

Critical Points of the Environmental Framework Law

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Introduction

This paper highlights some of the more important concepts in the Environmental Framework Law (EFL)³ including the significance of certain terms and the relation between those terms and other provisions of the Law. Also examined is the link between environmental protection and land use rights in particular those of peasant farmers and smallholders. In addition, particular issues that require further legislative definition are highlighted.

The Environmental Framework Law was approved by the Mozambican Parliament in July of 1997, the result of several years of drafting and consultation. The promulgation of this law was part of a larger effort to establish a legal and institutional framework for the oversight and regulation of environment related matters. This process included the creation and

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² This is the reference citation for the Environmental Framework Law. October 1 refers to the date on which the President signed, promulgated and ordered the law to be published. The law was approved by Parliament on July 30, 1997. The Boletim da República is the Government Gazette. All Mozambican statutory instruments as well as resolutions, orders, government personnel contracts, etc. must be published before they may be treated as in force and binding. Because of technical delays and inefficiencies, oftentimes the actual publication and distribution is subsequent to the official publication date. In the case of the Environmental Framework Law, the gazetted version was not available until February 1998.

³ See Annex 1 for a general description of the Mozambican legislative framework and an explanation of the technical content and purpose of the different legislative instruments. See Annex II for a list and description of relevant environmental legislation.

organisation of the Ministry of Environmental Co-ordination (*MICOA*) (*Ministério de Coordenação do Meio Ambiente*)⁴ in 1994.

Previously, there had been no specific legislation and no single governmental entity with responsibility for environmental affairs. Some sectoral legislation, such as the Mining, Land and Investment Laws, had generic provisions prohibiting pollution and environmentally harmful acts. There was, however, no comprehensive policy⁵ and legislative framework regarding matters such as liability and accountability for pollution and other environmentally harmful actions, nor was there any definition of the role and requirements of environmental impact assessments and action plans. Further, the same ministries that were expected to promote sectoral economic activities, such as mining, petroleum exploration and production, agriculture and industry, were also supposed to supervise and control the impact of these activities on the environment. In summary, prior to the establishment of the Ministry of Environmental Co-ordination (*MICOA*) and the promulgation of the Environmental Framework Law, Mozambique had a command focus⁶ which simply mandated environmental conservation and prevention of pollution and other environmental damage without addressing either the causes, controls or the consequences of such acts.

In the reading and analysis of the recently promulgated Environmental Framework Law, it is important to bear in mind that under the Mozambican legislative system, laws are limited to stating the general principles and guidelines which instruct the elaboration of the regulations⁷ which will define the specific powers and authorities, rights and obligations as well as the procedures and system for the exercise of the powers, authority, rights and obligations established or recognised in the law. For those who are accustomed to laws that

⁴ *MICOA*, which was established by Presidential Decree n.º 2/94 of 21 December, was preceded by the creation of the National Commission on the Environment in 1992 pursuant to Presidential Decree n.º 2/92, of 3 June. The Commission's task was generally to promote, co-ordinate, support, educate, etc. environment related activities. Most importantly, it was given the authority to propose policy and legislation for the protection and preservation of the environment and to establish mechanisms for assessment, monitoring and control of the impact of socio-economic activities on the environment. This mandate led to the subsequent creation of a full-fledged ministry and the promulgation of the Environmental Framework Law.

⁵ The National Environment Policy was approved in 1995 by the Council of Ministers (Resolution n.º 5/95 of 3 August; *Boletim da República*, 1st Series-No. 49-Supp. of 6 December 1995).

⁶ That is, pollution and environmental damage is simply prohibited without establishing any benchmarks or guidelines for prevention, or for dealing with the consequences, of environmentally harmful acts.

