed small surpluses into national and international markets through the intermediary traders and *ponteiros*, who in turn dealt with the more established *pontas* and the large trading houses. The post-war period thus saw the tightening of the monopoly hold of a small number of large firms over the accumulation and subsequent exportation of village-produced surpluses. The *tabancas* also engaged in clandestine marketing of crops across land frontiers, which also characterizes the years of State-monopolized marketing immediately after Independence. Thus even within a risk-minimizing farming strategy, small farmers sought to maximize income by avoiding official channels in search of better prices.

¹ A Portuguese colonial term for the indigenous people.

2.3 Post-independence Agricultural Policy: From Planning to Markets

Post-independence rhetoric has always promoted the idea of agriculture leading the way towards national development. During the early years after Independence, however, the rural sector received little attention in real terms. No new investment was made to repair or improve rural infrastructure, and State controlled prices and marketing systems gave farmers little incentive to invest or to raise their production.

Since 1984, the Government of Guinea Bissau has been engaged in a program of economic liberalization, promoted through successive Structural Adjustment Credits. Especially since 1987, there have been profound social and economic changes in Guinea Bissau. The State has withdrawn from its monopoly role in marketing and distribution, prices have been deregulated and subsidies removed, and new exchange rate policy has narrowed the gap between official and parallel rates.

As part of this, an agricultural sector review was carried out in 1986 (GOGB 1986). This sector review has been important for defining subsequent policy up to the present day. **Tabancas** are recognized as 'the most important economically and sociologically' and 'the principal object of Government concern' (1986:46). The State should in turn supply a range of technical and support services, including defining access to credit and giving special emphasis to new associations and other forms of collective activity. **Tabanca** farm access to credit is limited to security through forms of collective production or service activities. Thus the State is required to 'establish a legal and juridical status for [associations] which will allow them to realize profits, engage in commercial activities and offer services, obtain credit, and secure common capital goods [bens], conferring on them an effective ownership of the products of their collective activities' (1986:50, emphasis added).

For **ponteiros**, on the other hand, 'the problem of ownership of the soil and farm structures should be examined'. This is in addition to their receiving a range of support services. The review recognizes that 'it is necessary to establish preferred areas of development for setting up [**pontas**]', although care should be taken to avoid infringing upon the rights of rural populations already there' (1986:52). The review also discusses the diversity of **ponteiros**, and identifies two distinct 'traditional' and 'newcomer' types. These can both be either family-farm enterprises (generally small size), or enterprises of small to medium size, occasionally large, 'where the principal activity of the owner is outside of the agricultural sector' (1986:51). The greater 'technical capacity and more intense system of production' of **ponteiros** is assumed rather than established analytically. Yet 'new **ponteiros**', who now far outnumber their 'traditional' colleagues, are described as 'War Veterans who the Government wants to help install in the agricultural sector, as well as public sector employees in the process of "relocation" [**reconversão**]'² (1986:52). Why soldiers and ex-civil servants should have a higher technical capacity than **tabanca** farmers is not explained.

'Particular attention' is paid to 'development possibilities offered by foreign investment. These [externally-funded farms] broadly resemble the **ponteiros**: large areas, application of "modern" technology, important use of wage labor, and endowed with "savoir faire"' (1986:53). In the absence of specific land law provisions covering this situation, such firms are regulated by the provisions of the law governing foreign investment. Meanwhile, the Government will actively support these

² This is assumed to refer to government employees laid off as part of the program to reduce public expenditure.

newcomers, and help 'identify opportunities and, with the agreement of interested investors, carry out preliminary studies' (1986:54). As with the **ponteiros**, measures should be taken to protect 'the land rights of the surrounding populations and establish rules for the preservation of natural resources' (1986:53).

Actual developments in agriculture over the following years reveal how economic and social forces operating in a newly deregulated environment have exploited this policy framework. Thus one of the most notable features of rural development since 1986 is the explosion of new **pontas** controlled by absentee, urban-based 'owners', compared with the relative lack of effective assistance to the **tabancas** beyond specific donor-assisted projects.

Ponta expansion is closely tied to the availability of new production credits since 1986, and thus the **ponteiros** have also had the lion's share of investment support going to the sector. It is also clear that new **ponteiros** select the best land, near water sources or within new technical assistance or infrastructure project 'catchment areas'. These areas, naturally enough, are also those where existing population is likely to be found. Detailed field studies in such areas not only reveal that scant attention has been paid to avoiding 'infringing upon the rights of rural populations already there', but also show that most new **ponteiros** have close links to the Government or even hold high public office themselves (MAS 1991, Nassum 1991).

Agricultural production responded positively to the new economic incentives, with notable increases in most crops. Rice production rose from 85,000 tons in 1976 to 112,000 tons in 1989, and cashew and palm product exports rose by 42% and 250%, respectively, over the period 1985-1989 (MDRA/IBRD 1991:5-6). It is by no means certain that the massive outflow of funds to **pontas** has supported these increases. Improved rainfall explains part of the increase, but in any case the 'ponta explosion' since 1986 does not allow sufficient time for new commercial ventures to reach full production. Moreover, it is doubtful if many were able, or even intended, to implement their often inappropriate proposals (MAS 1991). The response of **tabanca** farms to the new market and price environment may account for most of this improved performance.

The most recent sector strategy paper presents a series of measures with clear roots in the 1986 Review, but which seek to incorporate post-1986 developments (MDRA/IBRD 1991). The GOGB still stresses the importance of agriculture for national development. The overall approach is to create 'an enabling socioeconomic environment' based on economic incentives and a stable policy environment. These include measures to increase economic incentives for farmers, review land tenure policy, encourage conservation, improve infrastructure and provide efficient farmer support services.

As in 1986, the Ministry of Rural Development and Agriculture (MDRA) will define strategy and policies, set targets and program resource allocation to provide adequate technical support, and look after certain specialist activities such as training and research. Meanwhile, the 1986 concern to support new **pontas** and foreign investors has evolved into a plan to create a distinct institutional base for commercial agriculture, in the form of an Agricultural Management Advisory Agency (AMAA). The AMAA will be autonomous and 'self-supporting through the sale of its services', which closely resemble those normally provided by a conventional state agricultural ministry: 'technical assistance and advice...to medium-sized farms' (1991:26).

This division between public responsibility and private practice is reflected throughout the document, with the **ponta-tabanca** distinction clearly determining who is to benefit from the various measures

proposed. While **tabanca** farmers are described in some places as 'smallholders' (**pequenos proprietarios**), it is clear that they are not considered to be part of the 'private sector'. Membership of this latter group, and thus access to AMAA support, is restricted to **ponteiros**, or 'commercial farmers'.

The strategy paper does recognize that small family farms will account for the bulk of agricultural growth 'for some time to come', and recommends that the public sector should concentrate 'on providing support to smallholders [**tabanca** farms]', in order to achieve these objectives (1991:23). Yet it is indicative of the overall tone of the strategy document that this statement is immediately followed by a call not to neglect the commercial farmers.

A closer look at the key areas of extension, credit, and land tenure, indicates that while **tabanca** farms are accepted as important over the short-term, they are likely to be neglected over the long-term as real resources target the more advantageously placed 'private sector' farms. For example, extension and technical support are to be split into separate extension structures for 'smallholders' and 'commercial agriculture'. The former are to be looked after by a new Extension Division within the MDRA; the latter will benefit from the technical support of the new AMAA.

The apparent autonomy of the AMAA gives the impression that the bulk of Government resources will be free to focus on **tabanca** farms. However, 'specialized technical assistance' to the AMAA (usually the most expensive input) will be financially supported by the Government (1991:26). And the AMAA will also 'liaise with the MDRA on topics of particular interest, such as research programs, extension operations, clarification of land tenure issues, incentives for production, credit for mechanization, and technical assistance and management training.' (1991:36). **Ponteiros** are also expected to 'benefit from the services of the AMAA [through] direct access to the research stations where, catering to the specific needs of the **ponteiros**, some topics will be examined and tested and where specific training and services will be provided against payment...Technical assistance will be provided by [AMAA specialists] or by private consulting firms (1991:32, emphasis added).

This approach does accord with cost-recovery principles, and **ponteiros** should indeed pay for the services they use. However, in a resource poor environment, it is obvious that those who can pay will receive preferential treatment from state bodies and officials who are also charged with supporting the proposed AMAA. The reality of 'liaison' will also inevitably involve limited state resources being used to support commercial agriculture, with little prospect of **tabanca** farms receiving more than token support along the way. And resources are indeed limited. Even in the context of SAP limits to public spending, public sector data still belie the idea that a commitment to rural development is really a priority, if by this is meant improving economic and social conditions for the majority of the population. In the 1990 National Government Budget, agriculture and fisheries received only 3% of the total. Eighty percent of this is for staff salaries, with the equivalent of just US\$400 for investment (MDRA/IBRD 1991:10).

This might be overlooked if sufficient donor funds were targeted on smallholders. Table One shows the case of planned extension support under the mainly donor-funded Public Investment Plan (PIP), for the period 1991-2000.

TABLE ONE

Public Investment Allocated to Pontas and Tabancas for Extension, and the Relative Needs of Each Group: 1991-2000

<u>NUMBER</u>	<u>AREA CULTIVATED</u> (N)	<u>RESOURCES</u> (hectares)	(US\$'000)
Small farms	86,000	315,000	1500
Commercial farms	300	5,000	500

Source: MDRA/IBRD 1991

A similar bias appears in discussions of rural credit. These stress the need for a new institution 'providing medium and long-term loans to the private sector', which again clearly means just the *ponteiros*. Meanwhile, loan collateral legislation is to be modified and 'the land tenure system reviewed' to enable the banking system to enforce loan repayment. It is assumed from the start that the new institution will not be able to cater to the needs of 'the smaller farmers'. As in 1986, assistance to this group will instead involve collective solutions, such as rural savings and credit societies. And what credit is available to smallholders will be channelled through 'small initiatives of the rural communities, and will create incentives to form rural commercial associations' (MDRA/IBRD 1991:33).

Thus *tabancas*, which are already starved of support, will have to generate their own investment resources through savings and collective action, while *ponteiros*, who have already reaped a massive bonanza of discounted and canceled debts from the 1986 credit boom, will again enjoy preferential access to externally generated credit resources.

The *ponta/tabanca* dualism in Guinea Bissau's agriculture has been in part created and is sustained by an equally dualistic regime of land law.

3. THE CURRENT LAND LAW

The dual system of land tenure originated in the colonial period but has survived remarkably intact into the present.

3.1 The Colonial Legal Inheritance

The basic structure of Guinea Bissau's national land law owes much to the law of the colonial period, and some important colonial era legislation remains in force. It is thus more than a matter of historical concern, though it can be conveniently approached in a chronological manner. Colonialism created

the fundamental dualism between 'governmental' land law (the law of concessions) and the customary land law of the indigenous peoples. The law of concessions is examined first, then the fate of the customary systems.

The early colonial experience, from the 'discovery' period until the mid-nineteenth century, was characterized by mercantilist policies which required few interventions regarding land beyond the establishment of secure access to trading points. By 1856, however, a modest colonization was underway in Portugal's African colonies, and Portugal enacted its first law to regulate land concessions. It embodied the principle that land belonged to the colonial state and that when land was allocated to settlers, it was not to be given in full ownership but in concessions subject to conditions. Concessions had to be developed within a five-year period, and could be retaken by the state for reasons of public utility without compensation. Transactions in concessions were permitted. In 1869 the Portuguese Civil Code was brought into force in all of Portugal's colonies, which provided a basic set of real property rules.

The colonial state could as owner of all the land assign it to private persons through emphyteusis, *sesmarias*, sales, donations, leases, rights of occupancy or other means. Little by little, law enacted in the 'province' of Guinea Bissau (*portarias provinciais*) adjusted the legal regime to local needs and conditions. In 1917 a Decree 3641 (11/29/17) provided a statute on concessions specifically for Guinea Bissau. While there were numerous supplementary enactments over the years, this remained the basic statute until 1961, during the independence struggle, when it was superseded by Decree No. 43 894 (9/6/61), a law to regulate concessions of land in all of Portugal's colonies. The new statute attempted to give a more human face to colonial land policy, but certain basic elements remained constant: state ownership of all land, and state grants of land on conditional concessions rather than in full ownership.

Land rights of the indigenous peoples initially received protection, at least in law, under 1869 Civil Code. The Portuguese Code of Civil Procedure, also applied to Guinea, protected indigenous rights by not allowing Africans to sell, charge, mortgage or lease their lands. In 1912, the policy of protecting indigenous land rights was confirmed in a Civil District Regulation (*Regulamento das Circunscrições Civas*) for Angola and Guinea. In 1919, a Guinea Administrative Rule 597 (12/3/19) provided that land occupied by native people could not be subject to concessions. Those seeking concessions were directed to obtain the agreement of the local people, to be certified by the surveyor at the time of the demarcation of the property. Where expropriation was necessary, it was required that the natives be compensated for their improvements and be permitted to move to land of equal elsewhere. The permission of the governor was required.

In 1938, a new Guinea Administrative Rule 27 (2/8/38) was enacted to permit definition of the areas as reserved areas for indigenous people, and emphasized that their land use should be governed by their customary laws. It confirmed that land expropriation was allowable only in cases of public utility, and not simply because the land was desired by a potential concessionaire.

The 1961 legislation (Decree No. 49 894), which largely replaced the earlier concession legislation was an attempt to provide a comprehensive land statute. It provided for the classification of land into three categories: Class 1 land, urban and peri-urban land under the control of Municipal Councils; Class 2 land, land occupied by natives, its use governed by their customs; and Class 3 land, all other land. It is this Class 3 land which is theoretically available for concessions in the rural areas. There has not however been any systematic, comprehensive assignment of land to these classes. To which class a particular piece of land belongs is determined on a case by case basis when the issue arises.

The decree also provided for a system of registration of concessions and other land rights, with a Land Registry (Conservatorio de Registra Predial) in the Ministry of Justice. It shortened some concession periods, and imposed stricter rules requiring that concessionaires make use of the land they have been granted. The law retained the dualism between concessions and customary legal rights and continued several key concession policies: ownership of all land by the state; grants of land on rights less than ownership; and grants conditional upon development and use. New encouragement was provided for Africans to register their customary holdings and thereby convert them to holdings under national law. The law confirmed rights of possession based on indigenous tenure systems.

These rules if examined by themselves appear to suggest a great solicitude with respect to Africans' property rights. In fact they were subject to manipulation and abuse in the situation of unequal power relationship between the colonial government, settlers and Africans.

The fundamental legal basis for the abuse lay in:

- 1) the concept that all land was owned by the state, and available for allocation except to the extent to which the colonial state restrained itself by law and regulation; and
- 2) the restrictive definition of natives' protected use rights to include cultivated and residential land, but not areas which were used for hunting and gathering or which had earlier been utilized and would eventually be needed again under shifting cultivation.

3.2 Post-independence Legislation

The Independence Constitution (12/24/73) did not introduce a new conception of land law to Guinea Bissau. Immediately following independence, a legal vacuum was avoided by the National Assembly legislating in Law No. 1 of 1973 (12/4/73) to keep colonial legislation in force until it was specifically changed. This included the 1961 Land Decree. While there were no new rules on land expropriation, some land was taken over for redistribution in both rural and urban areas.

In 1984, however, a new constitution confirmed the socialist orientation of land policy. Article 12 of the new constitution provided for three types of property:

12. (1) In the Republic of Guinea Bissau, the following forms of property are recognized:

- (a) The property of the State, the common patrimony of the whole people;
- (b) Cooperative property which, organized on the basis of free consent, affects agricultural exploitation, the production of consumption items, artisanship and other activities to be fixed by law;
- (c) Private property, which applies to things other than those of the State.

(2) The properties of the State are: the soil, the sub-soil, waters, mineral resources, principal sources of energy, forest resources, the means of industrial production, the

means of information and communication, the banks, the insurance companies, infrastructure and the basic means of transport.

Subsequent changes have altered only the reference to infrastructure (Constitutional Law No. 1 of 1991). Article 12 is commonly described as a nationalization, but it seems for the most part to simply have confirmed the position under colonial law. The one significant change was that concessionaires and other landholders lost the right to exploit underground resources. The implications of the new constitutional provision were laid out in Law No. 4 of 1975 (5/5/75):

1. All the land of the national territory, be it urban, rural or urbanizing, is part of the public domain of the State and cannot be reduced to private property.
2. Without prejudice to the domanial rights of the State over land or attachments, private rights over buildings, crops and any improvements on the lands are confirmed.
3. The buildings, crops and other improvements referred to in the previous section must indicate a clear occupation and effective utilization of the land in order to produce the prescribed legal effect.
4. The State Council of Commissars will provide by decree for the modalities for concessions of land. Legislation which embodies the principles of this fundamental law will be enacted.

It is not entirely clear how these provisions were expected to affect existing rights of either concessionaires or landholders in the *tabancas*. They could be read to abrogate all such rights in land, allowing private rights only in improvements. But subsequent government behavior and the continuance in effect of the 1961 land law suggests that this is not the intention. Concessionaires and landholders in the *tabancas* would appear to enjoy roughly the same rights as they did at the end of the colonial period (with the exception of sub-soil resources).

Today, then, applicants who assert the will to develop land can obtain up to 2,500 ha in a single concession, and the amount can be revised upward on application, once the initial concession is developed. Anyone can have more than one concession provided that they have only one application in the process at one time.

