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## **Environmental Legislation Changes in Nigeria: What Impact on Foreign Investment?**

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### **INTRODUCTION**

Environment issues have been in the domain of public discourse, especially in the industrialized nation of the western world, for about 2 decades(i) . At the close of the 80s, such issues raised question of global concern as the future of earth's climatic conditions and man's survival on the planet were called into question by the result of scientific studies. Scientists all over the world have persistently reported a continuous rise in the earth atmospheric temperature, popularizing the expression, "global warming" as a catch phrase for this phenomenon.

Two developments were clearly identified as casual factors in the alteration of the earth's climatic conditions. First, there is a continuous depletion of the "ozone layer" above the earth's atmosphere (an actual layer of ozone gas which shields the earth and its atmosphere from direct contact with the sun's ultraviolet rays). The depletion of the ozone layer is, in turn caused by a continuous rise in the emission level of what scientists term "green house gases" which consist largely of carbon related fumes emitted by motor vehicles and industrial plant.

Also, the World's forest reserve is persistently on the decline. The continuous loss of trees Worldwide to the activities of the logging companies and bush fires impacts negatively on the carbon dioxide/ oxygen circle. Trees absorb carbon dioxide from the atmosphere and give off oxygen in return. Fewer trees on a global scale, therefore, equals less oxygen to replenish the ozone layer. ENVIRONMENTAL LAW.

Against the background of these developments, there arose a tidal wave of public opinion world wide urging a consented global initiative to combat the growing threat to the earth's environmental balance. This culminated in the 1992 Earth Summit at Rio de Janeiro, at which world leaders from about 150 countries converged to fashion out ways of dealing with problems posed by these developments and also agree on measures to stem further deterioration of the earth's environment.

These efforts at combating the deleterious effects on the earth's environment of man's activities are under girdled by an attitudinal change. This change of focus has been described by Olawale Ajai PhD. as "the new paradigm of sustainable development." Central to this new thinking is the belief that the earth's environment and its resources should be exploited and managed sustainably. Noah Walley and Bradley whitehead in their "It's Not Easy Being Green(ii)" quote Vice President Al Gore of United State America as presenting this paradigm shift thus:

"We can prosper by leading the environmental revolution and producing for the world market place the new product and technologies that fosters economic progress without environmental destruction"

Oluwole Ajai PhD. says that international developments have also mirrored this shift in paradigm. Among others, he cites the precursory declaration for the 1972 of United Nations Conference on the environment, which stressed the fact that environment and development are two sides of the same coin i.e. the inter-connectedness of ecosystem and the interplay between pollution and resource management.

It is within the context of these international development that changes in environmental legislation in Nigeria can properly be examined, particularly, as they encourage or deter foreign capital flow to the country. Resulting from the new philosophy of sustainable development is the question of reconcilability or otherwise of environmental concern and the goals of business.

## **ENVIRONMENTAL LEGISLATION IN NIGERIA**

Environment legislation in Nigeria can be viewed broadly under two time-related categories. First, is the legal regime, which existed in the years, preceding 1988? The other consists of particular legislation, consequent guidelines and standards, and regulation introduced since the creation of the Federal environmental Agency by Decree No. 58 of 1988.

### **PRE- 1988**

This period was characterized by certain features. Principal among these was the near - total lack of public awareness concerning environmental protection and development. Issues as biodiversity, conservation, effluent limitations, pollution abatement and sustainable development of Nigeria's natural resources did not form part of the general public discourse.

At the official level, there seemed a slow realization of the interdependence of environment and development. This was underlined by the absence of a deliberate national policy aimed at protecting the environment while ensuring the conservation and sustainable use of natural resources. The absence of such deliberate policy naturally meant the non- existence of an agency entrusted with the responsibility for the protection and the development of the environment.

The resultant effect was that environment issues were reduced to matters of periodic litigation between aggrieved individuals and communities on the one hand and the oil producing companies on the other in the event of damage occasioned to fishes and the environment through oil spillages or damming of the water ways. In these parochial environmental pollution conflicts, parties invariably relied on common law remedies in pursuit or defense of their cases. Issues thus revolved around the rights, duties and obligations developed by the courts as pertaining to the established tortuous liabilities of Negligence and Nuisance and encapsulated by the rules in Donoghue v. Stevenson [1932] A.C. 562 and Rylands v. Fletcher (1868) L.R.3. Respectively. Relevant in this regard are Nigeria cases of Shell-BP Ltd. V. Cole & Ors. [9178] N.S.C.C Vol. 11 p. 9 6 and Umudje v. Shell- BP Petroleum (1975) 9/ 11 S.C. 155.