⁷ Regulations are in the first instance promulgated by the Council of Ministers, which is made up of the ministers and vice-ministers from each of the individual ministries. Usual practice is for the Council of Ministers, as the representative of Government, to designate which individual ministry will implement the law and regulations. This ministry may then be given the power to clarify by ruling or by further regulation either specific matters or in general any matter which might require further clarification or detail. Conversely, the Council of Ministers may retain for itself all such regulatory powers as is usually the case with tax and fiscal matters.

contain all the essential detail, the Mozambican law may appear vague and weak for its lack of detail⁸. The Environmental Framework Law must, instead, be evaluated within the Mozambican legislative context. Briefly, this standard is an adaptation of the general ends-means test for legislative drafting and analysis, which can be summarised as: 'To achieve the stated or perceived objectives of the law, what principles, delegations of power, definitions, guidelines must be included.'⁹ Further, what is or is not contained in other legislation must be considered¹⁰. Often, however, the analysis of a law prior to promulgation of the regulations can, in fact, be an exercise in guesswork and supposition¹¹, albeit useful in terms of determining the matters which require further definition in regulation.

Principal, significant concepts of the Environmental Framework Law

1. Objective of the Law: Environmental Conservation and Sustainability

The Environmental Framework Law adopts a structure that combines command and control provisions with a management policy approach that includes mechanisms and tools to address the causes as well as the symptoms and consequences of environmental degradation. Although both approaches require administrative resources and initiative in implementation, "[the former] in the old 'environmental protectionist mode' tends to treat the

⁸ As an example, under the American system laws or acts contain all of the binding provisions. Regulations are characterised as non-statutory, administrative rules. Under the American system, "[a]gencies issue regulations to guide the activity of those regulated by the agency and of their own employees and to ensure uniform application of the law. Regulations are not the work of the legislature and do not have the effect of law in theory." [Black's Law Dictionary; 6th Ed. West Pub. Co. 1990; p.1286.]

⁹ See generally the discussion of the hierarchy, analysis and interpretation of laws in Marcello Caetano, *Manual de Direito Administrativo*, Almedina. Coimbra, 10th Ed. Vol. I, 1990, §§ 32 et seq. For an American perspective see Robert B. Seidman, *The Memorandum of Law*, in *Seton Hall Legislative Journal*, Vol 15:319, 1991.

¹⁰ If, for example, a new penal or civil liability were to be established that was not already reflected in the Penal Code or in the Civil Code, this would have to be established by law, since these codes have the status and force of law. Thus Article 26 of the Environmental Framework Law establishes strict liability for environmental damage and Article 27 provides that crimes of a penal nature and infractions in respect of the environment will be regulated by specific legislation.

¹¹ Under the Mozambican system regulations are integral to the force and effect of the law. For example, one of the contributing factors to the inefficacy of the 1979 Land Law, recently revoked (1997), was the fact that its regulations were not promulgated until 1987. This delay left the law without the necessary framework for implementation. In addition, one of the strong criticisms of the 1979 Land Law and its Regulations was the contradictions between the two pieces of legislation making implementation difficult if not arbitrary. See e.g. Garvey, J.; *Análise do Direito de Uso e Aproveitamento de Terra ao Abrigo da Lei de Terras e seu Regulamento - Conteúdo e Terminologia* (unpublished paper) and Garvey, J. *Mozambique's Land Law: Contradictions within the Legislative Framework*; Second National Land Conference in Mozambique Briefing Book; May 1994.

symptoms of environmental mismanagement, i.e. pollution, not the causes, i.e. lack of capital, skills and technology and the absence of the capability to innovate.¹²

Thus, as command and control provisions, the Environmental Framework Law includes:

- A prohibition of pollution (Article 9);
- The obligation to repair and /or compensate for pollution damage (Article 4(g));
- The Government obligation to set minimum environmental quality standards including rules and time limits for the correction of existing operations(Article 10);
- The prohibition of activities which prejudice the conservation, reproduction, quantity and quality of biological resources(Article 12.1);
- The prohibition of the implantation of structures as well as the deposit of garbage and used materials which would have a significant negative impact(Article 14),;and
- The imposition of strict liability for damage resulting from the exercise of "particularly dangerous activities" (Article 26).