3.3 The Concession Process

For land outside municipal boundaries, the process of applying for a concession begins with the identification of the land for which application is to be made. This is the responsibility of the applicant, not the government, though the applicant may act on the informal advice of officials in locating a piece of land. A site plan must be prepared, and a declaration obtained from the local State Committee that the land does not belong to anyone and there are no reasons for the concession not to be granted. These are then submitted to the Directorate of Topography and Cadastre of the Ministry of Public Works with a formal request to the Ministry for the concession and, if the claim is for an area of over 20 hectares, a work plan detailing what is to be done on the land.

A complex process of review ensues. The Directorate for Housing and Urbanism reviews the application to ensure that the land is outside its sphere, and then it is sent to the Cadastral Unit to examine the site plan, to avoid overlapping concessions, concentration of holdings along main roads, and blocking of road access to other holdings. If no problem emerges, an **edital**, a formal notice that a claim is being initiated, is issued and distributed for review at regional and sector level. If no objection is lodged, a license of occupation is issued by Public Works and the applicant can begin development of the land. He or she has three to five years to develop it, after which an inspection (**visitoria**) is carried out. If it is satisfactory, a definitive demarcation of the boundaries is made and a title deed (**alvara**) issued and sent to the Land Registry for registration. A fuller description of these processes and the costs involved are provided in Annex I.

As indicated later in this report [see 4.6 (vii)], the key issue here is that of the adequacy of the consultation with local people. The consulting of the **tabanca** state committee may not be adequate, because these are sometime not representative of those whom the local community considers to have land allocation powers. The local people may not understand that by granting permission for the applicant to use the land they are opening the way for him or her to obtain a concession, moving the land from under the administration of the community to direct administration by the State. The possibilities for intimidation are very real; to the local people, the applicant seems to have government backing for his claim. Finally, the lack of written records of such consent often make it difficult to prove who gave the consent and for what area the consent was given.

An earlier USAID/Guinea Bissau report (Lifton 1991) has noted the problems involved in identifying the area covered by the consent and application:

...the process to obtain a concession is lengthy and it may take years before a grant is final. During this time the land may not be officially used by the villagers who may have had an original claim to the parcel. Many times, though, the villagers are ignorant of the concession process; and continue to use the land until they are notified. The **ponteiro** may utilize this land and often the surrounding land as well, since boundaries are not marked.

At the final demarcation, any land used by the **ponteiro** may be included in the concession. If the extra land is one-fifth of the original area he pays a fine for pushing his boundaries. If it is larger than that, he pays a fine and is eligible to start a new concession process.

If at the inspection it is found that the land has not been fully developed, an extension can be obtained, but if the land has then still not been developed a title can be denied. In fact this is unusual; often a building or some other facility on the property or the clearing and use of a very small portion of the property will be accepted as a sufficient basis for issuance of a title.

3.4 An Earlier Reform Proposal

The 1975 decree stated the intention of government to promulgate a new land law, but this has not yet been accomplished. A draft bill was prepared, but now appears moot. It is summarized in Annex 2 of this report. Very briefly, it retained most of the basic assumptions of earlier legislation (state ownership of land and a concession system). It however imposed a 30 ha. maximum, though the Council of Ministers could grant larger concessions to cooperatives or national partnerships and

corporations. Concessions were to be limited to 20 to 50 years, with the possibility of renewal for an equal period. Use was to be spelled out in a license and the concession could be revoked if the use did not comply with those specifications or if the land was not developed or used for three consecutive years. Rights based in custom were to be recognized only if they were registered within five years after the enactment of the law, a provision which would almost certainly have extinguished most customary titles for lack of registration. The draft bill reflected a command economy approach, and as economic liberalization proceeded, government appreciated that it was no longer appropriate.

3.5 The Current Land Reform Initiative

In July 1990 the National Assembly appointed a committee to review the land-use laws and propose a new Bill. The then Minister of Justice, Mr. Mario Cabral, was appointed chairman of the committee. He in turn formed a technical committee to draft a land-use bill, and nominated Mr. Mamadu Salin Djalo, his legal advisor in the Ministry of Justice, to coordinate the work. The committee has worked in an atmosphere of considerable uncertainty, for instance, as to whether a constitutional revision also pending would permit private ownership of land.

An important input into this process has been a Land Law Seminar held in Bula, Oio Province, under the auspices of the commission in July 1991. The Bula Seminar, with particular reference to the issue of conflicts as between *tabanca* and *ponteiro* agriculture, recommended (Tanner 1991:18) that:

- 1) 'Modern law' should take precedence over 'customary law';
- 2) 'Reservations' (*zonas de reserva*) should be created, where '*tabanca* populations can produce what they need for subsistence';
- 3) Both State and private entities should be made to comply with existing laws;
- 4) Concessions which remain unused or improperly used within the pre-determined period of time should be returned to the state;
- 5) The relevant provisions of the 1961 Law should be used wherever possible;
- 6) Land occupation taxes should be updated and increased to raise State revenues;
- 7) Boundary markers must be renewed and maintained;
- 8) The concession of large areas for planting species prejudicial to the environment should be reassessed;
- 9) Mechanisms should be created to allow rural populations to legalize their land and defend their interests;
- 10) Concessions should prove their technical and financial capacity to carry out a viable plan, irrespective of the area to be conceded;
- 11) New land concessions should be frozen until the new law is approved;
- 12) An upper limit should be set for concessions;
- 13) The State should undertake a study to see how agricultural productions and other items of property can be insured; and
- 14) Guinea Bissau should be surveyed to establish different land use and conservation zones.

Examining the recommendations for USAID/Guinea Bissau, Tanner (1991:20) concludes that they do not go nearly far enough. Again, the basic state ownership/concessions model would be unchanged. And the approach taken to *tabancas* and their customary rules suggests that the participants still

identified **tabanca** agriculture with subsistence production, failed to appreciate its centrality to commercialization, and saw little future for customary systems of land tenure.

Since the visit by the authors of this report in August 1991, a draft law is reported to have been completed and discussed, but they have not seen it.

4. FIELDWORK AND FINDINGS

4.1 Fieldwork Program

The previous chapters raise the following questions for field investigation:

- a) what is the extent of **ponteiro** penetration of the rural sector, and what are the past and present trends?
- b) does the **tabanca-ponta** distinction hide a range of farm types, and if so, can a new classification promote more harmonious rural relations?
- c) customary or '**tabanca law**': is it effective, what main forms does it take, and should it be kept?
- d) 'unoccupied land': is this a myth or reality?
- e) what are the types and sources of conflict: why, and for whom, is land tenure insecure?

These questions were approached through fieldwork, whose results are summarized here but fully reported elsewhere (Tanner 1991).

The fieldwork adopted a 'jigsaw approach', whereby selected interviews backed up by secondary data and other information progressively fill in the broader picture. In the process, new items are added and cross-checked between different information sources to confirm the accuracy of the conclusions being drawn. Over 30 **tabancas** and 15 **pontas** were visited. Impromptu meetings with individual farmers, traders, cattle herders and other individuals helped to fill in the picture. Interviews were conducted in Crioulo. Most meetings were conducted over several hours. After establishing the purpose of the visit, villagers were surprisingly eager to discuss the land issue. This eagerness alone reveals the concern felt in the **tabancas** about the loss of land and livelihood, and once barriers were down, very frank opinions were expressed on several occasions. At one **tabanca** meeting, over 90 village leaders (**homens grandes**) were present.

4.2 Ponteiros and Concessions

a) Types of Ponteiro

The casual observer of a discussion on agrarian sector problems in Guinea Bissau today would be forgiven for thinking that a **ponta** is simply a farm which is not part of a **tabanca**. Yet there is still much debate over what exactly a **ponta** is, and the lack of consensus over this issue prevents an effective analysis of agrarian socioeconomic structure in Guinea Bissau.

Key elements, given different weights in different definitions, are residency, size, technology, management, family origin, and possession or non-possession of a concession. Field visits quickly reveal that there are many different types of concessions all over the country, which in many cases bridge the prevailing **tabanca-ponta** distinction. The following is (an incomplete) list of the variety encountered:

- large, family-run, estates going back several generations, maybe with acquired local links through marriage;
- large corporate estates run by resident managers;
- large Church estates run at a profit to generate funds for hospitals and other charitable work;
- large estates run by NGOs as model farms;
- large unused concessions owned by urban elites;
- large timber extraction concessions;
- small concessions intensively farmed by a **tabanca** family using modern inputs when possible;
- small concessions intensively farmed by resident non-**tabanca** families without modern inputs;
- small concessions with non-resident owners, in various states of use/non-use;
- small well-farmed concessions held by extension workers, to provide extra or alternative income;
- medium-size concessions intensively farmed by a **tabanca** family with modern inputs if possible;
- medium-size concessions with resident or non-resident owners, maybe with local links;
- etc, etc...

b) Numbers and Trends

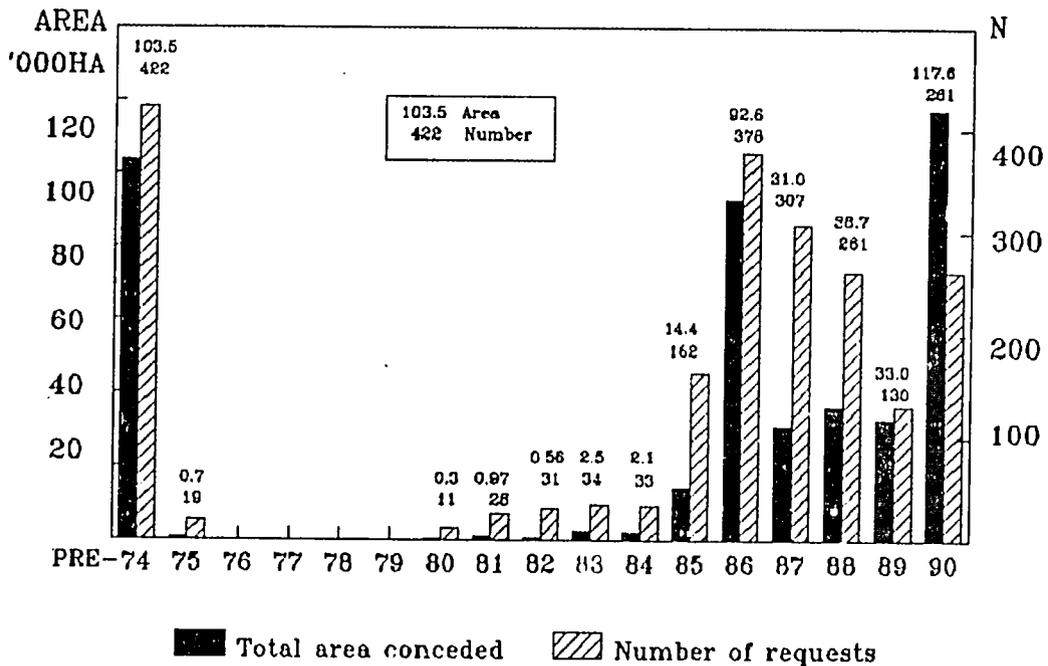
There is no clear consensus on the meaning of **ponta**, and so studies with different definitions produce quite different pictures. The MDRA definition includes criteria such as use of non-family labor, advanced production techniques such as tractors, and having an official concession of over 10 hectares (MDRA/IBRD 1991:4). On this basis, they estimate a total of between 200-300, cultivating a maximum of 5000 hectares.

There are also surveys of data on concessions. These simply count the number and area of registered concessions, productive or otherwise, and irrespective of criteria such as use of hired labor and machinery. From the point of view of assessing the access to and control over land, this is a useful approach which can then be backed up by more qualitative fieldwork data on actual land use and management. A concession survey by the Cadastral Service itself (Alves & Napoco 1991), covers the

entire period from the first concessions in the 1870s right up to 1990. This survey excludes all annulled concessions, and their data include only concessions that are valid and in force. However, the Cadastral Service has not always been notified of expropriations (for example, by the Bissau Camara Municipal after independence), and though relatively few in number, these remain hidden in the figures. It should also be noted that in the pre-1974 figures, there are many concessions that are still legally valid, but which might have been abandoned or are simply lying unused. The Cadastral Service is aware of the need to visit and assess these pre-1974 concessions, but simply does not have the resources to do so. In all other respects, the Alves & Napoco data are as reliable as can be expected, and are perhaps the best indicator of concession penetration of the rural sector in recent years. These data are presented in Figure One, which clearly shows the rapid expansion of concessions since 1986 and the early days of the economic liberalization.

FIGURE ONE

AGRICULTURAL CONCESSIONS: NUMBER REQUESTED AND AREA GRANTED ANNUALLY, PRE-1974 TO 1990



Source: Alves & Napoco 1991

The number of concessions granted in the entire pre-independence period (422) is very low when compared with the total granted subsequently (1653). And of these later concessions, 1337 (81%) have been granted since 1986. Similarly with area: 103,500 ha were granted before 1974, against a total of 332,430 ha since 1974; and of the latter, 310,900 ha (94%) have been granted since 1986³.

This trend shows no real signs of abating. The sharp rise in area conceded in 1990 is attributed by some to two factors. Firstly, this year saw the appearance of more new *sociedades*, or joint shareholding enterprises with several partners. Current law gives the top limit for new concessions as 2,500 ha. In *sociedades*, each partner is able to apply for land at this ceiling, with the result that, for example, a 10 partner enterprise might theoretically gain access to 25,000 ha.

This is probably also related to the second factor, credit. Some *ponteiros* who have taken out large concessions are now unable to secure new loans to carry on their often quite unrealistic plans. The rapid expansion of concessions has coincided with the availability of investment credits through the credit arm (DESECO) of the National Bank (BNGB). While concessions have not served as collateral for loans, a certificate of concession and related documents have been required as proof of access to a secure production opportunity. (Guarantors have been utilized in lieu of collateral.) Recently, government has decided to discount the interest rate on these loans, encouraging borrowing on a speculative basis. This, plus new infrastructural and other projects in specific areas, appear to have fueled the rise in concession requests and the large areas conceded over 1990. Insider information on credit policies and projects has enabled a small number of people to obtain preferential access to land (Tanner 1991:28).

4.3 Tabanca Agriculture and Indigenous Tenure Systems

a) Tabanca Production Systems

The *tabanca* farm system represents an integrated strategy using land on three basic levels: *bolanha* flood plains and river valleys (rice); river banks and drying out river bottom land (fruits, roots and tubers), and upland, rain-fed areas (cereals, groundnuts, forest products). Access to forests, for hunting and other products such as honey and certain tree crops, is also an important part of the year-round subsistence strategy of the *tabanca*. For many communities, fishing is a key activity, both for household consumption and for sale.⁴

Livestock, especially cattle, are important for all ethnic groups, but their significance and subsequent use varies. For all groups, grazing systems depend on two factors. Firstly, access to good pasture during the dry season is essential, which for the Fula especially means lengthy seasonal migrations of herds to traditional grazing areas in other regions (Sambu 1988). Secondly, herding is often the responsibility of particularly age groups, usually young boys and adolescents. Having sufficient labor

³ Figures quoted by Oliveira (1991) show over 1.6 million hectares, or 45% of the national land area, held as concessions. It appears, however, that although the source used by Oliveira also reviewed Cadastral registers, 1726 large concessions annulled before Independence were included.

⁴ See IUCN (1990a,b), for a detailed account of the various production systems of ethnic groups on the coastal regions; and Eyzaguirre (1987) for Fula and Mandinga groups in the East.

for this activity is an important aspect of maintaining an efficient and controlled migration and grazing system.

The production system is intimately bound up with the social organization of the *tabanca*. In Guinea Bissau, the term *moranca* is most often used to distinguish between the residential areas of the different extended families or lineages in each *tabanca*. Within these, the basic organizational unit is the *fogão*, which approximates to a nuclear family of two or more generations sharing the same cooking place. While individual *fogão* members might make up separate production units in their own right, labor and food exchanges are common at all levels. Most groups also have some form of collective production, either on a communal *fogão* or *moranca* rice field, or on fields cultivated by members of age-sets or youth groups. These aspects of social organization clearly affect production decisions taken at the level of each nuclear family, and act as a safety net should production not be sufficient to meet individual household needs at certain times of the year.

The principal constraint on area farmed is labor, although in many areas of the country all productive land has long ago been allocated. Where 'free' land is still available, the bigger the *fogão* household unit, the larger is the area farmed. In areas where land is scarce, fragmentation of inherited parental units is already evident. Thus the household developmental cycle--where the family grows older, splits as children marry to create new units which in turn grow larger--is an important determining factor of both area farmed, and changes in land allocation through time. The labor force comprises the older children and adults (especially women) of the immediate nuclear family unit; plus the numbers of workers it can rely on from elsewhere in the *moranca* at critical periods. Women are the most important element of the work force, being responsible for practically all activities with the exception of land clearance and soil preparation. Thus the numbers of wives the male household head has, and the numbers of children and younger wives brought in as sons marry, are key aspects of household wealth and productive capacity. All ethnic groups are polygamous.

b) *Tabanca* Land Access and Tenure Systems⁵

The non-agricultural components do impinge on the land conflict issue in various ways which are discussed below. Most attention, however, naturally focuses on access to productive land and water resources.

The system needs land of all types for distribution as a *fogão* expands. It is therefore extremely vulnerable to situations where access to land suddenly becomes constrained. This is particularly so for certain areas such as *bolanhas*, and several instances of this were encountered during field visits. It is also the case where forest areas are taken over by concessions, reducing the overall area available and denying important extraction and cattle grazing rights. Each *fogão* is subject to the authority of the *fogão* head, who allocates land of each type to his wives and unmarried sons, each of whom might have their own fields and degree of control over at least a part of what is produced. Behind the *fogão* head stands the wider land allocation system and social organization of the *tabanca* and, in some groups, the noble clan (*jorcon*) and clan chief (*regulo*). All land--*bolanha*, valley slopes and upland--

⁵ The different social and tenure systems of the major ethnic groups are well described elsewhere, and are concisely presented in a recent USAID Report (Lifton 1990). This discussion will limit itself to certain basic elements of the *tabanca* farm system which are common to all ethnic groups in the country.

is allocated downwards, either through the **moranca** or directly to each **fogão** head, by the village elder (**homem grande**) from the founding family or clan. These people may or may not be part of the **tabanca** committee, the state/party administrative institution within the local community.