A broader view of environment pollution and development was effectively curtailed by the fact that whatever legislation existed in that regard in the general body of the laws were disparate and inchoate. Some of such laws are outlined as follows:

- 1) Kanji Lake Park Act (iv). This Act provides the establishment of the Kanji Lake Park. It also makes further provision for controlling, managing and maintaining the park as well as ensuring the security of animal and plant life within the park.
- 2) Criminal Code Act (v). Relevant sections of the law provide for the prevention public health hazards. For instance, Section 245, which deals with water fouling.
- 3) The River Basin Development Authorities Act (vi). This makes provisions for the comprehensive development of water resources and of floods and erosion.
- 4) The Endangered Species (Control of International Trade Traffic) Act (vii). This Act provides for the conservation and management of the wildlife of the country and the protection of species in danger of extinction due to over-exploitation
- 5) The Oil Mineral (Safety) Regulations (viii). This Acts forbids the discharge of noxious or inflammable gas and penalizes its contravention.
- 6) Petroleum Regulation (ix). This prohibits the discharge or escape of petroleum into waters within harbor areas and makes provision for precaution in the conveyance of petroleum and rules for safe operations of pipelines.
- 7) Oil in Navigable Waters Act's (x) under this Act the discharge of oil or any mixture containing oil into the territorial or navigable inland waters is prohibited.
- 8) Petroleum Refining Regulations (xi). Among other things this makes provisions for the construction requirements for oil storage to minimize damage from leakage.
- 9) Associated Gas Re- Injection Act (xii). It makes provision for the utilization of gas produced in association with oil and for the re- injection of such associated gas not utilized in industrial project.
- 10) Oil Pipelines Act (xiii). This prevents the pollution of land or any waters.

## **POST -1988**

According to Obi Ogbalu in his Environmental Regulation in Nigeria, (xiv) "real environmental legislation in Nigeria was a product of National emergency". He explained further,

"The development of environmental regulation was greatly aided in the late 1980s by the Kook incident that occurred in the country. On 19th September 1987 Sunday Oyemire Nana, a farmer in kook, a small village five kilometers From the coast in the former Bendel State of Nigeria, was approached by Gian Franco Raffaelli, an Italian business man who had resided in Nigeria for some 20years, to dump about 3,880 tons of toxic and hazardous waste on behalf of Italian Company. The kook episode propelled the Federal Government Of Nigeria To reassess the general state of its environmental regulation...The kook episode Alarmed the general public of the inadequacy of the legal frame work for the Environmental protection in Nigeria. What emerged was the harmful waste (Special Criminal Provision etc) Decree 42 of 1988. The Decree prohibit the Carrying, depositing and dumping of harmful waste on any land, territorial Waters, contagious zone, Exclusive Economic Zone of Nigeria or its inland Water ways and prescribes severe penalties for any person found guilty of any Crime relating thereto. In addition to the harmful decree, an encompassing Legislative frame work for environmental protection was found necessary".

By Decree 58 of 1988, the Federal government created the federal environmental agency (FEPA). Decree 58 of 1988 was amended by FEPA (Amendment) Decree No. 59 of 1992. This legislation vests in FEPA overall responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigerian's natural resources in general and environmental technology, including initiation of policy related to environmental research and technology, among other function. (S.4 Decree No. 59 1992)

S.37 of the said decree charges FEPA further with the responsibility of making regulations generally for

The Purpose of Act and in particular prescribe standard for:

- (a) Water quality;
- (b) Influent limitation;
- (c) Air quality;
- (d) Atmospheric protection;
- (e) Ozone protection;
- (f) Noise control; and
- (g) Control of hazardous substances and removal control methods.

Accordingly, FEPA developed the following instructions in combating environmental degradation xv:

### **(i) The National Policy on the Environment**

Launched by Government on 27th November 1989, this document described guideline and strategies for achieving the Policy Goal of Sustainable Development

### **(ii) National guidelines and Standard For environmental pollution Control in Nigeria**

This was launched on March 12th 1991 and represents the basic instrument for monitoring and controlling industrial and urban pollution.

### **(iii) National Effluence Limitation Regulations S.I.8 of 1991**

This instrument makes it mandatory that industrial facilities install anti -pollution equipment, make provision for further effluent treatment, prescribe maximum limit of effluent parameters allowed for discharge, and spell out penalties for contravention.

### **(iv) Pollution Abatement in Industries facilities Generating Waste regulations S.I.9 of 1991**

Restrictions are imposed hereunder on the release of toxic substances and requirement stipulated

- Monitoring of pollution to ensure permissible limits are not exceeded;
- Unusual and accidental discharges;
- Contingency plans;

- Generator's liabilities
- Strategies of waste reduction and safety for workers.

### **(v) Waste Management regulation S.I.15 of 1991**

These regulate the collection, treatment and disposal of solid and hazardous waste for municipal and industrial sources and give the comprehensive list of chemicals and chemical waste by toxicity categories.

### **(vi) Environmental Impact Assessment (EIA) Decree No86 of 1992**

This legislation makes EIA mandatory for any major developmental project likely to have adverse impact on the environment, and prescribes the procedure. (S.2 Decree No86 of 1992)

### **(vii) The Sectoral for EIA**

Makes pursuant to S.60 (1) (a) of Decree No 86 of 1992, it prescribes the detailed guidelines for conducting EIA for projects and on Industry-by-Industry basis.