Complementarily, the Law instructs the Government in a series of provisions to adopt pro-active, preventive mechanisms:

- to involve all sectors of society in the management of the Mozambican nation's natural resources (Article 8);
- to protect and valorise on a continuous basis the Nation's environmental assets including its historical and cultural heritage (Article 11);
- to maintain and regenerate animal species, recuperate damaged habitats and create new habitats and protect plant species threatened with extinction or otherwise valuable (Article 12.2);
- to ensure that all persons have the right to access to information and education in respect of the management of the Nation's environment (although the Government is only required to established supportive measures to protect the right to education but not the right to information) (Articles 19 and 20); and

¹² Warhurst, Alyson; *The Political Economy of Mining and Environment: The policy Challenge of Environmental Management in the Southern African Development Community*. November 1992

- to require the realisation of environmental impact assessments and audits for new and existing activities, respectively (Art. 16 and 18).

The force and practical application of all of the preceding provisions of the law will depend on regulations. Until the Council of Ministers and/or MICOA promulgate the implementing regulations¹³, it is not possible to make a realistic assessment of the substantive strength of these provisions other than to note that they establish a balanced framework for both a management policy and regulatory framework.

Indeed, while it is presumed that the agency that will be charged with the implementation and enforcement of the Environmental Framework Law will be the Ministry for Environmental Co-ordination¹⁴, until the promulgation of the Environmental Framework Law regulations, this can only be a supposition. The Environmental Framework Law only makes reference to Government as the implementing entity with the authority to regulate and delegate these powers and authorities (See Articles 5,6, 8, 10,11,12,13,15, 16, 20, 26.2, 28, 30, 31, 32, 33).

Another aspect of the focus and structure of the Environmental Framework Law is that it defines the environment not only in terms of human beings but as the combination of the biodiversity of different organisms as well as the socio-economic and health conditions of communities. Further, it recognises that sustainable development requires a balance of these environmental components not only for the present but also over the continuum of generations. In an early draft of the environment law, the concepts of environment and sustainable development had a decided human socio-economic focus. That is, environmentalism was essentially viewed as the sustainable exploitation of natural resources for the benefit of human beings¹⁵. The law as passed places this human factor in the context of being one component of an ecosystem. Thus, Article 4, in listing the principles and objectives of the Environmental Framework Law, defines a policy of "[e]nvironmental management ... based upon ... the rational utilisation and management of environmental

¹³ The fact that the delegation of authority to promulgate regulations has been given generically to government (Article 33 of the EFL) signifies, according to one interpretation, that either the Council of Ministers or any one specific ministry can validly issue regulations. See Freitas do Amaral; Curso de Direito Administrativo 1-223; Livraria Almedina Coimbra 1990.

¹⁴ Consistent with MICOA's charter set out in Presidential Decree n.º 6/95 of 16 November.

¹⁵ The 1994 draft Article 3 (Fundamental Principles and Objectives) defined the national environmental policy as based the right of all citizens to an ecologically balanced environment, to improved quality of life and the reciprocal rights of the State and citizens to the use and protection of natural resources. In the Environmental Framework Law as passed, the objectives and principles were separated into two articles. The objective of the law is now framed in terms of the correct use and management of the environment with a view to the sustainable development of the Nation based on, inter alia, both the improvement in the quality of life of its citizens as well as the maintenance of bio-diversity and ecosystems (Article 2 and Article 4.1 of the Environmental Framework Law).

components in order to promote the improvement in the quality of life of citizens and to conserve biodiversity and ecosystems”.

2. Definition of Pollution:

Pollution is defined in Article 1.21 as: “the deposit within the environment of any substance or residue, regardless of its form, as well as the emission of light sound and other forms of energy in such a way and in such quantity that such deposit has a negative impact on the environment.” This definition is extended in Article 14 to include the implantation of any structure that has a materially negative impact on the environment.

This definition of pollution is generic with an all-inclusive coverage where any item or activity is potentially classifiable as pollution. Whether it is a pollutant or not is determined by its impact on the environment. Conversely, this definition effectively requires a demonstration of a negative impact in order to designate an item/activity as pollution.¹⁶

Pollution is one of four methods of environmental degradation. Environmental degradation is defined¹⁷ as the negative or adverse alteration of environmental characteristics and includes pollution as well as desertification, erosion and deforestation. Of these, the latter three forms or acts of degradation are quite specific in their operation. Pollution, as noted, is a broader, potentially all-encompassing act.