While individual members look after their own fields (women in some groups have their own rice fields for example), the whole extended family under the direction of the **chefe de fogão** comprises an integrated system of production. Communal labor at critical times of the year allows each sub-unit to farm larger areas than it would be able to on its own, and the area farmed by the community as a whole also rises. To the extent that the head allocates land, however, the **fogão** can be considered a unit under a single management.

Where **bolanhas** are contracting, for whatever reason, the only recourse is to extend upland areas and/or go out of area to either work on **bolanhas** elsewhere for wages, or to find unused **bolanha** in neighboring **tabancas**. These **tabancas** may be of the same, or a quite different ethnic group, and the same procedure of requesting land from the **homem(ns) grande(s)** responsible for land in the 'host' **tabanca** land will have to be respected.

Clearly land availability is a critical issue. In certain areas, where most land is already allocated (for example, Biombo Region, Mancanha areas to the west of Bula, and Balanta areas north of Bissau), one is struck by the neatly laid out field patterns and well-organized, intensive cultivation being practiced. Visits to **tabancas** in these areas reveals long-established land allocations between the resident households, which in some cases is resulting in land fragmentation as groups of brothers inherit rights to land held by their father⁶. In other areas where land pressure is less intense, discussion with villagers nevertheless reveals that (a) each **tabanca** knows clearly where its boundary with the next **tabanca** lies; and that (b) within this area, all **tabanca** land is either (i) already allocated to existing **morancas** or **fogãos** or (ii) is held 'in trust' under the authority of the founding family or clan, for allocation to new households and other 'newcomers' in the future.

In other words, when new, related households are created through marriage, the head of the parental **fogão** or **jorcon** with rights to a given area is responsible for allocating a plot within 'their' area to the new unit. Similarly, a family entering the area in search of land can ask a **fogão** it might have links with, to cede a piece of their land. And if there is not enough land, then both the newly married and the 'outsider' household can go direct to the original **tabanca** authority to ask for an entirely new portion. Once allocated, however, the head of the new unit has allocative power over the land received.

Finally, and most importantly, land once allocated cannot be taken away, and all groups recognize the right to transfer land rights through inheritance. This applies even to a **fogão** at an early or late stage in its developmental cycle, and thus short of the labor needed to farm an inherited plot. There is growing evidence that, in these situations, land is also being bought and sold, or rented in order to secure some return from it or simply to have it maintained until needed at a later date by the 'owner' household (an essential consideration in the case of **bolanhas**).

⁶ There are of course differences between ethnic groups. The Manjaco, for example, have two types of land, one passed patrilineally from a **fogão** head to his sons, the other, communal, which is passed matrilineally to the sons of his wife's brothers.

Land rights can however be lost if a **fogão** moves out of the area and indicates that they are giving up their land, which then usually reverts back to the control of the founding family or clan, to await redistribution. For some groups, notably the Balanta, land is inalienable, and cannot be sold; others do sell land, and amongst the Manjaco and Máncaha, unused or 'surplus' areas can be rented. In most groups, however, rights over land are recognized even when a son or grandson of a previous resident returns and can establish a family claim, usually by reference to the **homens grandes** and other village authorities. Land can also be lost when it is left to regenerate secondary forest cover during long fallow periods. **Tabanca** households usually respect the rights of the 'owner' and will not occupy this land, but outsiders seeking a new concession are either not aware of the original allocation or simply disregard it on the grounds that the land is not actually being cultivated at the time the concession claim is made.

The response by **tabancas** everywhere is what one extensionist called 'natural legalization', or the planting of fruit trees on cleared land as 'trees of occupation' (**arvores de ocupação**). Another response is simply to clear more land than is needed and then plant trees, at least along the edge of the cleared area.⁷

This does not mean that **tabanca** law recognizes rights over land only through occupation and use, as some would argue. Rather, rights are established through traditional allocation procedures (that is, traditional land law), and subsequent use (or non-use) of the area in question does not affect those rights. The planting of fruit trees to prove occupation is an extension of traditional practices, where trees, especially mangos, were planted around the village itself at the time of its foundation (such trees are often pointed to when villagers are asked how old the **tabanca** is, for example). **Arvores de ocupação**, in the context of present competition over land, is an adaptive response to existing formal legislation which, unlike customary law, does use actual land occupation and use to define those areas of **tabanca** land which cannot then be subject to a concession claim.

To sum up, **tabanca** land is a collective resource and not 'private property'. It is perhaps more accurate, however, to see the **tabanca** not just as a socioeconomic unit, but also as a territorial unit which oversees land tenure issues in its surrounding area. The **tabanca**, under this definition, then extends beyond the houses and cultivated area, to the border it shares with the neighboring **tabancas** in the area. Moreover, within this territorial unit, the land allocated is occupied and farmed on quite individualistic lines. These private land rights have deep roots in the legitimating structure of customary law, and in most areas are long established. Once allocated, land is held in a **de facto** form of private ownership, by either individual households or collective groups of various types; and changes in 'ownership' or disputes over land use or trespass are regulated by the same customary law.

4.4 Current Trends

The main areas where disputes are occurring are those where concessions have followed new projects and better infrastructure: Bafatá Region, along the main river valleys of the Geba and its tributaries; and in Oio and eastern Cacheu, where good roads and a supportive project and institutional

⁷ This behavior has been noted elsewhere (Fortmann and Bruce 1988:149).

environment has stimulated extensive land occupations by a whole range of ‘**ponteiros**’ (from high ranking Government officials to NGOs).

In Biombo, close to Bissau, there is also a very large number of concessions, mostly under cashew. Many of these are old colonial **pontas**, purchased during the 1970s by nationals who either knew or worked for the original owners. Others are much newer, and are owned by local and urban elites with ties to the dominant Papel ethnic group, and who have acquired their claims using the relatively intact, centralized customary legal structure.

An examination of the cases indicates a process over time, whereby Biombo was the first region to be subjected to large scale land occupation, but is now in a second phase where most areas are allocated and disputes are over specific ownership or boundary issues. Bafatá and Oio/Cacheu are in a second group, which is experiencing a ‘first phase’ of enclosures and where disputes are over areas of land being taken out of **tabanca** control. The third group will be those areas which new roads are now opening up, and where a land rush and disputes over customary **tabanca** territories can also be expected.

4.5 Sources of Legitimacy and Land Access

The legality of modern land law is accepted by **tabancas**, but only as part of a powerful State administration which is external to and surrounds the customary legal system. For many communities, this external authority earned its legitimacy in the struggle for national independence. Yet post-independence policies produced what was in many ways a ‘nationalized’ version of the colonial state, rather than a new, non-colonial authority with roots in the customs and history of the country.

Field interviews also revealed that **tabanca** residents often identify **ponteiros** with ‘the State’, and that this new State has engendered attitudes and practices which almost appear to be less sensitive to local customs than in colonial times. In one case this link was very direct, when a new **ponteiro** seeking local approval was accompanied by the Sector President, the Chief of Police and some military personnel. It is unlikely that the **tabanca** would have said ‘No’ to the request, even though they are losing control of **bolanha** and even some areas planted to cashew. During the interview, they clearly felt wronged by what is happening and the way it is being done.

Even where the identification between **ponteiro** and the State is not so direct, most **ponteiros** approach the **tabanca** through the local Sector Committee, rather than going first to the **tabanca** Committee. Even in the latter case, it is not the **tabanca** Committee which has ultimate authority over land allocation, but the relevant **homem grande** or customary authority figure with legitimate roots in the specific socio-legal history which has produced the customary land law for the ethnic groups in question in each area. Ignoring the latter in favor of the former is one cause of subsequent problems, discussed in more detail below.

Nevertheless, there are instances where the role of the modern system is unchallenged, or is used by opposing parties to establish a claim over land when there is some doubt about who has rights to it through the **tabanca** system. This can occur in rural communities which began as plantation labor and colonial population control settlements. From the outside, these look like traditional **tabancas**, but do not have the characteristic social organization and founding family or clan. Tanner (1991) details case studies where a blend of **tabanca** and **praça** town law was used by informants to uphold

their claims to land surrounding them. These communities offer a type of bridge between the two systems. A more important bridge is found, however, in the established **tabancas** themselves. Fieldwork confirmed earlier observations in the Gambiel Valley, that many **tabanca** farmers are now trying to 'legalize' their customarily allocated land through the 'town' laws regulating concessions.

The 'legalization' issue was explicitly addressed during village meetings. It is apparent that many people know about legalization, but do not know how to do it. Everybody, however, talks of it as a long and difficult process beyond the normal means of **tabanca** residents. The increasing awareness of the process, and the need to use it to protect themselves, is a clear response by **tabanca** residents to the presence of new concessions in their areas.

It is notable by comparison that although many concession holders also claim to respect the 'traditional' channels by first requesting land from **tabanca** elders, none have subsequently explained to the **tabanca** that they intend turning that land into a concession, and none have sought the approval of the village before doing so. Only now are villagers waking up to the reality of what this means, as **tabanca** land passes beyond the control of customary legal procedures and is denied to new resident families who might seek access to it in the future.

4.6 Types and Sources of Conflict

The conventional view of **tabanca-ponta** conflict which is the subject of this report must instead be seen within the wider picture of a range of possible conflicts between equally ranked partners (horizontal) and unequal partners (vertical). There are several 'immediate' reasons for conflicts over land and other resources. These in turn are rooted in what are more fundamental, or 'structural' causes, such as ethnic diversity, social inequality and the legal system itself.

a) Land Demarcation (horizontal)

Within **tabancas**, there are surprisingly few land demarcation conflicts, and it can be confidently stated that in general, the customary land law is functioning well and dealing with what is a complex and potentially difficult situation. Even in areas where most land is already distributed, the neat divisions between plots reflect general community agreement over who farms which area. Land demarcation disputes between **pontas** occur over land boundaries, overlapping logging and agricultural concessions, and over disputed claims at the level of the Land Registry and Cadastral Service.

b) Land Demarcation (vertical)

This is the classic setting of **tabanca-ponta** conflict, which is triggered off mostly by new concessions occupying land claimed by **tabancas** and thus threatening their integrated farm systems and livelihoods. This affects land for cultivation, and forest areas used to hunt game and extract honey and other products, many of which are used for cash income.

c) Inheritance Problems

Horizontal conflicts may involve disputes over inheritance, marriage, and divorce which flow over into disputes over land rights. These occur in both **tabancas** and **pontas**. For example, in areas dominated by matrilineal ethnic groups, where the uterine cousin has normally inherited land and goods

when the father dies, the traditional route of inheritance is increasingly being challenged by the sons. This is perhaps linked to the economic liberalization program, as control over resources and wealth gains much more significance under the new market economy. Similarly, many pre-independence concessions are still valid, although they were abandoned during the Luta and the immediate post-war period of centrally planned development policy. Now, with the economic liberalization, various descendants of the original concession holders are returning to claim their rights over these areas, with many cases of conflicting claims between, say, grandsons and nephews of the previous owner.

d) Reactivated 'Abandoned' Claims

Reactivating old claims to concessions which are still legally registered in the Cadastral Service should also be noted as a growing source of vertical conflict. **Tabancas** in areas where there is an abandoned or minimally used concession, have tended to establish themselves on this land, often planting **arvores de ocupação**. Problems occur in three main ways: (a) when the old owner or his descendants return to reclaim the concession; (b) when somebody arrives claiming to have 'bought' the concession, from the original owner; and (c) when somebody arrives claiming they have had the abandoned claim transferred to their name through the legal concession system.

e) Access to and Control over Water

When concessions occupy prime sites along river valleys, local communities lose not only use of the rice lands located there, but also access to the river itself. This is critical from the point of view of their overall farm strategy, as receding river water leaves important river bank areas where a range of tubers and vegetable crops are cultivated. Also, even if they do have the means to irrigate by pumps, they cannot do so or it is far more difficult. Many fields and rice terracing can also be integrated into a much wider water control system. If this breaks down at one point, then everybody else suffers. Thus if a large **ponteiro** dams 'his' section of the river to guarantee a certain head of water for irrigation pumps for a longer period, or draws off substantial volumes of water, this denies essential water resources to communities living downstream of the concession.

f) Cattle Grazing

Cattle grazing is another major problem, especially in areas along traditional trails which have been used for generations by cattle herders. In the east particularly, younger men and boys have herded cattle west and south, following the water and good pasture as the dry season progresses (Sambu 1988). As more land is enclosed and cultivated, commonly used trails are cut off or restricted. The loss of younger manpower to the towns is also making the control of herds less reliable, with the result that cattle often stray into concession areas and destroy crops. Few **ponteiros** have fenced off their land, and there are several areas where cases of **ponteiros** shooting cattle have been reported. Other responses have been the impounding of cattle and the demanding of 'fines' by the **ponteiros** before the cattle are returned.

g) Disputed Legality of Documentation

The disputed validity of documentation always comes up in discussion: 'So-and-so arrived with the documents. What could we do?' These disputes are a major point of contention, yet suggest one area which, if better managed, could help to reduce and avoid many land conflicts.

Interviews indicated that many concession claimants secure the approval of the **tabanca State Committee** only, and see this as sufficient. Yet in many **tabancas**, the Committee does not represent the customary founding or clan leaders with land allocation authority, and may actually disregard them altogether. The State Committee may consist of younger men reacting against the gerontocratic customary system, or who see personal advantage in developing Party links. Whatever the reason, bypassing the customary authorities in this way can cause internal (horizontal) conflict within the **tabanca**, and is often the cause of more serious instances of open conflict between **tabancas** and **ponteiros**.

Another scenario which in fact follows customary norms yet still creates problems is where a concession claimant asks a particular **fogão** (to which he may be related, for example) for a piece of the land allocated to it through customary procedures. Technically, the **tabanca** has no say over how the **fogão** responds, although the **homens grandes** should be advised. Neighbors might however disagree with a **ponta** being established in this way, or the new, initially small **ponta** might serve as a type of 'bridgehead' into the area [an important aspect of the case documented by Nassum and cited in the Tanner (1991) report]. Less seriously, but just as damaging for good relations, is the importance of respecting customs and courtesies, the abuse or ignoring of which can breed resentment.

Where consent is given, it is always given verbally. This has two important consequences. Firstly, it makes it difficult to identify who actually gave the consent, and whether it was in fact 'legal' under both customary and 'town' law. This can create confusion within the **tabanca** and distract attention from the dispute between **tabanca** and **ponteiro**. Secondly, the written declaration that no third parties are affected by the new concession,⁸ comes not from the **tabanca** but from the higher Sector State Committee for the area. This Committee cannot be guaranteed to have close knowledge of the **tabanca** concerned, and yet will always carry greater weight than any verbal declaration by **tabanca** leaders, particularly if it is a Party person who wants to take out the concession in question.

There is one other stage at which the local community can object, which is when the **Edital** is posted, giving thirty days for objections to the concession to be lodged. Objections are unlikely: (a) the **Edital** is written in Portuguese, and few **tabanca** residents even speak the language, let alone read it; (b) the time period begins the day the **Edital** is signed by the Cadastral Service, not the day it is posted in the local area, where it is likely to arrive much later, if at all. Under such circumstances, the absence of objections cannot seriously be taken as 'consent', although it often is.

Conflict also arises over the area included within a concession. It is apparent that **tabancas** have failed until recently to comprehend that once they had offered land to somebody (according to local traditions of hospitality and social obligations), then that person would go to the Cadastral Service and have the land legalized. Cases were recounted too of concession holders who, when they return with the Cadastral Service to mark out the plot, indicate areas that are far greater than originally conceded by the **tabanca**. Neither the new **ponteiro** nor the survey team consults with the **tabanca** again when the map is being drawn up.

Tabancas have also indicated the area offered in a very vague way: 'you can farm here', they say, with arms stretched out. They assumed that the newcomer will farm only what he needs or is able to, which is in keeping with prevailing customs of hospitality and helping those who need land to live

⁸ See Annex One.

on. But where non-resident **ponteiros** are involved, intent on using credit and machinery, then this is a very risky assumption on the part of local communities. This is changing rapidly, however, and most **tabanca** meetings revealed that (a) they know what legalization is and what it means; (b) they feel they should be involved when the Cadastral Service comes to fix the location on the map; (c) large unused areas are a waste and were not within the 'spirit of the original agreement'; (d) though more cautious now, they still feel powerless to do much about influencing a concession process; but (e) they are increasingly interested to know how they can safeguard their land in the same way.

h) Compensation

Finally, amongst 'immediate' reasons for conflict is the issue of compensation and the capital value of the land and enterprise. As land belongs to the State, **tabancas** have no rights to payment or rent when they cede what they see as 'their land' to outsiders. In this way, outsiders with far more resources are gaining access to the best land for virtually nothing. For example, a large new concession on prime river valley land within the territory of long-established **tabanca** gave the local council of **homens grandes** 'a bag of kola nuts and PG100,000' when they came to request the consent of the community. This is an absurd sum to offer for what under other systems would be a valuable capital asset, yet once 'legalized', the community will lose all hope of recovering its true value if there are fundamental changes to the land law in the future. This concession involves highly placed and influential public officials. After a long meeting, the **tabanca** elders resolved to speak frankly about their feelings, and revealed deep bitterness and powerlessness over the way the transaction had been conducted.