Article 9¹⁸, which contains the prohibition of these acts, makes a distinction between pollution and the other forms of environmental degradation. There appears to be an assumption that desertification, erosion and deforestation occur, naturally, on their own. Article 9 therefore only prohibits the practice of activities that accelerate the pace at which erosion, desertification, deforestation and other environmental degradation occur, while pollution is prohibited as such.

Finally, the prohibition of acts of pollution and other forms of environmental degradation is not absolute. Article 9 foresees the establishment of minimum/maximum levels. Even the

¹⁶ Again in an early draft pollution was defined as the deposit of noxious substances. The present definition complements the Law's focus on environmental equilibrium with pollution being an act or substance that unbalances the ecological equilibrium.

¹⁷ Article 1.8 of the Environmental Framework Law.

¹⁸ Article 9 is entitled “Prohibition Against Pollution”. It should more correctly be title “Prohibition Against Degradation” since pollution is only one of four defined forms of degradation and Article 9 actually not only prohibits pollution, but also the production of pollutants and toxic substances, as well as deforestation, desertification, erosion and other forms of degradation.

prohibition against the importation of toxic wastes is given an escape clause that allows the prohibition to be revoked if special legislation allows it. By use of the term "legislation", the parliamentary lawmakers effectively delegate the authority to allow the qualification or limitation of this prohibition at any level of the legislative hierarchy, subject to the general regulatory delegation given Government¹⁹.

- a) The definition of the standards and procedures for the determination whether an activity or a substance has a negative impact on the environment and therefore constitutes pollution or otherwise falls under the prohibition against environmental degradation will be determined by regulation. Some alternative regulatory models could be: As indicated in Article 9, the definition of minimum and/or maximum limits for the presence of certain substances in the air, water, etc. Then any activity that exceeds or otherwise violates these limits would automatically constitute pollution.
- b) As part of an **Environmental Impact Assessment (EIA)**, it would be necessary for the proponent to demonstrate affirmatively that the activity does not constitute or produce pollution or environmental degradation.
- c) The regulatory authority would have power to determine at any time that an activity is presumptively polluting or degrading the environment. Upon receipt of notification of any such determination, the person responsible for the activity in question would have the burden or responsibility to disprove this determination and affirmatively demonstrate that the activity does not constitute or produce pollution or environmental degradation.

3. Prerequisite of an Environmental Impact Assessment (EIA)

The Environmental Framework Law makes provision for a regime of registration and licensing of activities which are susceptible of provoking material impacts on the environment (Article 15). The definition of what is an activity having a material impact or what are the criteria for such a determination is left to regulation. Consistent, however, with the definition in Article 1.5 of environmental impact assessment, no distinction is made between the assessment of both positive and negative impacts.

Quite significantly, the E.I.A. and any resultant environmental license are prerequisites to the issuance of any other license for the exercise of any business activity. Yet, given the

¹⁹ Article 33; C.F Footnote n.º 9 herein.

general lack of administrative resources and capacity in Mozambique, particularly at the provincial and district levels of government, this disposition is likely to be difficult to enforce unless the categories subject to this requirement are realistically and clearly defined and the procedures are efficient and transparent. If the EIA, licensing and registration requirements are too broadly defined, or if the implementation of these requirements is bureaucratically cumbersome and inefficient, the result could be to encourage both the business community and the government officials interested in promoting investment and ventures which bring in jobs and government revenue to treat superficially, or avoid altogether, any such requirements and procedures which are not predictable and quantifiable.

Although the EIA and environmental audit regulations have not yet been promulgated, a draft has been in circulation and used generally as the basis for the conduct and review of EIA's. Also, because of the requirements of banks and other financial institutions, new investments in Mozambique have generally been following World Bank (IFC) guidelines for impact studies and plans.²⁰

Article 18 provides that activities/operations, which predate the promulgation of this law, will be subject to an environmental audit at the cost of the operator. Thus, both pre- and post-EFL activities will be subject to environmental impact assessment. This raises the question whether or not such pre-existing activities will be subject to different standards in the specific definition, prevention, treatment and removal of pollution. There is no provision in the Environmental Framework Law that indicates the criteria for the setting of these standards, limits and other factors which enter into the regulation of the definition, prevention, treatment and removal of pollution. This question should be clarified in the regulations.

4. Right to Sue/Obtain redress

- I. Among the various rights of citizens to damages and other redress recognised under the Environmental Framework Law²¹, the most significant are:

²⁰ These EIA regulations have been and are being revised so that, in addition to being the scope of this paper, any in-depth analysis at this point should await the release of the revised draft.

²¹ The inclusion of the class action suit to allow an individual or a group of citizens the ability to bring suit on behalf of a larger community of affected or potentially affected persons without this whole class of persons being specifically named as plaintiffs was proposed and specifically excluded from the Environmental Framework Law. While the specific reasons are not known, it can be surmised that the experience of other countries with the resultant procedural difficulties and burdens placed upon the court system could have led to its rejection. Conversely, in country such as Mozambique characterised by scarce judicial resources and difficult if not impossible access to judicial processes by the general citizenry, the class action suit is arguably an appropriate instrument to fulfill the State's obligation and the citizen's constitutional right to a balanced environment.

- the personal right to sue directly for redress and prevention of a violation of rights protected by the environmental legislation(Article 21.1);
- II. the right to obtain consequential damages for injury and damages including crop and profit loss(Article 21.2);
- A. The establishment of the right to consequential damages is significant since indemnification for these damages is subject to a determination of foreseeability²². This provision can be interpreted as providing a presumption in favour of these types of damages.
- III. the right to obtain an injunction and to use other procedures to protect rights to an ecologically balanced environment (Article 22);
- A. Although not apparent from the text of article 22, this right is limited by Article 414 of the Civil Procedure Code which provides that this remedy is not available against public works carried out by the State and Municipalities. With the exception of these types of activities, Article 22 would give a citizen standing before the Administrative Tribunal to seek such an injunction or other remedy. The Administrative Tribunal has jurisdiction over matters, inter alia, involving public service and other concessions given to private persons(Law n.º 5/92).
- IV. The provision for strict liability for activities that are characterised as especially dangerous and that cause either significant environmental damage or the temporary or permanent paralisation of economic activities (Article 26).
- A. Strict liability means responsibility for injuries or damages which result from a person's act regardless of that person's good faith, lack of malice or negligence in acting. By virtue of establishing the link between the cause and the effect, the person is held responsible for the injury and damages. Whether the injury or damages were the result of an accident, negligence or intentional is not relevant or at issue.
- V. Although the Attorney General is given the general, overall authority to defend the principles established in the law, the law states specifically that this authority does not limit the standing of the individual to seek redress in accordance with the terms of the Law (Article 21.4).

²² Article 564 of the Civil Code

The Environmental Framework Law's quite explicit recognition of the ordinary citizen's standing to sue and right to compensation, including consequential damages, for injury and damages resulting from acts of environmental degradation and other violations of the Environmental Framework Law is an important, innovative complement to and check on the Law's provisions concerning (a) environmental management, conservation and sustainability, and (b) prohibitions against pollution and other violations of the rights and obligations imposed under the Law. There is not, at present, either a culture or practice of citizen activism in the courts or before the administrative authorities. Therefore, the first priority in implementing this Law arguably should be the satisfaction of the Government's obligation to provide environmental education and information (Article 20), and the citizen's right to this education and information (Articles 19 and 20). At a later stage, the judicial and administrative structures can be modified and supplemented in order to facilitate citizen activism in the protection of personal rights and matters of public interest.

5. Land Tenure and the Environment

One of the essential criteria for natural resource sustainability is security of tenure over the resource. Poor people in particular have no incentive to invest their very scarce resources in the protection and conservation of natural resources for long term benefits if they have no guarantee, no security of tenure which will ensure that they, and not some third party, will reap the benefit of their sacrifice and hard work. Without security of tenure, farmers and users of natural resources have little or no incentive to alter subsistence practices which may satisfy immediate food security needs but are not sustainable in the long-term.²³ Such practices reflect a risk aversion strategy that focuses on responding to immediate exigencies rather than balancing the immediate with the long term and thereby controlling the sustainability of both the resources and the products obtained from those resources²⁴.