Similarly, **ponteiros** who lose all or part of their farms, either through State appropriation or through damage by some third party, have a difficult time establishing the true value of the lost 'assets'. Ludicrous evaluations were mentioned by several informants, based upon how much a new cashew seedling is at current market rates for example. Such estimates make little allowance for either the work or time investment that has gone into developing a farm, or for the economic and capital value of the now-developed land which may have an advantageous position next to a good main road close to Bissau.

Underlying these diverse immediate causes are certain structural causes. Ethnic diversity can be a factor, though it was less problematic than expected and in most cases where it was cited as a factor, there was a very real competition for resources left over after **ponta** penetration which could just as easily have created conflict between members of the same ethnic group. Social inequality is the principal structural cause, not just as between **tabancas** and **pontas** but within and between **tabancas** and between **ponteiros**. A further and critical underlying cause is the Constitution's conception that all land belongs to the State. While **tabancas** and **ponteiros** alike accept the idea of State 'guardianship' of the national patrimony, few **tabancas** accept the idea that land belongs to the State, creating the possibility of the State overriding their customary rights.

4.7 Grounds for Cooperation

The usual examples given to show how the two sides might be encouraged to cooperate and coexist more peacefully, are the use of **ponteiro** tractors by neighboring **tabancas**; and new employment opportunities on **ponta** farms and large concessions. Both **tabanca** meetings and **ponteiro** interviews

included questions on these points, and on balance it is difficult to be optimistic about cooperation based on either factor.

Tabanca farmers are keen to use modern machinery, and renting in equipment is one way of achieving this. Cases were encountered of **tabancas** renting tractors from nearby farms, or even using a tractor service started up a group of **ponteiros** in one regional town. This is done on a communal basis, where several farms will band together to arrange for a tractor to come by at a specified time. The tractor then works on their individual fields, with each farm paying only for the time spent on its land.

These cases are canceled out, however, by other instances where the offer of tractors was used as an incentive to secure local consent for a new concession and then never actually put into practice. There are also many cases where the local **ponteiro** is simply not interested in maximizing his return on investments by using his equipment outside, particularly if he has acquired it through a virtually free BCN credit and has no need to either repay the loans or fear having his property expropriated. Other negative cases concern the few examples of State extension 'tractor brigades' which have been helping small farmers. These have either been monopolized by new concessions owned by state officials, or wound up as the tractors themselves are purchased by concession holders exploiting the fact that the MDRA cannot afford to repair them.

On the employment front, it is notable that all permanent labor used on **pontas** comes from outside the region or lives in nearby towns. Local farmers cannot work on the concessions at peak periods without jeopardizing their own farms. They do sometimes work on a contract basis to carry out specific tasks such as land clearance when they are not needed on their own land. Women and children also work at specific times, especially during the cashew harvest, when they are allowed to keep unused fruit to make crude wine which they then sell.

Other ways in which cooperation can be generated are more 'egalitarian' in nature. **Tabanca** residents are quite genuine when they say they are pleased when somebody arrives who can productively use land which would otherwise remain idle. Like farmers everywhere, they respect other good farmers. The sad fact is, however, that the majority of new concessions are very poorly exploited, if at all, and this fact alone generates considerable resentment amongst local people.

Local people also appreciate the benefits which some concessions bring with them. For example, **tabancas** around a large Church concession in the South spoke favorably of the farm, because the Church runs a school there where many local children are offered free education. Other concession holders will open up new roads which benefit everybody, and perhaps bring other 'communal' benefits such as access to wells and transport.

4.8 Conflict Resolution

The distinction between 'immediate' and 'structural' causes of conflict is revealed in the type of conflict resolution procedures followed. This is particularly the case with conflicts between **tabancas** and **ponteiros**, who have vastly different views of, and access to, the modern tribunal system and higher level State and Party Committees.

Horizontal disputes over land and resources at **tabanca** level are resolved between the parties concerned, then by recourse to the **homens grandes**. Occasionally they go to the local **Tribunal de**

Base, which in any case usually has a few **homens grandes** sitting on it; and (even less frequently), disputes are taken to the Regional Tribunals. By contrast, inter-ponta disputes always involve the tribunal system when necessary, and never at a level below the relevant Regional Tribunal and usually higher. Another response by a **tabanca** resident not satisfied with the decision of the **homens grandes** or the Tribunal is to invoke religious powers and deities. However it is important to stress that even if unresolved, such disputes on their own rarely threaten the socioeconomic structure of **tabancas**. In short, **tabanca** law works well, and handles a complex land access and land use situation with a relatively low level of dissent or difficulty.

Problems begin to arise when external factors intervene, such as the large **bolanha** recuperation project in the South, or the need to compete internally over fewer resources once nearby land is lost to concessions. This is when ethnicity might emerge as a problem, generated not by genuine inter-ethnic hostility, but by tensions caused by competition over diminishing resources.

However, for both small **tabanca** farms and smaller, family run **pontas**, managing 'vertical' relations with larger more powerful interest groups can be difficult. Formal resolution of vertical conflicts is nearly always at the instigation of the more powerful party, who wants to establish his claim based on 'town' law, and will always use State Committees and Tribunals. Such processes are never lower than the Regional Tribunal or Sector Committee, involve time, money and transport, and are heavily biased against the **tabanca** or small **ponta** owner.

It is also apparent that there is some overlap between the authority of the supposedly separate 'State Committees', and the Tribunals, especially above 'Base' level. Thus many disputes are spoken of as being resolved 'by the Committee', although these bodies are not accorded this role under the Constitution. A concession holder with close ties to State and Party structures in Bissau will have a strong influence over decisions at the Regional or Sector level if State Committee and Tribunal are virtually one and the same thing.

To sum up, the very different arenas and procedures for conflict resolution reflect, and reinforce, the conventional **tabanca-ponta** socioeconomic classification discussed above. And where the various systems do meet, it is usually an unequal, 'top-down' contest which may resolve the legal issues, but do little to quell the real feelings of the injured party.

4.9 Conclusions

Returning to the questions set out at the beginning of this chapter, the first conclusion to be drawn is that **ponteiro** penetration has indeed been excessively rapid, and has had clear links to other factors at work in the economy. These in turn have much to do with how the economic liberalization has been initiated and managed by the GOGB, and exploited by those with preferential access to the information and the resources needed to identify, claim, and to use large areas of 'unoccupied' land which **tabancas** do not have the means to farm. Also, in areas where concession areas have risen dramatically over recent years, problems over land occupancy and grazing rights are particularly severe. In such areas, it is not uncommon to find problems between **tabancas**, which are forced to compete over reduced resources; between **pontas**, which may encircle one another or dispute forestry rights, for example; and between **pontas** and **tabancas**, where either local cattle destroy **ponta** crops or local people feel aggrieved at the loss of land once under their control.

The second question concerns the adequacy of the simplistic **ponta/tabanca** distinction. The data reveal a complex range of farm types and a considerable 'grey area' in the middle of the conventional **tabanca** and **ponta** classification. Yet current sector strategy is based upon the conventional view of **tabancas** as essentially 'primitive communes', and **ponteiros** as modern 'individual farmers'. Few officials appear to adopt Amilcar Cabral's positive view of small farms, and ask what would happen if **tabanca** farms did have the means to expand and improve.

On the third issue, the effectiveness of **tabanca** law, fieldwork confirmed that in all regions, this customary law provides a solid legitimating base for existing allocation patterns, and for conflict resolution where necessary. Customary legal systems are far from being outdated and unchanging, and are 'modern' because they work and are relevant today. Whilst they may adhere to an underlying 'traditional' legitimating framework, within that framework there is room for great adaptation and flexibility. It would be almost impossible to write down a new law capable of achieving this, and the existing **tabanca** law must therefore not only be retained, but fully integrated into any new legislation on an equal, if not superior footing to modern 'town' laws governing concessions.

The fourth question--does 'unoccupied' land exist--is more difficult to answer with any precision. Further research is needed to establish precise land use patterns by **tabancas** and concessions throughout the country. It is however striking that practically all communities have a clear idea of where 'their land' ends and that of the next **tabanca** begins, even though this is not all cultivated and may be mostly virgin forest. **Tabancas** also view these more extensive areas of surrounding land as a collective resource held in trust for future generations, which must support a sustainable crop rotation system.

To answer the final question concerning sources of conflict, the case studies by Tanner (1991:Annex 3) show clearly how several layers and types of potential conflict can co-exist inside the same area. These can remain dormant until triggered off by the actions of outside parties; and if this 'external' dispute is resolved by recourse to the modern legal system, the 'solution' might well create other problems for the **tabancas** who still base their claims on stronger, 'legitimate' historical and family ties.

Meanwhile, current 'town' law contains a number of provisions which, if properly administered and policed, would go some way to protecting the rights of local communities and guaranteeing security and relative peaceful co-existence for **tabancas** and **ponteiros** alike. Similarly, customary law, if fully recognized as an equal and legitimate legal system, also offers ways to achieve these goals. Insecurity of tenure then has two main starting points: first, a failure to apply the 'town' law as it stands, for a number of reasons ranging from power and social differentiation, to the sheer lack of resources at the level of the Cadastral Service; and second, a failure to genuinely respect customary law as providing the fundamental 'base map' of land distribution in the country, against which all other land allocations should be compared before being finally approved.

It is at this point that the social inequality issue comes in, and the advantageous access by the larger concession holders to bureaucratic and state structures wins the day. Ultimately, 'town' law is the more powerful, backed as it is by major economic and political elites. Moreover, under 'town' law, **tabanca** rights are determined not by long-standing and culturally legitimate claims to areas of land, but by actual use of specific pieces of land.

5. COMPARABLE EXPERIENCES AND POLICY LESSONS

Every national land use and land tenure situation in Africa is different, but based on twenty years of post-independence experiments with land policy and tenure reforms on the continent, it is possible to discuss some of the general advantages and disadvantages of particular approaches.

Policy-makers must often rely on such comparative experience when there is a lack of adequate evaluative research on land issues in their own country. It is helpful as regards issues such as the relative efficiency of different scales and technology levels in farming. It can also clarify whether a troubled land situation is the result of poor administration of a good land law, or whether the land law is itself at fault. A land law model may be very attractive in theoretical or ideological terms, but if it consistently--in many countries--results in similar serious problems, the problem lies not with its administration but the law itself. It is either misconceived or not implementable in present circumstances.

This discussion will be limited to the two systems present in parallel in Guinea Bissau today: the state leasehold (or concession) system and the indigenous tenure systems. A more comprehensive discussion of reform models (Bruce 1989) has been left with the Land Commission and the information provided below is summarized from that paper, except where another source is indicated.

5.1 State Leasehold or Concession Systems

a) Ideological and Other Bases

Concession systems were of course a major tool of colonial land policy and, somewhat surprisingly, the tenure model most commonly adopted by African states after independence. They tend since independence to be referred to as 'state leasehold' (or just 'leasehold') systems. In the 1960s and early 1970s, there was a rash of national legislation declaring all land owned by the State. This was true in Guinea, Sudan, Lesotho, Mali, Nigeria, Cameroon, Burkina Faso, Zaire, Mozambique, Uganda, Somalia, Senegal, Tanzania and many other African states. The intent of the declaration of state ownership of land was to provide the legal basis for the state to allocate land to farmers under leasehold tenure from the state. (In fact, the colonial state had often, as in Guinea Bissau, made similar claims to ownership of land, and the legal position was not much altered by the declarations.)

Often the intention of the new governments was to bring all or most land under administration by the national government within a reasonably short period of time. This has not in fact happened in any country, largely because of the vast administrative costs implied by such a change. As a result, the situation is often similar to that in Guinea Bissau: the bulk of rural land, while state-owned, is in fact held under indigenous tenure systems administered by traditional authorities; a leasehold sector exists along side the indigenous tenure sector, and gradually expands at its expense. There is extensive experience with this model, and it is worth consulting in thinking about the future of the system in Guinea Bissau. What may appear to be problems of implementation in this national context may be so pervasive that they deserve to be thought about as problems intrinsic to the system.

The attraction of the model has been in part ideological. For moderate socialist states, it represented a way in which the state could assert its dominant role in the allocation of the means of production,

but still allow for private farming. African socialists consider it an arrangement analogous to indigenous systems, in which a resource once owned and allocated by the traditional communities now is owned and allocated by the state. The assertion of a state title to land often involved an intent to take over land administration from traditional authorities, strengthening the political hand of the national government at their expense.

State leasehold/concession systems are not an easy topic for generalization, because a lease is an extremely flexible legal instrument. The holder may hold the land under lease with secure title for a hundred years, subject to nominal rent and few conditions, inheritable by his children, and readily saleable or mortgageable. (It is possible to frame a lease which comes very close to full private ownership, and has almost identical market value.) Or the holder may hold on a one-year lease with a heavy rent and subject to many onerous conditions. It all depends on how the lease has been written. A 'typical' or average lease under these state leasehold systems in Africa would be for perhaps twenty years, inheritable but not transferable or mortgageable, and subject to development conditions of some sort. The state uses its right as landlord to maintain control over the use and distribution of the resource.

Leasehold tenure has most often been implemented as a tenure for 'commercial farmers', farmers who are expected to specialize in production for the market. They may be in development projects such as irrigation schemes or settlement projects, or may be individuals seeking large tracts of land for commercial production. There are no cases of really widespread provision of leasehold tenure to peasant farmers. The granting of a lease by the state usually means that the land is being transferred from the control of a local community to someone from outside that community.

b) The Issue of Scale: 'Modernity' versus Profitability

Here we will focus on the use of leasehold tenure as a means by which large holdings for commercial production are carved out of the indigenous tenure sector and allocated by the state to aspiring commercial farmers. (Much of this discussion would apply whether the large holdings were being provided in full ownership or leasehold.) This approach is based on some very questionable assumptions about economic efficiency in farming. The assumptions are that mechanization and use of imported inputs increases productivity (it may do so) and profitability (it often does not do so), and that these technologies can more easily be brought to bear in on large-scale farm units than on peasant holdings. There is a tendency to forget that given factor costs in Africa, less capital intensive (less 'modern') technologies may be more efficient and thus more profitable. If so, the argument for large-scale operations is undermined.

There are unfortunately no careful econometric studies of relative efficiency of different scales and associated technologies in Guinea Bissau. But studies elsewhere in Africa and from Asia and Latin America have consistently shown that--other things being equal--smaller units tend to be more efficient and profitable. There have been startling increases in productivity in the peasant farming sector, early on in Kenya in export crops including coffee and most recently in maize production in Zimbabwe, when services are effectively provided to those small farmers. Large farms do not do as well because the technical economies of scale available to larger units are rarely achieved because of the management problems associated with larger units. These findings are borne out by the trends when large holdings are subjected to market forces. In Kenya, the long-term trend for the large farms from the colonial period, initially transferred to Kenyans intact, has been for them to be gradually broken up by sales into smaller, more efficient units.

Few would argue today that there are significant economies of scale in production for most crops. Economies of scale are one of the great illusions of Marxist agricultural policy, and are ironically most often heard of these days from white settlers resisting African takeovers of land in South Africa. Such economies do exist in processing, however. Where there is poor access to processing facilities, it may be advantageous to internalize processing within the production unit, and this may require production on a scale which justifies the processing plant. Still, unless the crop requires extremely close integration of production and processing, it is likely that higher profitability could be achieved if the processing enterprise were relying on smallholders growing the crop as outgrowers or contract farmers.

A fundamental flaw in the practice of state leasehold tenure has been its use to create large, specialized production units utilizing relatively costly inputs, units which may not be as profitable as a better serviced peasant sector. Indeed they may not be profitable at all, if not tightly managed, and even if they are profitable for the individual concerned (who has paid little for the land), it may be radically inefficient from society's viewpoint. Size limitations on concessions may thus be entirely appropriate, in the interests of productivity per hectare as well as equity.

What has been said so far only suggests that it may be important to reconsider the size of holdings being allocated in concessions, in recognition of the absence of achievable economies of scale, and of the vast discrepancy between large allocations and the resources of the allottees to develop them. These are objections more to allocation policy than to the tenure itself. There are however, some important problems with state leasehold tenure.

c) Administrative Allocation, Investment and Management

A further justification for the granting of leasehold tenure to large farms concerns not the scale but potential to attract capital and new skills to agriculture. It is argued that large farms are necessary to attract good commercial farmers, and farms of this scale cannot be obtained through allocation procedures under indigenous tenure systems. The state must therefore identify and provide the land to those with the ability to plan a modern production enterprise, to invest capital in it, and to implement modern management practices.

Experience has shown that few of those who actually receive leasehold tenure or concessions in fact fit this profile. Although the criteria stated above are sensible, the characteristics which turn out in practice to be most important in the pursuit of land under a bureaucratic system of land allocation are insider knowledge (for example, where good land is available, or when a new feeder road will create access to a remote area); skill in operating within a bureaucracy, including literacy and experience in government service; and personal contacts with officials involved in the process. Knowledge of farming and capital to invest are often lacking, and if management skills exist they may already be committed to a full-time job far from the farm. Such skills are not available on the market, at least not at a cost which permits a profitable operation with hired management.

In fact, the land is commonly acquired with no intention of utilizing most of it in the near future. By the standards of a market economy, the fundamental reason why such misallocations occur is that land is treated as a virtually free good. A land market allocates land instead to those who are willing to pay for it at a price set by the market, and while speculation can occur here as well, its scope is more limited. Most of those who buy must be willing and able to recoup the costs of their purchase through efficient production. A cost imposed on the use of the land, such as a fixed rent or land tax, also creates a need to use the land productively. Serious acquisition costs, even in an administrative

allocation system, may do more to direct land to those who are serious about production than any set of administrative selection criteria.