A similar logic drives investment risk analysis and bankable feasibility studies. Business investment requires security for project development, during the period of recoupment of the investment and during the period of profit. If land tenure and property rights are perceived to

²³ Davies, S. *Green Conditionality and Food Security: Winners and Losers from the Greening of Aid*. Journal of International Development: Vol. 4, No. 2, 151-165 (1992).

²⁴ The link between environmentally sustainable practices and land tenure security demonstrates one of the weaknesses of a simplistic command and control approach referred to at the beginning of this paper. To achieve the ideal of environmental sustainability (and implicitly conservation and protection of bio-diversity), there must be an integrated practical approach to motivate citizens to achieve such an ideal (unless of course a government has sufficient police power and political will to "force" compliance). As suggested, such an integrated approach would include in addition to the environmental controls, such inputs as secure tenure and rural extension services.

be insecure without long term stability, an investment project , regardless of its technical or /theoretical long term profitability, will be structured and will employ practices that interpolate and skew the returns to allow the investors to take out their profit in the quickest way possible without regard for its economic or environmental sustainability and consequences.

Using the same rational, a peasant without security of tenure will cut down the trees that provide shade and protection against erosion and desertification for the immediate guaranteed profit from the sale as charcoal or use for cooking. The "security" of the short term, even if short sighted, outweighs any greater long term sustainable gain for which there is no equivalent guarantee or security.

Thus the security and guarantee of tenure given land occupants under the 1997 Reform Land Law²⁵ is an essential factor in the conceptualisation and implementation of the Environment Framework Law. This said, tenure security alone does not necessarily mean sustainable use of land. In the context of Mozambique's particular circumstances a variety of factors have created a situation in which land use rights can be considered precarious. These include a long colonial history of forced removal of native Mozambicans to marginal land and the non-recognition of 'native' title. Following independence, the legal and political framework as well as the war and the drought that ravaged Mozambique during the Eighties and the first part of the present decade also diminished tenure security. Simply by virtue of the end of the war and the drought, and the stabilisation of land occupancy, it should not be expected that land use would be ecologically sound and sustainable. Another essential prerequisite is the intervention of both (1) environmental and agricultural education and extension services and (2) the material improvement of rural economies, in particular through the establishment of the commercial networks.

²⁵ The Reform Land Law, Law n.º 19/97 of 1 October went into effect on January 1, 1998. Although the implementing regulations have not been promulgated, there are a series of provisions in the Reform Land Law, which, in themselves, strengthen the land tenure rights of ordinary citizens, especially when compared with the vague and contradictory text of the 1979 Land Law. Among these provisions are (1) the recognition of actual occupancy as a means of acquisition of the right of land use and benefit; (2) the exemption from registration and titling requirements land users who acquire rights by occupation; (3) the recognition of verbal testimony to prove tenure rights; (4) the State can only revoke land rights if there is a violation of the legal requirements or through expropriation in the public interest; and others.

6. Local Community

In an attempt to reflect the form and precepts which structure land use and occupancy which is acquired and held pursuant to customary norms, the figure of the "Local Community" was adopted in the 1997 Reform Land Law. Although the 1997 Reform Land Law has only one definition for the term of "local community"²⁶, in application "local community" would appear to have two distinct although related meanings. One, which is in the nature of a real property right²⁷; the other as a socio-political unit²⁸. The latter was an addition by the Mozambican parliament and its significance must await the promulgation by parliament of an additional law²⁹.

As a form of real property right, it is akin to the figure of a condominium, in the sense that a community member shares in the title for the overall area occupied by the community and has an individual title for the area that the community member personally occupies³⁰.

Although reference to the figure of the "local community" was included in the earlier versions of the Environmental Framework Law, it was used interchangeably with the term "community" and with the apparent intention to distinguish its social geographical connotations from terminology related to political and territorial divisions. With the use and development of this term in the 1997 Reform Land Law, it takes on a new significance that permits an application or cross-reference of the principles, rights and obligations adopted in the Environmental Framework Law .