Our impression is that all these problems are present to a greater or lesser degree under Guinea Bissau's present system of land law.

d) Monitoring Problems

Most state leasehold systems recognize to some extent the imperfect nature of administrative allocation processes, and try to compensate for them by imposing development conditions. If at the end of a probationary period (or sometimes at any point during the lease when an inspection may occur) the land has not been developed, the state may take back the land (perhaps subject to compensation for improvements). In theory this seems an adequate safeguard. In practice it has not been. Leaseholds and concessions, though commonly undeveloped, are almost never revoked for that reason.

This is in part due to the difficulty of specifying what constitutes adequate development. But the reason also lies in the lack of efficient monitoring machinery. The agency responsible for monitoring often lacks trained staff, vehicles or even petrol. Inspectors are poorly paid and corruptible. Inspections may never occur or may be very cursory. Or positive evaluations may be fabricated in return for bribes. Or bribes may produce recommendations for further grace periods, arguing factors which excuse the lack of development. Whatever the basis, it is very unusual in these systems for land to be retaken for failure to develop it. The legal safeguard provided by development conditions is not effective.

What development conditions do, however, in a good many countries, is to create tenure insecurity and undermine the value of the leasehold as collateral for a loan. A holding which can be taken on the basis of an administrative determination that it has not been developed is insecure. A bank which is asked to lend against the land will think twice. Insecurity of tenure also reduces incentives for landholders to make long-term investments on the land. Development conditions also provide officials responsible for monitoring development with an occasion for extracting bribes and favors from concession holders. When a revocation of a concession does take place, it may have less to do with underdevelopment of the holding than with the political fortunes of the holder.

Again, our discussions have indicated that these same monitoring problems have arisen in Guinea Bissau. The policy lessons is: the fewer conditions the better.

e) Equity Problems, and an Ethnic Dimension

State leasehold and concession systems pose opportunities for land grabbing on a large scale. National, urban-based elites, in government and in commerce, use concession systems to appropriate land on a scale which may endanger the viability of local communities. The land which is appropriated may not be land which the local people are currently utilizing intensively, but it may be land which on a seasonal or fall-back basis plays a critical role in providing their livelihoods. Often this role is not apparent on cursory examination.

The appropriation process is one by which national political and bureaucratic elites, who have often achieved position based on education, can seek to acquire resources and become an economic class as well. The tendency is particularly noticeable in economies moving away (or on the verge of moving

away) from socialism and toward market economies. This is just being recognized as a common and critical impact of structural adjustment programs. State leasehold systems are in that situation a means by which political power can be converted to property as the transition takes place. Insofar as equitable land distribution is threatened in Africa today, the threat comes primarily from government land allocation rather than developing land markets.

This has happened to some extent in many of the countries using the system, but notorious cases include Somalia and Sudan, Nigeria and, nearer to Guinea Bissau, areas of Senegal and Mauritania. Political instability results, and violence often ensues. The rapid expansion of the landholdings of mechanized commercial farmers in Ghana and Sudan has led to sniping at tractors and burning of crops.

But the dangers of violence are greatest when the land grabbing has an ethnic dimension. In Senegal's Casamance, the appropriation of land by outsiders has fueled ethnic resentment and the current unpleasantness. In Mauritania, the land grants from the state involved a large scale intrusion of the politically dominant white Moors into landholding in the Senegal River Basin, at the expense of the traditional landholders, black ethnic groups with close ties to Senegal. The deep resentment generated has been the occasion for the violence in the border areas over the last two years, the mass expulsion from each country of each others' citizens (and in the case of blacks expelled from Mauritania, its own citizens). A paper left with the Commission (Park et al. 1990) details the Mauritania/Senegal case.

These problems exist in Guinea Bissau, though fortunately the ethnic dimension of the conflict does not seem to be critical.

Those who establish leasehold and concession systems usually attempt to incorporate some precautions against land grabbing. An inspection of the land applied for is usually required, and sometimes certification from local communities that their interests are not adversely effected. While these may prevent some concessions from being awarded, there is reason to doubt if they are generally effective. Again, the inspection machinery may not be adequate. It may especially not be adequate to assess the need of local communities for seasonal use or relatively unintensified use of land which may on an inspection visit appear unutilized. The land involved may be a commons for hunting or grazing on which not one but many communities rely. Bribery is again a problem, both as regards the inspectors and local leaders who must certify the availability of the land. As a result, conflicts often only come to light some years after the grant of the leasehold or concession.

The lesson appears to be that it is dangerous to permit application for and granting of land on a piecemeal, unsystematic basis. This does not allow for an adequate consideration of local interests and does not take into account the cumulative impact of the granting of many individual leaseholds. It is far preferable if grants are made within the context of a general assessment of the needs of existing land users and availability of land in an area.

f) Environmental Concerns

More recently, it has been realized that concession agriculture poses serious dangers to the environment. Most obviously, the environment is endangered if concessions intrude on national parks or game reserves. This is the extreme case, but there are other very real dangers. Dry season grazing land is often greatly reduced by concessions, because it is often irrigable land. This can mean

increased livestock pressure on other pasture resources, surpassing their carrying capacity and initiating environmental degradation. Wildlife habitats are destroyed or reduced in size to the point where species populations are no longer viable.

Deforestation commonly takes place on a large scale on concessions, with the clearing of the forest seen as the first step toward meeting development conditions. Tree cutting is also a quick way to generate income from the concession, with little or no investment. The threat of concessions can also drive forest destruction by local people. Faced with the possible loss of their land if it appears unutilized, tree cutting provides a simple way to demonstrate use and hopefully disqualify the land for allocation to concessionaires.

Botswana in the early 1970s carried out a national land use zoning exercise (see Section 6.5 below). One of the advantages of a zoning exercise such as that undertaken in Botswana is that it provides an opportunity to assess not only the current and future needs of human communities but those of wildlife and bio-diversity. The small size of Guinea Bissau makes such a zoning exercise a viable option, achievable within a four or five year time frame if sufficient resources were available.

We return to this concern below, in 5.2(c), in discussing common property resources.

5.2 Indigenous Tenure Systems

The *tabanca* sector, the 'traditional' farming sector, is still the larger of the two sectors, and accounts for the bulk of agricultural production in the country. As noted earlier, there is growing evidence from across Africa of the ability of this sector to respond effectively to opportunities for commercial production, so long as prices are set by the market, and input supply and marketing channels are functioning properly. Existing commercial production in this sector is in most countries seriously under-represented in official statistics. This helps perpetuate the incorrect notion of this sector as an exclusively 'subsistence' production sector. While the sector does perform important food security and social security roles in relation to the larger economy, these are not inconsistent with growing commercial production in the sector. It is misleading, in fact, to continue to think of it as a distinct sector, set in opposition to a commercial sector defined by concession agriculture. The point applies very clearly to Guinea Bissau (see above, part 2, and Tanner 1991: 18-21).

There has been a long debate over the impact of indigenous land tenure practices on agricultural development in this sector. It has not been finally resolved, and it is unlikely that there will ever be a pat answer because the diversity of indigenous tenure practices makes any generalization, however broadly valid, misleading in some specific contexts. But recent research has clarified a number of key points in the debate, and are leading the major donors to rethink policy in this area.

In 1985, the World Bank and AID collaborated to initiate comparative econometric studies on these issues. The World Bank team, based in the research section of its Agriculture Division, conducted studies in Ghana, Burkina Faso, Rwanda and Kenya. Preliminary reporting of the research is now available and a copy has been left with the Land Law Commission (Migot-Adholla et al. 1990). The Land Tenure Center (LTC), University of Wisconsin, carried out the research program for AID, conducting studies in Senegal, Uganda, Somalia and Kenya. Again, preliminary reporting of the research results to AID are available and have been left with the Committee (Bruce 1990).

The Bank research dealt primarily with the issue of whether indigenous tenure systems constrain agricultural development, while the AID/LTC studies examined whether the national state had in fact been more effective in providing secure tenure than had indigenous systems. The material which follows draws heavily on those findings and the recommendations of the research teams.

a) Do Indigenous Tenure Systems Constrain Agricultural Development?

The World Bank studies sought to determine whether those farming under indigenous tenure systems perceived themselves as constrained by insecurity of tenure or limited rights of disposition of the land, and whether improvements and productivity increased with greater degrees of security and freedom of disposition.

The Bank studies found that land rights in indigenous tenure systems were evolving toward fuller concepts of private property in the presence of commercialization and growing population pressure. The ability to transfer land (to lend, to bequeath freely, and to sell and mortgage land) tended to vary directly with commercialization and population growth. The broadening of these rights did not provide farmers with significantly greater access to formal credit, as might have been hoped. Formal lending institutions had no effective presence in the research areas, which precluded their use by smallholders no matter how satisfactory their tenure might be for securing loans. Land improvements did increase with the strengthening of land rights in some research locations. In those locations the critical right appeared to be the right to bequeath the land and improvements freely rather than the right to sell the land. But in other locations greater land rights appeared to have little impact, making it clear that increases in land rights alone, in the absence of other supportive policies on prices and services, make little difference. Similarly, productivity per hectare increased with land rights at some sites, but not at others. Generally, the connection between stronger tenure and increased productivity was not clearly established.

The Bank researchers concluded that indigenous tenure systems appeared to be adapting efficiently to changes in relative factor scarcities, as reflected by the emergence of markets for the sale and rental of land, and in the trend toward increased privatization of land rights. African governments were urged not to undermine this process through the assertion of state rights over land or through legal prohibitions of selling and leasing land. Rather than restricting evolutionary change in indigenous tenure systems, governments should create an 'enabling legal and institutional environment' for tenure evolution.

Given the capacity of indigenous tenure systems to change, it does not appear that indigenous tenure systems pose an important constraint to agricultural development. The researchers therefore conclude that in most African circumstances it will be difficult to justify expensive programs of large-scale, comprehensive cadastral survey and titling. They conclude that '...a pragmatic approach that promotes the adaptability of existing land tenure institutions appears preferable to radical reform....'

The findings require that we stop thinking about indigenous land tenure systems as traditional, communal and static, and begin thinking about them as evolving systems of private property rights. They suggest that policymakers in Guinea-Bissau need to consider what would in local circumstances constitute the creation of such an enabling legal and institutional environment for tenure evolution. This report will return to this question later.

The World Bank findings do not suggest that all farmers in the indigenous tenure sector have exactly the same tenure needs. There may still be a need in the short run for exceptional tenure for some farmers who wish to initiate larger-scale commercial production. In the long run, there may be a need for a formalization of individual rights through measures such as land registration. What the Bank study does say, however, is that such a formalization should be the capstone on an evolutionary process rather than a means of preempting that evolution and forcing individualization of tenure.

b) Indigenous Tenure and State Tenure Compared

The LTC studies address the possibility that while indigenous tenure systems may be evolving, the informal nature of the process and the lack of recognition of the process by African governments may undermine linkages between security of tenure and land rights on one hand and improvements and productivity on the other. Formal tenure change, it might be argued, would produce development impacts not produced by informal, evolutionary change. The LTC studies were therefore framed to explicitly compare performance of farmers operating under indigenous tenure systems with that of those who had obtained titles for their land from the state. Econometric methods were used to eliminate the influence of factors other than tenure from the analysis.

To make sense out of the evidence from its field studies, the LTC researchers first had to set aside the research sites in which titling by the state had not upgraded the tenure of existing land users, but displaced them. In the case of both leasehold titling in Somalia's Jubba Valley and freehold titling in colonial Senegal, it was clear that the programs had been largely a vehicle for land-grabbing by elites. This produces a broader demand for titles from the state by smallholders, who wish in this way to secure their land against allocation to outsiders.

Looking at the cases in which some farmers at each site had received tenure from the state, the results were mixed. Behavior which economic theory tends to associate with more secure tenure, such as investment in coffee trees (to take an example from the Uganda study) appeared to be occurring across tenure types or, in the case of Senegal, not occurring at all (regardless of tenure) because of failures in pricing and credit systems. The investment impact of greater security of tenure generally tended to be weak, though in Senegal and Somalia's Shabelli Valley patterns of investment were so undifferentiated as among farmers and investment at such a low level, that there was little variability to be explained by tenure or any other factor. Credit impacts of security of tenure were also weak, and tended to disappear in cases where factors such as scale of operations, market access and off-farm incomes were factored in. Institutional arrangements for credit in most of the countries studies were not such that stronger tenure could be expected to have a substantial impact.

Why did formal titling not make more of a difference? The LTC researchers concluded that the reasons lay not so much in the adequacy of the theory employed but in some other assumptions. First, the balance of communal and individual elements in indigenous tenure systems, the degree of security that they provide, and their ability to evolve (rather than 'break down') in the face of new needs seem to have been seriously misrepresented in the literature. This conclusion is supported by the findings of the Bank research. Second, state titling interventions have often been weak and ineffective. Rather limited tenure (sometimes more limited than at custom) has been offered by the state, and the state has often proven less able to provide security of tenure than the indigenous systems of local communities. The research revealed a crisis in record-keeping for formal titles, due largely to the failure of titleholders to register their successions and transactions. Inability to prove title due to out of date records undermined the utility of the formal system.

The research did however reveal interesting patterns with respect to land transactions and their relationship to investment. Sales were often found spread across formal and indigenous tenure and so did not track, as expected, the tenure distinction. There did emerge, however, in Kenya with respect to rented-in land and in Uganda with respect to transacted land, a positive relationship between transactions and subsequent investment and productivity.

The bottom line from the LTC studies is that whatever the theoretical advantages of formal titling, African governments have in practice often not been able to provide more secure title than indigenous tenure systems. The LTC researchers note that this appears to undermine the argument for large-scale land tenure reform and titling. Few benefits could be expected by most holders. Where there is an exceptional farmer who has a felt need for a title from the state, it should be available on a full-cost (un-subsidized) basis. Outside of exceptional situations, reliance should be placed on tenure evolution and the creation of a supportive environment for such evolution. Particular attention should be given to change in the way in which indigenous systems treat transactions, and the impact of such transactions on patterns of distribution and landlessness. There is very little empirical evidence from Africa on the impact of emerging land markets.

c) Natural Resource Management: Common Property Issues

At the time of the research reviewed above, productivity concerns focused tenure discussions primarily on the farm, on cultivated land. In the last few years, there has been a major shift of attention to conservation objectives, and to community tenure in areas used as commons.

In the past, access to scarce natural resources on what is now considered public land was often governed by more or less effective customary common property regimes. Throughout Africa, these have been weakened by the reduction in tribal authority to exclude outsiders, the diversification and individualization of households economic interests, the ability of new interest groups to appropriate the resources for their own use, and the assertion of government ownership. In spite of these trends many common property regimes still function in rural Africa.

There is great variation in the extent to which different local groups perceive natural resources to be threatened and in their willingness and ability to do something about it. But it is increasingly recognized by those concerned with natural resource management that there are few resources in the landscape which are not to some extent and at some time of the year, used or valued by rural people. Most of the non-reserved, non-cultivated, public land forests, woodlands and seasonal marshlands are not unused or 'idle,' but is used by local communities and farming households.

The contribution of these lands to the economy, food security and welfare has not been sufficiently recognized in government policy and legislation. Most households consume, utilize and trade a large number of products which derive from forests and woodlands. These include fuel wood, charcoal, poles, sawn-timber, medicine, wild vegetables, wild fruit, honey, fish, grasshoppers, mushrooms, and the wood to make bricks, beer, houses and other objects. The list can be made much longer. Some of these products are vital both from a nutritional and a strictly economic point of view.

In most parts of Africa there are sacred groves of forest protected by customary law for symbolic, environmental, religious and/or medicinal reasons. Natural woodlands by and large, however, are a resource only recently perceived as scarce. Today some communities have come to consider the woodlands they use as theirs, but most do not seem to have a clear sense under customary law that

woodlands 'belong' to them. Rather they consider themselves to have a right to use the woodland resources, not to control it or prevent its use by others.

It should be emphasized that many villages in Africa today do manage to protect economically important common resources by using customary law or informal but well-known agreements which function like by-laws, whether or not they have been written, formally passed, and forwarded for higher level approval. In culturally homogenous villages common property management often functions well without recognition from government authorities or support in statutory law.

Customary and informal restrictions on the use of public lands resources can be quite effective until they are challenged by 'outsiders' or by other government institutions. Communities commonly rely on customary sanction systems which deal with misuse or trespassing by calling an offender in front of the elders. If the offender does not pay, he or she can be subject to a humiliating experience, and the ultimate punishment would be exile from the community. 'Outsiders'--immigrant groups, commercial farmers or enterprises--do not belong to the local community in a moral sense and can often disregard these traditional sanctions with impunity.

As customary institutions are weakened, the elders sometimes seek support from the government. Governments sometimes have established forest reserves on land which previously was managed in sustainable ways by local communities. Such attempts to protect the forests have tended to result in less effective environmental protection and in local people losing access to important natural resources.

There is a growing recognition of an urgent need to develop new kinds of forest conservation and management, in which the Government pursues environmental objectives by negotiating rights and responsibilities with local communities, rather than by 'taking over' their land without offering compensation or the benefits of co-management. There is a need for considerable flexibility, however, as to who is to manage such reserves. In some cases, kin units, sub-villages or user groups within a village, or even cutting across several villages, are better suited to manage and protect forest resources than the village government or the district government. Most indigenous or traditional community institutions are organized in smaller units than the whole village, but such less comprehensive institutions can be incorporated in the village governance system.