The inclusion of this term in both the Environmental Framework Law³¹ and the Land Law provides a legal foundation for application of the generally accepted principle that natural

²⁶ Article 1.1 defines **Local Community** as "a group of families and individuals living within a geographical area at the territorial level of a locality or subdivision thereof and which seeks to safeguard its common interests through the protection of areas for habitation or agriculture including both fallow and cultivated areas, forests, areas of cultural importance, pasture land, water sources and areas for expansion."

²⁷ See Footnote no.25. Also Article 7.3 of the 1997 Reform Land Law provides: "The right of land use and benefit by local communities shall observe the principles of co-title for all the purposes of this law."

²⁸ Article 30 of the 1997 Reform Land Law provides that: "With regard to the right of land use and benefit, the mechanisms for representation (of the interests of) and for the exercise (of such rights) by a local community shall be established by law."

²⁹ See the preceding footnote.

³⁰ Article 10.3 of the 1997 Reform Land Law stipulates that "[t]he right of land use and benefit by local communities shall observe the principles of co-title for all the purposes of this law". There are different forms of co-titularity or joint title. Condominium is one of these. The figure of "Local Community" is likely to be *sui generis* since it is derived from and therefore must synthesise Mozambican customary practices that vary somewhat throughout the country.

resource sustainability and environmental equilibrium is best guaranteed by local, 'community' control and management of natural resources. Further it provides a legal basis for the effort to establish community natural resource management such as the CAMPFIRE program which gives communities direct control **and, most important, a share of the profits** from hunting, tourism and other forms of natural resource exploitation. To date, these efforts have only been carried out on an experimental or pilot project basis rather than on a formal institutional basis³².

Based on the text of the respective laws, it was apparently the intent of the respective drafters of the Environmental Framework Law and the Reform Land Law to provide an institutional basis to reflect, as well as to reinforce, localised community control of land and natural resources. The apparent intent of at least some parliamentary legislators, as manifested in parliamentary debates of these laws and the addition of article 30 in the Reform Land Law³³, was to give this term and concept a more political connotation. For others, the term was used as a platform for institutionalising so-called traditional authority³⁴ as a political counter-weight. These divergent goals may result in the distortion and ineffectiveness of the local community as a vehicle for decentralised, direct control and protection of land and natural resource use rights.

³¹ Reference to the term "Local Community" appears in EFL Articles 4(b), 8, 13.4 and 30. Reference to the word "Community" appears in Articles 1.7, 11 and 20. Article 7 refers to the creation of services at the local level which incorporate local knowledge and initiatives.

³² For example, the Mahenya Campfire Project. See De Vletter, R. (1994) From Conflict to Cash Flow, The Story of the Mahenya CAMPFIRE Project. Unpublished report and De Vletter, R. (1995) The GEF Transfrontier Conservation Areas and Institution Strengthening Project. Unpublished report

³³ See Footnote no.27.

³⁴ Based on numerous research projects and studies by both government and private entities, there is more than ample evidence to indicate that while custom and localised community structures govern the daily lives of the majority of Mozambican citizenry who live in rural and to some extent peri-urban areas, there is not generally a consistent, direct line of authority. In some cases there has been a fusion of state administrative and customary authority structures. In other cases, there is a strong direct custom defined authority and in still others the successive interventions of colonial and post-independence governments not to mention warring factions and now political parties has led to confusion and multi-level disputes of authority. History and political science would suggest a hybrid neutral institution which allows the interaction and incremental fusion of these "two" forces rather than the separation which leads to the strengthening of one or both and eventual polarisation and conflict.

Conclusion

The Environmental Framework Law provides the principles and structural outline for the implementation of a policy of environmental sustainability. Given the generality of its terms³⁵ the full analysis of the Law's content must await the promulgation of the regulations that will provide the substantive details of and the procedures for the exercise of the powers, rights and obligations referred to in the Law. The ultimate analysis of the Law's effectiveness will depend on the actual implementation and exercise of these powers, rights and obligations. Needless to say, there are any number of well-drafted laws and regulations that are effectively superfluous either because of a lack of political will or, on a more practical level, because of a lack of administrative infrastructure and/or resources.

³⁵ Which results from the nature of a law as the legislative instrument in the Mozambican legal structure which defines principles, guidelines and areas of authority and which does not contain specific delegations of authority and procedures for the exercise of authority, rights and obligations which might have been created by the law. See the explanation of Mozambican legislation in Annex I.

ANNEX 1

A Short Description of the Mozambican Legal System:

1. Under the Mozambican system, a reference to the applicable law would include the relevant law (*lei*), any regulations approved pursuant to a Council of Ministers' Decree (*Decreto*) or by Order of a particular Minister (*Diploma Ministerial*) pursuant to a delegation of authority stipulated in the law, the regulations or in some cases in the Constitution as well as any relevant provisions of the Civil Code, Commercial Code and other Codes. *Despachos* include decisions approving or disapproving applications as well as other types of orders. In most instances *despachos* are only applicable to a particular case. Occasionally, however, *despachos* are used to promulgate regulations or rules of general application.
2. Under the civil law system followed by Mozambique, a code is a systematic compilation of basic legal precepts. The principal codes are the Civil Code which treats civil or private rights, liabilities and remedies as opposed to criminal liability; the Penal Code; the Commercial Code (which provides further detail to commercial matters covered in the Civil Code); the Tax Code and the several Procedural Codes. The Civil Code, Commercial Code and the Penal Code have the status of law and can only be amended by another law. The Civil Procedure Code, the Penal Procedure Code, the Notarial Code and the Civil Registration Code (*inter alia*) are important sources not only for the rules and procedures for the acquisition and defence of rights and obligations, but also many times give definition to substantive rights and obligations.
3. In Mozambique, statutory instruments have the following hierarchy: (1.) Laws are passed by Parliament, set forth general principles and policy regarding the matter in question and grant authority to subordinate governmental entities (usually the Council of Ministers but occasionally a specific ministry) to issue regulations in accordance with the provisions of the laws; (2.) Decrees are issued by the Council of Ministers, usually prepared and proposed by the ministry having oversight of the relevant sector/subject matter and regulate the general principles and policy established by law; (3.) Ministerial Diplomas are issued, individually or jointly, depending on the subject matter, by the minister or ministers having authority over the subject matter pursuant to specific delegations of authority in decrees and, occasionally, laws; (4.) *Despacho* is the generic term applied to orders or authorisations given by ministers or other persons in authority in individual cases. The Civil Code, Commercial Code and other codes (compilations of legal precepts) have the status of a law and can only be amended by law. The Constitution of course is the supreme legal instrument.
4. The Council of Ministers is one of the most important/powerful organs in terms of legislative initiative. At the present most laws approved by Parliament are in fact proposed by the Council of Ministers (Government). The Council of Ministers is sometimes referred to as the Cabinet in English. Its function and powers however are quite distinct from those of the cabinet of the American presidency.
5. Regulations under the Mozambican system are statutory instruments and **have the force of law**. The distinction made, for example, under the American legal system between statutory and regulatory law does not apply. (Under the American system, "[a]gencies issue regulations to guide the activity of those regulated by the agency and of their own employees and to ensure uniform application of the law. Regulations are not the work of the legislature and do not have the effect of law in theory." [Black's Law Dictionary; 6th Ed. West Pub. Co. 1990; p.1286.])

ANNEX II

A List and Brief Description Of Mozambican Environment Related Legislation:

1. Constitution of the Republic of Mozambique of 1990; Articles 36, 37 and 72 (Article 72 gives every citizen the right to live in a balanced environment as well as the duty to defend this balanced environment).
2. Presidential Decree n.º 2/92, of 3 June (creation of the National Commission on the Environment, predecessor to the Ministry for Environmental Co-ordination.)
3. Presidential Decree n.º 2/94, of 21 December (creation of the Ministry for Environmental Co-ordination, successor to the National Commission on the Environment).
4. Presidential Decree n.º 6/95, of 16 November (definition of the objectives and functions of the Ministry for Environmental Co-ordination created by Presidential Decree n.º 2/94, of 21 December).
5. Council of Ministers' Resolution n.º 5/95 of 3 August (Approval of the National Environmental Policy); Boletim da República, 1st Series-No. 49-Supp.of 6 December 1995..
6. Environmental Framework Law: Law n.º 20/97 of 1 October; Boletim da República, 1st Series-No. 40- 3rd Supp. of 7 October 1997.