All this is not to suggest that there is no role for government in regulating the use of these resources. Community property in a resource does not exclude the possibility of or need for government regulation of use any more than in the case of ownership by individuals. There are cases in which common property coupled with co-management with a government agency have proven successful, and this approach to improved natural resource management may have considerable potential.

In thinking about alternative future for customary land tenure systems, we need to think not only about the land used relatively exclusively by families but about these larger community resources.

d) Alternative Futures

One can imagine alternative futures for indigenous tenure systems. One, the systematic individualization of tenure such as that carried out in Kenya, seems unlikely. It is very costly. A recent examination of costs in registration projects by the Land Tenure Center shows considerable variability. It may cost \$25/hectare to extend an existing titling system in which individual ownership

is already established and a trained cadre of survey and registration personnel already exists (Thailand). Or it may cost \$150/hectare, as in AID's St. Lucia project, where a great many small parcels have to be brought under a new system of registration (Bruce 1990:2). There have been other important problems with the Kenya experience, including (1) the cutting off of not just community land rights but subsidiary use rights of individuals in the family and neighbors; (2) growing landlessness due to 'desperation' sales of land; and (3) widespread failure to register transactions and inheritances, so that registers established at great expense soon no longer accurately reflect the actual control of land (Bruce 1989:18-20). A more fiscally likely future would involve the more gradual replacement of indigenous tenure by Western tenure forms such as freehold and leasehold. This could be accomplished through the grant of state titles in response to demand by landholders, one at a time, until at some distant point in the future all the land is titled. This is the scenario assumed in most concession systems, and appears to us to apply to Guinea Bissau. A third future could involve the codification of customary rules, but this tends to freeze tenure systems whose major advantage has been their flexibility and capacity to respond to new needs.

Both the Bank and LTC researchers reject these paths and instead recommend a primary if not exclusive reliance on the evolution of indigenous tenure forms under the influence of market forces and population growth. The reliance is not exclusive because there will be some sectors, the urban sector, for instance, where 'imported' tenures and land registration may well be appropriate. There will similarly be needs for such tenure in some rural situations, as where outside investors wish to acquire land, or a local commercial farmer wants a tenure which allows him to use the land for collateral, or land is the subject of active competition and perhaps conflict, with which the customary system seems unable to cope, in cases of urban sprawl into rural areas, or project activities such as irrigation require a radical rearrangement and possibly some redistribution of landholdings (Bruce 1990).

Generally, however, it was recommended that governments seek to create an environment conducive to the evolution. In practice, what does a 'supportive legal and institutional environment' mean?

First, it probably implies a clear recognition of the legal applicability and enforceability of indigenous land tenure rules. A system whose entire status is unclear under national law is unlikely to have the vitality to respond to new challenges. This in turn seems to imply: (a) recognition of the authority of traditional or at least popular local land administrators, including the authority to declare changes in existing rules; and (b) recognition of the economic value of both individual and community land use rights, for which the state must pay compensation if it disturbs them.

Second, it probably means institutional innovation in dispute settlement. Disputes often involve claims by landholders to powers over the land which they have not had before, and dispute settlement is one way in which customary norms change to reflect changed popular expectations. There is likely a need for a dispute settlement authority distinct from the land administration authority, which will after all have a vested interest in its own power to administer land. That authority might function as an appellate authority. There is a related need for publicity of decisions, both to encourage some consistency in decisions in similar situations and to spread ideas about possible directions of change.

Third, there will be a need for legal and institutional innovation with respect to the management of common property and open access resources. Strategies for resource management are increasingly emphasizing the need for decentralization of land management, even for resources which have not been

controlled by a single community. The resources in question are pasture, forests and open savannah. Where one community uses the resource, there is a need to vest control in the community and help it to organize itself to use the resource soundly as a commons. Where several communities share the use of the resource on an open access basis, there is a need for the development of contractual arrangements among the communities for sustainable use of the resource.

The arrangements at community level cannot be specified in very great detail because the national tenure regime must accommodate the considerable diversity of indigenous tenure systems and relevant forms of social organization. The need is not to replace existing tenure forms, but to provide a framework which is conducive to tenure evolution.

Because most land tenure systems in Africa already include some land under Western tenure types, a legal framework must in addition be able to accommodate them as well.

In recent years, a term has been applied to laws which seek to accommodate diversity in the short term but provide a supportive framework for evolution in the longer term: 'framework laws'. An early example from the Civil Law tradition is provided by the provisions of the 1960 Ethiopian Civil Code on property rights of 'agricultural communities'. The example of Botswana and its Tribal Land Boards is perhaps the best known. An example nearby is Senegal, where a 1964 law provided for a new land-administering institution called the 'communauté rurale', consolidated by further legislation in 1972. These experiences have not been without their own difficulties, but deserve attention, and we return to them (section 6.5).

6. A NEW LAND LAW: CONCLUSIONS

6.1 The Constitution and Private Ownership of Land

The present constitutional provisions on land prevent the establishment of private ownership of land. Private ownership rights provide the strongest incentives for development, and this prohibition of private ownership lies at the base of many problems in the country's land tenure system. The constitutional provision that all land belongs to the state undermines customary legal systems and has likely retarded evolution of customary land tenure rules. It allows the state to distribute the land at nominal costs and thereby encourages applicants to apply for areas of land far beyond their capacity to develop. It confronts the *tabancas* with a specter of shrinking resources, a whittling away at their future with no clear limit in sight. It has been the basis for the prohibition of land sales and the use of land as collateral, since the use of land as collateral requires the existence of a land market, on which the foreclosing lender can dispose of the collateral in satisfaction of the debt.

A critical step in reforming land law in Guinea Bissau would be a constitutional amendment. It should:

- 1) not itself automatically convert public land to private ownership but establishes the power of the government to confer or recognize such ownership, pursuant to the provisions of a new land law; and

- 2) provide constitutional protection to private ownership of land, limiting the taking of such land to situations required for specified public purposes and requiring compensation based on market value of land when there is such a taking.

A proposed amendment to the constitution of Mozambique addresses the first issue. It was drafted in 1990 and not included in the 1991 Constitution but is still under discussion for post-peace accord constitutional revision. It reads:

Article 12. All property in land originally vests in the State and may be transferred to individual persons or collective entities, taking into account its social purpose. The transfer of property and the granting of titles to land shall be regulated by law, benefiting direct users and producers. The law shall avoid the use of property rights to produce situations of economic domination or privilege to the detriment of the majority of citizens.

It would appear that a legal regime still exists in Guinea Bissau for private ownership of land: the provisions of the Civil Code. Those provisions have been irrelevant; there has been no privately owned land to which they would apply. But we are not aware of any repeal of the provisions, and suggest that they might be taken as a starting point. They would need to be reviewed carefully and any necessary updating done, given the early date of application to Guinea Bissau.

If such a constitutional amendment is possible, the provisions of a new land law on the upgrading of concessions to ownership would need to provide ownership only for those parts which had been developed. Failure to so provide would consolidate the questionable large land allocations of recent years, and create windfall wealth for those receiving ownership. Provision should also be made for registration of ownership by *tabanca* farmers of their existing holdings, at their request, and for the possibility of systematic, comprehensive land registration in limited areas where this seems required.

If the Constitution cannot now be amended to permit such ownership, the current legislative exercise should seek to strengthen individual private use rights within both the *tabanca* tenure systems and the concession system.

6.2 The Law Concerning Concessions

Guinea Bissau is still utilizing a colonial period concession law as its major tool for allocating land to commercial production. In relating the results of the fieldwork on concessions and the conflicts with *tabancas* to the comparative experience, a number of problems have emerged, problems which have fairly consistently appeared with similar systems elsewhere in Africa. The system is based in state ownership of land. In theory, the state with the consent of the *tabanca* takes for concessionaires land which is by the state's legal standards unused, though it is often seen by the *tabancas* as part of their heritage. The system is obviously fraught with potential for conflict, and the fieldwork indicated that, as elsewhere, that potential is being realized in spite of a set of legal safeguards in the 1961 law. Some of the difficulties are rooted in the policy of large concessions to potential investors, others in the law itself, and yet others in the way the law has been implemented.

a) State Ownership, Cheap Land Policies, and Development Conditions

Because land is owned by the state, it is treated as a free good, to be allocated as needed. Fees seek to cover the cost of the allocation process, but there is no open market in land which can set land values, and the state does not attempt to calculate them. Because land is so cheap, and there are no significant land taxes, applicants for concessions have every incentive to seek as much land as they can obtain, regardless of how much land they can afford to develop. The result, as elsewhere, is that while small areas of commercial production may be established on some concessions, the total area of most concessions is often less intensively utilized than land in the traditional agricultural sector.

In other countries, where long-term leaseholds can be used as collateral, the concession is often obtained as a basis for access to credit on concessionary rates for agricultural investment. The funds borrowed are often invested in other sectors or in urban land. In Guinea Bissau the concessions cannot be formally used to secure a loan, but possession of a concession can nonetheless provide access to credit and the connection between credit availability and concession grants has been noted earlier [see 4.2(b)]. The extent to which such credit is actually used to invest in the concessions, rather than more lucrative opportunities, is a topic which deserves further study.

The most straightforward and effective way of dealing with this problem is the discipline imposed by a land market and land taxes. If the state sold the land for commercial agriculture in private ownership and holding that land imposed some modest costs which needed to be recovered, applicants would ask for only so much land as they could use profitably, to recover the costs and make a profit. A similar effect could be achieved, though probably less reliably, if the state (or the *tabancas*, if ownership were vested in them) auctioned off the land available for concessions, and charged a more substantial rent.

Guinea Bissau has instead relied on contractual obligations to develop and invest according to appended development plans. As elsewhere in Africa, these appear to have been ineffective. The fieldwork indicated that substantial areas of concessions remained undeveloped and that revocations were unusual. This is the invariable experience in African countries with concession systems, due on one hand to a lack of resources for monitoring and evaluation, and on the other a failure of will on the part of enforcement officers to act against the interests of acquaintances, friends and colleagues. There are obvious temptations to bribery of public officials implicit in the system.

The pervasiveness of these monitoring problems in other countries with similar systems suggests that this is not simply an implementation problem, but a flawed approach. As a result, a new law should seek to rely not on development conditions but on the creation of economic pressures to develop land by imposing a real cost on land acquisition and landholding. As a safety measure, it should also include a size maximum.

There is already a widespread recognition in government of a need to significantly limit concession granting. The experience of other African states suggests that the large concessions granted in recent years are unlikely to be very intensively or efficiently utilized in the near or intermediate future. On the other hand, there is a need to provide some means of access to land for potential investors. The need is for either the state or the *tabancas*, as owners of unused land, to allow market forces to exercise a growing influence over its allocation.

The likely extent of the contribution of these larger operations to agricultural development remains to be seen. The experience of other countries suggests that it may have been exaggerated in the Gambia in recent years, but this does not obviate the need to provide an adequate legal regime for it. What is much less clear is how much the state should be investing to promote and service the development of this scale of farming. More rigorous econometric studies of economic profitability at different scales are needed before this question can be answered.

b) State Ownership, the Concession Process and Ponta/Tabanca Conflict

The fieldwork has indicated that the criteria used by the state to decide if land is available to a concessionaire may be different from those of the local community, and that the local community may be willing to allow an outsider to take up use of land, but not want to suffer the loss of long-term control of the land to the government. Other problems include:

- 1) Resentment among **tabanca** residents over land taken for concessions but not used;
- 2) Resentment among **tabanca** residents over more land being taken than has been approved by local authorities; and
- 3) Competition for resources, such as water for irrigation and grazing for livestock, the latter involving mutual claims of cattle damage to crops.

Scaling down the size of the concessions is critical, and means of attacking this problem have already been suggested in the previous section. This set of problems could most directly be ameliorated by shifting the ownership of land and the granting of concessions (or sales of land) to local communities. On the basis of his fieldwork, Tanner (1991:71) suggests if government considers that concession-granting must remain the business of the State, and more fundamental (that is, constitutional) change is not possible, then a new law should require that:

- 1) The concessionaire should be required to obtain permission to use the land, in writing, from the group recognized by custom as controlling rights to the land in question, and not just the consent of the Sector State Committee.
- 2) The land should be clearly demarcated when the consent is obtained, with the boundaries marked on the ground and recorded in a sketch map to which the local consents would also be required.
- 3) This consent should include a consent to grant by government of a concession, and the concession process and its implications should be explained in the local language by a local official, who should witness the community's consent.

All this should be done at the beginning of the process, before an application can be made. In addition, it is suggested that:

- 4) The concession agreement should be a three-way agreement, to which the community is also a party, and by which the government and concessionaire legally commit themselves to return the land to the local community if the concessionaire fails to develop it as promised or fails to meet commitments undertaken to the community.

c) The Concession-Granting Authority

The siting of the authority to grant concessions in the Ministry of Public Works is unusual. The authors are unaware of any other country in which this ministry controls concession policy. The authority was presumably located in this ministry because a survey capability existed there.

It would be best if that authority were transferred to another ministry more intimately involved with the policy questions involved in agricultural concessions. If the authority were to rest with any one ministry, it should be with the Ministry of Agriculture, because concession policy should be directly linked to agricultural development strategy. But land use decisions affect many interests, and a Land Commission with representation from several ministries representing those interests is preferable. Ministries responsible for environmental concerns, local administration, and the administration of justice should be members, and there are certainly others. A Commission has another advantage; it is less subject to problems of undue influence that are individual administrators. The Commission might be lodged administratively within the Ministry of Agriculture, in a Land Use Division which would have broader responsibility for land policy.

6.3 Customary Rights in Agricultural Land

The findings of the fieldwork carried out by Tanner and summarized earlier (chapter 4) are very informative. They suggest a serious lack of recognition of the extent of existing commercial production in the *tabanca* sector--or its potential for commercial production. There is a danger of the marginalization of the bulk of the national population by an agricultural development strategy which is concession-focused in implementation if not in conception. There is an alarmingly persistent tendency to regard the *tabanca* sector as a subsistence sector whose destiny is more the provision of social security needs than the achievement of production goals. Terminology (the *tabanca/ponta* dichotomy) may be part of the problem, but the persistence of the tendency is also based on the desire of town-based elites to capture development funds rather than have those funds go into the *tabanca* sector.

The picture which Tanner paints of *tabanca* land tenure is not unlike that from recent studies elsewhere in Africa. He notes that the system is not static but evolving; that holders of farmland in the *tabancas* consider themselves de facto landowners; and that the level of internal conflict over land within the *tabancas* is low, suggesting that the existing tenure systems are meeting local needs reasonably adequately. The common use of the term 'communal tenure' for these systems obscures the fact that they provide secure private rights (less than ownership, of course) to individuals or households.

From studies in other African countries, we know that indigenous tenure systems do not in most cases have to be replaced in costly titling exercises. but will under population pressure and the influence of market forces evolve toward systems of stronger private rights in residential and agricultural land. This process is advanced in many African countries and a legal framework should be put in place in Guinea-Bissau which facilitates this process. The need to provide a supportive framework for the development of the customary legal system has been mentioned and several 'framework laws' noted, to which we will return shortly (in 6.6).

6.4 Law and Commons Management in the Tabancas

As noted in chapter 5 of this report, there is a growing recognition of the need to reinforce the dimension of customary land tenure which is in fact 'communal': the shared use of land for grazing, hunting and gathering. The land may include fishing pools, natural forest, grazing areas, sacred groves, and brush and waste areas. (Here we are concerned with resources on a scale susceptible of community management, not large forests or wildlife areas better handled as reserves by the state.)

Management of the use of an area as a commons requires a legal basis for community control of the use of the resource, either as a matter of property or administrative law. Tanner (1991:61) has noted that as a matter of administrative territory, rural land is already entirely divided into *tabancas*, even if some of the area within a *tabanca* is not occupied or used. Local people know where one *tabanca* ends and another begins, even in the forest, and they 'view these more extensive areas of surrounding land as a collective resource held in trust for future generations, and which must support a sustainable crop rotation system' (Tanner 1991:61). He suggests that customary law, which establishes the boundaries of *tabancas*, be used to define the *tabanca*'s property rights, rather than current use and occupation (the standard used by the state for recognition of property rights in the *tabancas*). All land within the administrative *tabanca* would be vested in the *tabanca*.

The *tabanca* seems a reasonable size for management of non-farm resources. A first step in the implementation of such a program would need to be the demarcation of *tabanca* boundaries. Tanzania, attempting to sort out the confusion created by villagization, now has a program of village demarcation and registration under way. While there have been some disputes between villages, the process has on the whole been remarkably smooth. The villages are almost invariably found to abut one another, and expectations that some unclaimed land might be found have proved incorrect (Hoben et al. 1992).

If there is an area over which no one *tabanca* has a strong customary claim, and which is used by several *tabancas*, it may need to remain in the hands of the state, with the state assisting the communities in developing a plan for coordinated use. If in some regions such areas are extensive, over and beyond officially declared reserves, then a zoning exercise may be necessary to plan for the best use of such land.

Vesting the land at the *tabanca* level seems appropriate provided representative management institutions can be identified or created, and, especially important, provided that the land vests subject to individual, family and clan rights already existing over the land, especially residential and agricultural land. A new 'communal' tenure should not be created which undercuts the evolution of stronger private land rights. Those individual rights need to be protected and allowed to evolve over time, even to the eventual exclusion of the community title or its diminution to merely theoretical proportions for most land used by households, as in the case of the tenure rights of the Crown in English law.

Custom may provide an adequate and dynamic set of rules for agricultural land, but it is very possible, given findings elsewhere, that rules and institutions for the management of commons areas may need considerable development. Some areas may have been shared by different landholding groups. Management decisions may or may not have vested in a *tabanca*-level institution. If the *tabanca* is to be the relevant level, it will be necessary to provide a clear legal basis for the right to exclude outsiders from and control the use of the resource by residents. The legal basis must be clear. It may be a matter of administrative law, with an lower administrative unit regulating land use by by-

law, managing land which belongs to the state and over which more senior administrators have authority. Or it may--preferably--be framed as a matter of property rights, with the *tabanca* residents as co-owners managing their common property, property protected by law.

There are thus two important needs:

1) a supportive legal and institutional environment must be created for the evolution of customary law. Some of the minimum requirements of such a situation have been noted earlier:

(a) a clear recognition of customary rules as the controlling law, and legal protection of the customary rights, and

(b) dispute settlement mechanisms would need to be reexamined to understand how they could best be arranged to facilitate change in customary rules to meet new needs;

2) a legal basis for community (*tabanca*) management of resources used in common, preferably as common property or failing that, as a matter of administrative law.

Are there legal models available which can meet these needs? Models from Ethiopia, Botswana and Senegal have already been mentioned. Copies of the relevant legislation have been listed in Annex 5 and provided as a separate Annex 6, but they will be discussed here in broad outline, by way of introduction.

6.5 Framework Laws: Three Models

a) Ethiopia

The 1960 Ethiopian Civil Code was drafted by Professor René David of the University of Paris in consultation with a committee of Ethiopian colleagues. Its property provisions contain a chapter (arts. 1489-1500) intended to cover the communal tenure area of northern Ethiopia, especially Eritrea and Tigray. It provides for the Ministry of the Interior to have every land-owning community to draw up a charter detailing the custom of the community and specifying: (a) the persons or families composing the community; (b) the land to which the rights of the community extend; (c) the manner in which the community is administered and its authorized representative; (d) the manner in which the land or other resources of the community are allotted and exploited; and (e) the conditions on which the charter may be amended.

Land is inalienable by the community, except with the written permission of the Ministry of Interior. Discriminations based on race, religion or social condition are to be of no effect. The Ministry of Justice is to encourage revision of the custom of communities as seems appropriate, and any provision in a charter than custom may no be revised is null and void. Appeals may be taken to the courts against any decision by the community of the ground that it is contrary to the Constitution or is taken by community representative in excess of their powers.

The provisions are attractively simple. They vest title in the community and confer broad--if not entirely unlimited--discretion of the community to develop its own law over time. No new institutions

are envisaged and the intention appears to have been to rely on village-level, customary institutions to manage the land. The provisions were never implemented on a significant scale, and the concept which they embody was replaced after 1974 by the revolutionary peasant associations, which were (or became in time) unpopular local organs of the party.

b) Botswana

The Tribal Land Act, 1968, vested all land in the several Tswana tribes. It created local land administration institutions at district level: Tribal Land Boards composed of indirectly elected members of the District Council and ex-official members from the district administration. Chiefs remained as members, sometimes as chairmen. Later they tended to drop out in pique over their diminished authority. The substantive law to be applied remains however Tswana customary law, subject to local variations, but no attempt is made to codify it. Certain tenure innovations are however included. A Board must allocate a resident member of another tribe land in its territory of another, and Boards have selectively introduced leases, initially for industrial and commercial land uses, later for residences in towns and for commercial ranches.

The Board administers the land as trustee for the Tribe, but the Board is also the lowest level of government land administration. Its executive secretary is a public official and it must take orders given by the President, via the Ministry of Local Government and Lands. Appeals from Board decisions are in the first instance into the Ministry and only after appeal have been exhausted there, into the court system. This dual role has been problematic when the Boards have been required to carry out controversial programs, for example the ill-advised Tribal Grazing Land Policy.

Botswana in the early 1970s carried out a national zoning exercise which classified land as communal, reserve, and available for commercial use. Land grants for commercial purposes were frozen pending the completion of the zoning exercise. The exercise emphasized participatory methods (though it was not always successful in this) and was conducted by the District Land Boards. Subsequent evaluations of the process indicate that too much land was zoned commercial, but large areas were excluded from land granting processes and the rights of local communities in those lands confirmed.

These Boards are of particular interest in that they have been supported with reasonably adequate resources, unlike most and administration institutions in Africa. Nonetheless, the District Land Boards were able to effectively control land allocation only in and near the towns (referred to locally as 'major villages') where their offices were located. Sub-district Land Boards were then created, but have still been only partly effective in taking over allocation of land for agricultural purposes from customary authorities. Gradually, a modus vivendi is being reached between the Boards with the lowest level of the traditional authority structure, the ward heads, who still handle much local land administration.

c) Senegal

Senegal like Botswana has created new local institutions to administer land. The 1964 Loi sur la Domain National provides for several categories of land, one the zones de terroire, which correspond to *tabanca* land in Guinea Bissau. This land like all other land in Senegal belongs to the State, but it is to be administered by a new institution called 'rural communities' for whom a quite elaborate statute, the Loi Relative aux Communautés Rurales, was promulgated in 1972.

The councils of these communities are part elected, part appointed, and usually consist of leaders from several, often traditional leaders. The law requires them to administer the land under the control of the state, and their allocation decisions are supposed to be in accordance with national development priorities in their area. The basis of rights to land is the development (*mise en valeur*) of the land, not customary rights, and provisions in the law specifically prohibit any sale or lease of land. In fact, the councils commonly administer land according to customary rules. Much of the day to day business of land administration is done in the villages, with the councils acting as appellate bodies. Decisions of the councils must be ratified by the *sous-préfet*, with ultimate authority resting in the Ministry of Interior.

Investments in this system have been modest. While it is now in theory in effect nationwide, after many years of region-by-region implementation, its penetration and effectiveness are very uneven. Abuses of authority under the law have caused deep resentment in the Casamance, while in the Peanut Basin some villages are hardly aware that it exists.

d) Lessons

The new local land administration institutions in both Senegal and Botswana have had difficulty fully taking over land administration from customary authorities. The sheer size of the task and the unsatisfied information needs of a bureaucratic land administration system make their task difficult. It may be best to expect no more from these institutions than land use planning decisions, management of resources shared by the several communities under their authority, and an appellate review to ensure traditional land administrators' compliance with the law's basic principles. An institution similar to a Botswana Land Board at *tabanca* level might be combined with an approach at the village level more similar to that of the Ethiopian Civil Code.

The consultants offer these not as models to be adopted, but to illustrate some of the options which need to be considered. The authors have a preference, based on experiences elsewhere, for the models which confer property rights on the local institutions, but do not feel able without further discussion to recommend how institutions to administer land should be constituted and nested within the complex of local institutions in Guinea Bissau.

6.6 Dispute Resolution

Conflict management requires not only good substantive rules, but effective means of managing and resolving conflict once it arises. As noted earlier, dispute resolution is one important way in which customary law changes to meet new needs, and the nature of the dispute settlement process can facilitate or hamper that process of adjustment.

The role of state land law--as opposed to customary land law--must be framed in light of what is a very rudimentary state structure for dispute resolution, even by African standards. Its reform and upgrading are critical--second only to the provision of fair laws itself--in building the rule of law in Guinea Bissau. At the moment, however, regional tribunals are the formal court of first instance, with one law judge and two lay judges. These exist in Bissau in only three rural regions--Bafatá, Cacheu, and Cattó--and the three rural tribunals began operating only last year. Appeals are taken to the Supreme Court in Bissau. Also at regional level is a representative (*delegado de círculo*) of the Ministry of Justice, and inspectors (*controladeros*) of the local Popular Tribunals at sector level.

It is these last local tribunals which are of particular interest. Under the 1975 draft land law, these Sectoral Popular Tribunals (PTs) were to be the court of first instance in land disputes when customs are the applicable law. The Regional PTs would have been competent in other cases, as when some conflict between statutory law and custom arose (art. 76). The Organic Law Bill (art. 20) for the Ministry of Justice provides for a PT in every sector and region. A summary of the current situation with respect to the establishment of the PTs provided by the Ministry of Justice is reproduced in Annex 4.

The PT system, however, appears to be in crisis, especially at sectoral level. The *controladeros* do not have transport to go to the sectors to work with the PTs there. The Ministry has been unable to service adequately or even monitor these tribunals, and is considering reducing their numbers by centralizing them or extinguishing them in a more radical fashion.

Our impression is that villagers reject the PTs as a basis for formalizing their customary law. They prefer to solve their problems under the guidance of local elders. Usually they say that 'conversation is the most important tribunal', even when the question involves disputants from different ethnic groups or *ponteiros*. Their reaction reflects not just a disenchantment with the PTs but a dislike of any dispute settlement process which emphasizes strict enforcement of rules rather than mediation and conciliation within a more flexible legal framework.

A good deal of information was gathered in the course of the preparation of this report concerning dispute resolution mechanisms, and the need for greater investment in the system and fundamental change are clear. But our level of understanding of these situations does not at this point allow us to put forward concrete suggestions. We suggest that the processes and institutions for the resolution of disputes over land and other natural resources as a key area for further investigation (see below, 6.8).

Any legal changes needed would in any case be made not in land law but in laws concerning local administration and judicial administration.

6.7 Information Needs

Two key areas stand out as requiring further study.

1) **Relative Efficiency in Ponta and Tabanca Agriculture:** There is a need for a rigorous econometric study of the relative efficiency and profitability of agriculture on the different scales. It should be possible to compare efficiency in factor use, market response, etc., between the smaller *pontas* and *tabanca* farms, and then examine how, within *ponta* agriculture, efficiency is affected by increasing scale. Adequate legal regimes can be framed for each type of agriculture without this information, but it is required--together with information on equity impacts--for any rational allocation of development funds between the sectors.

2) **Legal Change in Customary Law:** This report suggests reliance on the evolution of customary land law as influenced by growing population pressure on the resource and market forces. The strategy of adaptation rather than replacement of customary law is grounded in a recognition that customary land tenure systems are developing

systems of private land rights. Further studies are needed to understand how best to structure the administration of that law and dispute resolution so as to provide a supportive environment for legal evolution. The Traditional Law Institute proposed in the USAID law reform project could provide a locus for such a program of research, though the field research should be cross-disciplinary and focus on processes of dispute resolution as much as the substance of customary rules.

7. RECOMMENDATIONS

7.1 The Constitution as the Legal Basis for Land Rights

Private ownership rights provide the strongest incentives and best opportunities for land development.

- (a) A Constitutional Amendment is recommended.
- (b) It should permit private ownership of land and allow government to confer or recognize such ownership, pursuant to the provisions of a new land law.
- (c) It should provide constitutional protection to private ownership of land, limiting the taking of such land to situations required for specified public purposes and requiring compensation based on market value of property interests when there is such a taking of property.

7.2 The Civil Code and Property Rights

The Civil Code provisions concerning ownership and other private property in land do not appear to have been repealed. We recommend that:

- (a) A new land law should refer to those provisions and make it clear that they would apply to ownership of land if and when it can exist constitutionally.
- (b) In the longer term, a detailed review of those Civil Code provisions should be undertaken to see whether they require updating.

7.3 Natural Resource Management and the Public Land/Tabanca Land Interface

There are a broad range of conflicts which have their roots in alternative views of the extent of *tabanca* authority over land. The *tabancas*, relying on custom, see the whole of their territories, including sporadically or lightly used areas, as their property. The state sees only those areas which they at present use relatively intensively as belonging to the people of the *tabancas*, and the other land as available for allocation. The point is relevant to the availability of land for concessions, but it is also extremely important for management of local natural resources, a concern largely neglected in earlier discussions of land law

revision. Communities with ownership rights over their commons are empowered and have greater incentives to manage natural resources well, and this is increasingly viewed as a viable and often preferable alternative to creation of state-run 'reserves' in many situations.

We recommend that:

(a) A new law should accept the customary definition of the extent of the property rights of the **tabanca**, including land used as commons areas for grazing, hunting and collection of fuelwood and other forest products, plus land for future use, rather than defining those rights by current intensive use.

(b) A new law should provide for a process of **tabanca** demarcation, with such land to be subsequently registered as the property of the **tabancas**, subject to the rights enjoyed by individuals or groups under customary law or statute [see 7.4(a)].

(c) It should provide for such demarcation and registration at the request of any **tabanca**, at its own expense; and also compulsorily, when required by government for a demarcation unit of one or more **tabancas**, in which case it should be at government expense.

(d) A new law should provide for public ownership where land lies beyond the existing territories of the **tabancas**, or where several **tabancas** share the use of land which belongs to no one of them.

(e) A new law should provide for a subsequent law defining an institution at **tabanca** level which would manage **tabanca** land used as commons [see 7.4(b)].

7.4 Individual and Household Land in the Tabancas

Experience elsewhere indicates that customary land tenure, influenced by growing population densities and market forces, tends to evolve in the direction of stronger individual rights. This appears to be happening in Guinea Bissau, though unevenly. Rather than attempting to replace customary land tenure with statutory land rights, a legal and institutional environment must be created which is supportive of the evolution of customary land law to meet new needs. To accomplish this we recommend:

(a) A new land law should provide a clear recognition of customary rules as the controlling law for land in the **tabancas**, and rights under customary law should be constitutionally protected on the same terms as property rights under statutory law.

(b) A new land law should provide for a subsequent law defining (or recognizing) an institutional basis for administration of customary land law at **tabanca** level, including local dispute settlement and the amending of customary law [see 7.3 (f)].

(c) Provision should be made for the recording of indigenous tenure rules and for recording the decisions of community leaders and local courts in land disputes.

(d) A new land law should recognize the role of informal dispute settlement at **tabanca** and lower levels, with appeals into the formal judicial system.

(e) Studies should be made of the problems of and alternatives to the Sector Popular Tribunals.

7.5 Land for Larger-scale Commercial Production

There is already a widespread recognition in Government of a need to limit concession granting significantly. The experience elsewhere in Africa suggests that the large concessions granted in recent years are unlikely to be very intensively or effectively utilized in the near or intermediate future. The need for access opportunities for real commercial farmers is much more modest in size, and could be accommodated even if far smaller areas were available to government for this purposes (see 7.3). It can be met by allocating the land available for agriculture by market process and providing the recipients with stronger property rights, preferably individual ownership. It can similarly be met by allocations by the **tabancas** themselves out of land which they are not currently using, in ownership or on lease.

We recommend:

(a) Land grants should preferably be in private ownership, or failing that, by long-term, inheritable, and transferable concession.

(b) Procedures concerning identification and consent for allocations should be strengthened, to be applicable whether land is being allocated by Ministry or **tabanca** authorities:

(i) The applicant should be required to obtain permission to use the land, in writing, from the group recognized by custom as controlling rights to the land in question, and not just the consent of the Sector State Committee.

(ii) The land should be clearly demarcated when the consent is first obtained, with the boundaries marked on the ground and recorded on a sketch map to which the local consent would also be required.

(iii) This consent should include a consent to grant by the Ministry or **tabanca** authorities of ownership or a concession, as the case may be, and the grant process and its implications should be explained to the community in the local language, who should witness the local consents.

(iv) The grant should be a three-way agreement, involving the consenting authorities as well as the Ministry or **tabanca** authorities and the grantee, by which the authorities and the grantee commit themselves to return of the land to the **tabanca** if the grantee fails to develop it as promised or fails to meet any commitments to the community.

(c) At national level, the authority responsible for making grants should be a Land Commission on which the several relevant Ministries and other agencies are represented, including those responsible for protection of wildlife and the environment. It should be either an autonomous agency with links to several ministries or be based administratively in the Ministry of Agriculture.

(d) Grants of land should no longer be distributed free, but instead the law should provide for distribution by the market. Wherever possible this should be accomplished by public auction.

(e) The new law should impose an absolute maximum for grants of 350 ha/person as recommended by the Bula Seminar; partnerships and corporations should be allowed double this amount, but more than that only with the approval of the Council of Ministers.

(f) The new law should provide for a field review of all existing concessions over that limit to determine if they are fully utilized, and where this is not the case, the underutilized portions should be withdrawn and returned to the control of the *tabanca*. The law should not permit any concession to be converted to ownership without this being done.

(g) The new land law should empower the Land Commission or other administering authority to declare certain areas as available for or closed to land grants.

7.6 There Is a Need for Studies to Clarify:

(a) the relative efficiency of *tabanca* and *ponta* agriculture, and its implications for agricultural policy and public investment to support these farm types;

(b) the processes of change in customary land law, including their institutional dimensions, and ways in which this change can be encouraged; and

(c) gender issues in both customary and statutory land law.

ANNEX ONE

CONCESSION PROCEDURES AND FEES

Present legislation lays down a clear procedure to be followed when a land concession is sought by an individual or entity. This involves the following main steps¹:

- (a) Submitting a 'Processo' to the Ministry of Social Equipment. This includes three essential documents, and a fourth which depends upon the size of the concession sought:
 - a site plan showing where the land is;
 - a formal request for the concession, to the Ministry;
 - a declaration from the State Committee for the area that the land does not belong to anybody and there are no reasons against legalisation;
 - a workplan detailing what is to be done on the land (if the claim is for an area over 20 hectares).
- (b) Consideration of the Processo at regional and sector level. The Region apparently has the last word on the matter of conflicts of interest, and should consult closely with the Sector Committee within whose area the claim falls. If no obstacle is found, the third stage begins.
- (c) The Edital. This is a formal notice of the claim being made. Two copies are sent to the Official Bulletin; and four to the Region. Of these four, one is filed and another is placed on a notice board in Regional administration; a third is posted in the locality where it can be seen by the public; and the fourth is returned to the DCNN signed by Region if no objection is lodged².
- (d) Issuing of License of Occupation. With this the concession claimant can now go to the Region and ask for the 'Provisional Demarcation' of the land in question; this involves simply placing a sign up on the land saying whose it is. He or she then has between 3 to 5 years to use the land as planned.

¹ Tanner (1991). The table refers to September 1991 revisions.

² This has to be within 30 days of the Edital being signed, not 30 days after it is posted in the local area, which of course can be days or weeks after the document is signed at DCNN.

- (e) Prova de Aproveitamento. An inspection (**vistoria**) takes place after a maximum of five years, to ensure that the original plan is being carried out. The concession holder can accompany the 'Commission' which consists of members from DCNN, the MDRA, and the Regional government. If the visit is satisfactory, the licence to proceed with the 'Definitive Demarcation' is issued (Definitive Concession), and marker posts are put in place.
- (f) The 'Alvara', or title deed. This is the final stage. The original and one copy are prepared by the DCNN. The former is sent to the Land Registry (Conservatorio de Registro Predial) of the Ministry of Justice, and to the Ministry of Finance, where it is recorded and then returned, via DCNN, to the concession holder. DCNN retain the copy in case of future loss of the original.

The whole process takes years rather than months. During this time, use of the land is denied to others, including *tabancas* who previously may have used it under the traditional land use system. At the very least it will take three years, and a maximum of five, before there is an inspection of the land prior to issuing the Definitive Demarcation and Alvara.

It is only at the last stage that the land on the ground is marked off accurately, when boundaries are marked out with pegs. Up to this stage, the concession holder simply has to indicate that it is his, using a sign posted in the area. He can then begin to exploit the land. It is not unusual for adjoining land to be incorporated, particularly if this happens to be of good quality. At the time of the final demarcation, if no objections are raised and provided that this 'extra' land is no more than a fifth of the original claim size, the applicant pays only a small fine³ and this land is included in the final Definitive Concession. Where the added area is more than a fifth of the original claim, a fine is also levied. The concession holder, now with the original process complete, is then free to initiate a new process for this added area, which he can of course continue to farm in the meantime.

The cost is not great in real terms, but is a hurdle for the smaller farmer with few resources. There are fixed payments for the paperwork, such as the Site Plan form (**Croquis**), preparing the *Processo*, and notices in the Official Bulletin. One area-related payment is made per hectare when the Provisional Demarcation takes place; and at the Definitive Demarcation further scaled payments are made as shown the table which follows.

The applicant also has to cover all costs involved, including transport of surveyors and inspections, subsistence and lodging while they are on the field, and fees for their services. According to DCNN, these charges are negotiated between the applicant and the officials concerned, on the basis of a scale of suggested costs. Add these to the overall bill and it becomes a difficult financial hurdle for the average small farmer to jump.

³ Presently at the rate of PG2000 per hectare.

FEES FOR SERVICES AND DOCUMENTS TO SECURE LAND CONCESSIONS

<u>SERVICE AND PAYMENT SCALES</u>	<u>CHARGE LEVIED</u> PG
DEMARCATING AREAS OF LAND	
Non-agricultural use	
Housing in urban areas	55,000.00
Housing in rural areas	25,000.00
Industrial & tourist use	190,000.00
Agricultural use	
First 4 hectares	65,000.00
Per hectare between 4 & 10 ha	4,200.00
Per hectare between 10 & 30 ha	3,200.00
Per hectare between 30 & 50 ha	2,100.00
Per hectare over 50 ha	1,100.00
TOPOGRAPHICAL SURVEYS	
Up to 5 ha	1,200,000.00
Per hectare between 5 & 10 ha	21,000.00
Per hectare between 10 & 30 ha	13,000.00
Per hectare between 30 & 50 ha	10,500.00
Per hectare over 50 ha	8,000.00
Levelling (per kilometre)	39,000.00
Piquetagem, per marker installed	1,300.00
For each re-installation of markers	7,800.00
Coefficient of difficulty +25%	
Transverse and longitudinal profiles, Per linear metre	750.00
Area surveys to 1/1000 scale, per hectare	345,000.00
RECORDS DIVISION	
First 5 hectares, per sq. metre	550.00
Between 5 & 10 ha, per sq. metre	500.00
Between 10 & 50 ha, per sq. metre	450.00
Over 50 ha, per sq. metre	400.00
Placing concrete markers, per post	100,000.00

PRINTED FORMS

Property Title Deeds (Complete)	10,000.00
Concession Licences	3,000.00
Concession Contracts	5,000.00
'Autuações' (Process documents)	8,000.00
Registration in General Record Book	3,000.00

Source: Ministry of Public Works, Construction and Urbanisation,
Directorate of Topography and Land Records (Cadastral Service)

ANNEX TWO

THE 1975 LAND BILL DRAFT: A SUMMARY

This Bill maintains the ban on private ownership of land, and that land cannot be sold, leased or attached. Any contract of this sort would be null and void (Article 1). Land concessions would follow national, regional and urban government plans.

Land was classified under three categories, according to its destination: agrarian, non-agrarian, and protected zones. Agrarian land was considered to be for agriculture, animal ranching and forestry uses, according to the National Development Plan (Articles 17 to 21). Concern for environmental protection, particularly fruit trees and hardwoods, was put forward. The Council of Ministers would set the rules and regulations for land management, and establish the mandate of different government offices. The "Direção de Topografia e Cadastro" would be in charge of land registration (Article 3).

Maximum size of rural plots were set at 30 ha. No minimum sizes were established. The Council of Ministers, however, could determine the concession of larger areas to cooperatives, national partnerships and corporations (Article 5). Both individuals and companies may be entitled to land tenure. Foreign citizens and businesses may be granted these rights, exceptionally, by the Council of Ministers, and only when reciprocity agreements for Guinean nationals exist with respective countries for Guinean nationals (Article 6).

Except for traditional land use, grantees must obtain a license to have access to land. Traditional rights would be admitted, as long as legalized within five years from the entry in force of the Land Bill (Articles 7 and 8).

Grantee's right and duties (Articles 13 to 16); cumbersome land concession (Articles 37 to 54) and registration (Articles 63 to 69) procedures were established in detail. The Party, government organizations, popular associations with cultural, athletic or social objectives, international and foreign government organizations were entitled to free access to land, otherwise an annual fee would be charged. The Council of Ministers, at its discretion, could provide for exemptions (Article 10).

Land concessions were limited to 20 up to 50-year terms, with the possibility of renewal for equal period. Agriculture cooperatives, state organizations and companies; scientific and research institutions; individuals and family groups that produce for their own needs, as long as they do not hire outside labor, could receive unlimited land grants (Article 11).

Among other reasons that could terminate a land grant, this Bill provided that it could be revoked if utilized differently from the license terms (Article 60), or not developed or exploited for three consecutive years.

Urban and urban expansion areas, as well as their green belts were included as non-agrarian land, and could be used for housing, industrial and commercial purposes (Articles 23 to 30), under specific conditions to be set by the municipalities. Finally, protected zones would include not only areas for environmental protection but also those of national security, such as military defense zones, the coastal zone and the continental shelf (Articles 31 to 36).

N.B. This summary was kindly provided by Mr. Ivon d'Almeida Pires Filho, having been prepared earlier for USAID/Guinea Bissau.

ANNEX THREE
POPULAR TRIBUNALS

Mapa 1

República da Guiné-Bissau, Ministério da Justiça
Mapa dos tribunais populares de base a nível nacional

Regiões	Total a nível da região	Províncias	Total a nível da província	Total nacional
Oio	24	norte	57	
Cacheu	23	norte		
Biombo	<u>10</u>	norte		
	57			
Towbali	35	sul	65	
Quinara	22	sul		
Bolama/Bija	<u>8</u>	sul		
	65			
Bafatá	28	leste	48	
Gabú	<u>20</u>	leste		
	48			
Zona 1	2	S.A.B.	8	
Zona 2	3	S.A.B.		
Zona 3	4	S.A.B.		
Zona 4	1	S.A.B.		
Zona 5	1	S.A.B.		
Zona 6	<u>1</u>			
	8		178	178

Mapa 2

República da Guiné-Bissau, Ministério da Justiça
 Mapa dos tribunais populares de base
 por província, região, e sector

Norte	PROVÍNCIA		REGIÃO			SECTOR			
	No. tribunais anteriores	No. tribunais actuais	Região	No. tribunais anteriores	No. tribunais actuais	Sectores	No. tribunais anteriores	No. tribunais actuais	Tribunais elimi. por região
-	57	Oio	-	24	Farim	-	5		
					Bansaba	-	3		não fora
					Bensoa	-	6		fornecia
					Bhacra	-	3		os dados
					<u>Bissorã</u>	-	7		dos T.E.
					5 secto.			24 trib.	
		Cacheu	-	23	S.Domin	-	2		
					Bigene	-	5		
					Bula	-	4		idem
					Octó	-	4		
					Canchun	-	4		
					<u>Cacheu</u>	-	4		
					6 secto.			23 trib.	
		Biombo	-	10	Biombo	-	5		
					Sefim	-	2		idem
					<u>Prábis</u>		3		
					3 secto.			10 trib.	

Mapa 3

República da Guiné-Bissau, Ministério da Justiça
 Mapa dos tribunais populares de base
 por província, região, e sector

Sul	PROVÍNCIA		Região	REGIÃO		Sectores	SECTOR		
	No. tribunais anteriores	No. tribunais actuais		No. tribunais anteriores	No. tribunais actuais		No. tribunais anteriores	No. tribunais actuais	Tribunais elimi. por região
						Cató	-	13	fornevia
						Quebo	-	6	os dados
						<u>Cacina</u>	-	<u>10</u>	dos trib.
						4 secto.		35 trib.	elimin.
			Quinara	-	22	Enpada	-	5	
						Euba	-	6	
						Fulacun.	-	6	idem
						<u>Tite</u>	-	<u>5</u>	
						4 secto.		22 trib.	
			Bolama/ Bija	-	8	Bolama	-	5	
						Caravela	-	1	
						Eubaque	-	1	idem
						<u>Uno</u>	-	<u>1</u>	
						4 secto.		8 trib.	

Mapa 4

República da Guiné-Bissau, Ministério da Justiça
 Mapa dos tribunais populares de base
 por província, região, e sector

Leste	PROVÍNCIA		Região	REGIÃO		Sector	SECTOR		
	No. tribunais anteriores	No. tribunais actuais		No. tribunais anteriores	No. tribunais actuais		No. tribunais anteriores	No. tribunais actuais	Tribunais elimi. por região
72	48	Bafatá	47	28	Bafatá	27	7		
					Contubo.	5	5	tribunais	
					Ganadu	5	5	eliminado	
					Cossé	4	2	na região	
					Bambadn	6	3	da Bafatá	
					<u>Kitole</u>	<u>10</u>	<u>6</u>	(19)	
					6 secto.	47 trib.	28 trib.		
		Gabú	25	20	Gabú	8	5	tribunais	
					Pirada	5	5	eliminado	
					Boé	3	2	na região	
					Pitche	5	4	de Gabú	
					<u>Sonaco</u>	<u>4</u>	<u>4</u>	(5)	
					5 secto.	25 trib.	20 trib.		

Mapa 5

República da Guiné-Bissau, Ministério da Justiça
 Mapa dos tribunais populares de base
 do Sector Autónoma de Bissau

SECTOR AUTÓNOMA DE BISSAU			ZONAS			SECÇÕES						
Bissau	No. tribunais anteriores	No. tribunais actuais	Zona	No. tribunais anteriores	No. tribunais actuais	Secções	No. tribunais anteriores	No. tribunais actuais	Tribunais elimina. por zona			
30	8	No. 1	9	2	Flaque-1	1	-					
					Flaque-2	1	-					
					Brá	1	1	foram				
					Cuntum-1	1	1	elimi-				
					Cuntum-2	1	-	nados 7				
					Clele	1	-	tribunais				
					D.Milit.	1	-	na Zona-1				
					T.P.Zona	1	-					
					<u>Cobornel</u>	1	-					
					9 secç.	9 trib.	2 trib.					
					No. 2	8	3	Cambanco	1	-		
								Bandim-1	1	-	foram	
								Bandim-2	1	1	elimi-	
								R.Gambe.	1	-	nados 5	
								C.P.Var.	1	-	tribunais	
								Mindara	1	1	na Zona-2	
								B.Eelám	1	-		
								<u>T.P.Zona</u>	1	-		
								8 secç.	8 trib.	3 trib.		

Mapa 6

República da Guiné-Bissau, Ministério da Justiça
 Mapa dos tribunais populares de base do Sector Autónomo de Bissau

SECTOR AUTÓNOMA DE BISSAU		ZONAS			SECÇÕES				
Bissau	No. tribunais anteriores	No. tribunais actuais	Zona	No. tribunais anteriores	No. tribunais actuais	Secções	No. tribunais anteriores	No. tribunais actuais	Tribunais elimina. por zona
			No. 3	2	-	Bair. Sete Ilheu Eet 2 barrios	1 1 2	- = 0	foram elimi- dos 2 tribunais na Zona-3
			No. 4	1	1	Tehada 1 barrio	1 1	1 1 trib.	não foi elimina- do nenhum
			No. 5	5	1	Pefine Sin Hema Cupe Cima Cupe Baixo T.P.Zona 5 secç.	1 1 1 1 1 5 trib.	1 - - - = 1 trib.	foram elimi- nados 4 tribunais na Zona-5
			No. 6	5		Pluba San Luzi. Antula Pabijar T.P.Zona 5 secç.	1 1 1 1 1 5 trib.	1 - - - = 1 trib.	foram elimi- nados 4 tribunais na Zona-6

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ANNEX FOUR

LIST OF LAWS

Ethiopia

1. Civil Code of 1960, Chapters 2 (Agricultural Communities) and 3 (Official Associations of Landowners) of Chapter IX.
2. Billign Mandefro, 'Agricultural Communities and the Civil Code', *Journal of Ethiopia Law* VI(1), June 1969 (contains earlier, more elaborate drafts of Chapter 2).

Botswana

1. The Customary Law Act, 1969 (CAP.14:03) of the Consolidated Laws of Botswana.
2. Tribal Land Act, 1968 (Act No. 54 of 1968) as amended by the Tribal Land (Amendment) Act, 1969 (Act No. 48 of 1969).
3. The Tribal Land Act Commencement Notice, 1970 (Statutory Instrument No. 8 of 1970).
4. The Tribal Land Regulations, 1970 (Statutory Instrument No. 7 of 1970).

Senegal

1. Law No. 64-46 of June 17, 1964, concerning the National Domain, as amended by Law No. 72-25 of April 19, 1962, concerning Rural Communities.
2. Decree No. 64-573 of July 30, 1964, providing for the Application of Law No. 64-46 of June 17, 1964, concerning the National Domain.
3. Law No. 72-25 of April 19, 1972, concerning Rural Communities.
4. Law No. 80-14 of June 3, 1980, Repealing and Replacing Certain Articles of Law No. 72-25 of April 19, 1972, concerning Rural Communities.

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ANNEX FIVE

LIST OF PERSONS CONSULTED

GOVERNMENT OF GUINEA BISSAU

Land Law Commission

Minister Mario Cabral

Juliano Fernandes
Julio Alves

Civil Service Ministry (Função Pública)

Lawyer, Customs Division
Director, Cadastral Department,
Ministry of Public Works

Ministry of Justice

Armando Prucel
Mário Filomeno Mendes Pereira
Fernando Manoel Lima

Lawyer
Lawyer
Popular Tribunal (Coordinator)

Other GOGB and Regional Officials

Santos Mamadu Djata
Mario Gibril Embalo

Moreno Antonio Gomes

Sr. Henrique

Sulemain Njai

Gerard Pichel

Mario Mahuel Rodrigues
Josef Tome
Agriculture Delegate
Circle Delegate
Juiz Regional

Extensionist, Caio
Bafatá Region Controller,
Regional Tribunal, Bafatá
Circle Delegate, Province
of Leste, Regional Tribunal,
Bafatá
Gabu Region Controller,
Regional Tribunal, Gabu
Regional Director of
Agriculture, Bafatá Region
Department of Hydrology and
Water, MDRA, Bissau
Extensionist, Caio
Extensionist, Caio
Caboxanque, Tombali
Regional Tribunal, Catio
Bafatá

OTHER ENTITIES

Chief of the Papels
 Chief of the Papels
 Robert Collingwood

Pierre Campredon
 Guilherme da Costa
 Mamadu Djai
 Fernando Ferrage

Luis Mesquitela
 Manuel Nassum

Eric Penot

Michael Tinne

Vila Vicenzo
 Joãzinho Vieira Co

Biombo
 Prabís
 Resident Delegate,
 EEC Delegation, Bissau
 Resident Representative, IUCN
 IUCN, Bissau
 Sociologist, INEP
 General Secretary, Chamber of
 Commerce, Industry and
 Agriculture, Bissau
 FAO Project, Catio
 Sociologist/Researcher,
 National Institute of
 Research and Studies (INEP),
 Bissau
 Agro-economist, DEPA-CIRAD,
 Caboxanque
 Coordinator, PASA Project,
 MDRA
 FAO Project, Catio
 Lawyer and law professor,
 Bissau

TABANCAS VISITEDBafatá Region

Bigini
 Cauncumba
 Sucutó
 Temato

Tombalí Region

Cruzamento de Caboxanque
 Hamindara
 Kachaka
 Mato Farroba
 Ponte Balana
 Timbó

PONTAS VISITED

Antonio da Silva Monteiro
 Carlos' Kapè Barbosa
 Jose Gil de Matos
 Malan Sambu
 Ponta da Igreja Catolica

Nhacra, Oio Region
 Bafatá Region
 Tombalí Region
 Bafatá Region
 Cubucare, Tombalí Region

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