## **ENVIROMENTAL LEGISLATIVE CHANGES**

The post - 1988 corpus of environmental laws and regulations are represented previously continued to prevail without any mentionable change. What change has occurred relates to FEPA's commencement of strict implementation of these legislations and regulations at the end of a five years moratorium unilateral declared by it.

In 1990, when specific environmental laws and regulations were still nascent development in the general body of our laws FEPA decided on a five years moratorium in the implementation of their provisions. The move was aimed as designing and effecting a public awareness campaign in the interim, allowing industries time to make contribution to proposed regulations and also adjust and align their production method and possess to the guidelines and standard made by FEPA.

At the Expiration of the five years period in 1995, FEPA commenced the monitoring and enforcement of its standards, guidelines and regulations through its department of inspectorate and compliance monitoring.

However, in Lagos State of Nigeria, an edict formally establishing the Lagos State environmental Protection Agency ("LASEPA") has been enacted. Aside from charging the LASEPA with the setting, monitoring and enforcement of environmentally standards and guidelines, it introduces an environmental development levy specified under No. 9 (nine) categories. The levy is payable annually by any person engaged in any form of manufacturing. The edict cited as edict No. 9 also prescribes fines for non-compliance.

## **PROPOSED CHANGES TO ENVIROMENTAL CHANGES**

Given that FEPA has only recently commenced the actual existing environmental laws and

regulations, they are in practical effect new laws. Consequently, there are no compelling reasons presently to propose changes to the principal legislations. However, FEPA continued to meet new situation with the insurance of fresh guideline in pursuance of the general and broad provision of the principled laws.

In this regard, FEPA has announced the proposed issuance of fresh guidelines to regulate noise, emission and vibration around residential areas. This is necessitated by the growing use of power generating plants and industries.

The proposed environmental sanitation edict of 1997 in Lagos State of Nigeria prescribes varying fines for individuals and corporate organization with violent environmental sanitation standard, such as failure to clean side works, street obstruction, failure to cover waste trucks, improper disposal refuse.

## **IMPLICATIONS FOR FOREIGN INVESTMENT**

It is generally acknowledged that responding to the challenges posed by environmental changes has always been a costly and expensive affair to managers of business. Walley and Whitehead defined this problem when they stated that:

"For years, the goal of business and the environment seems hopelessly unrecognizable. According to common wisdom, what helps one would almost certainly harm the other".

They proceed further with an illustration of the seeming dilemma posed by the theory of sustainable development of the earth resources and state:

"In industries such as petroleum and chemicals, which are already plagued with over-capacity, fierce competition, and declining margins, a company's ability to respond to environmental changes in a cost-efficient manner may well determine its viability"

The ultimate issues in relationship between the environment and business having been thus lucidly defined, it remains to be considered how positively or otherwise changes in environmental legislation as outlined would influence foreign investment flow to Nigeria. The Government in Nigeria has embarked on a policy of commercialization and privatization. To this end, it has liberalized the country's investment laws to facilitate the inflow of foreign capital and repatriation of same. It is critical that our environmental legislatures are not at cross-purpose with liberalized investment laws put in place xv.

One of the characteristics of good law is certainty. This is the immediate advantage enjoyed by the prospective foreign investor intent on knowing or updating his knowledge of the state of environmental laws in Nigeria: a situation which was virtually impossible before 1998. Thus armed with accurate information, the prospective foreign investor is properly positioned to make an assessment of his investment in real terms from the onset

This however, does not translate to higher investment cost. Being comparative, investment cost in a particular country must be viewed against situations prevalent in other countries offering equal opportunities to arrive at a proper assessment.

In this connection, FEPA's choice of strategy in implementing Nigeria's environment laws creates a conducive atmosphere for enterprise as a spin-off. FEPA describes this strategy as comprising of:

"...Policy formulation, standard setting, establishment of guidelines and regulations as well as the monitoring and enforcement of the standards, guidelines and regulations through a consultative, participatory and collaborative approach as well as enlightenment and compliance promotion".

(Emphasis ours) xvi

Although there are fines and other sanctions provided for in the principal environment laws in the event of non-compliance, FEPA's preference for compliance promotion as opposed to compliance enforcement implies that such sanctions would largely be honored in their non-use. (SS.35 and 36 Decree No 59 of 1992 and S. 62 EIA Decrees No. 86 of 1992).

Additionally, compliance with the Environment Impact Assessment Decree No 86 of 1992 would promote health relations between the industry on one hand and environmental active NGO's and the public on the other hand. Decree No. 86 of 1992 provides for access to information and for inputs by the public at particular stages in the process of environmental assessments. (S. 57 Decree No. 86 of 1992). The involvement of the public at this seminal stage of any proposed project or activity ultimately casts such enterprise as people and environment friendly, thereby enhancing the value of investment made by the foreign investor.

## **CONCLUSION**

Environment issues and attendant legislations will assume higher placement in the order of national priorities in ensuing years due to the public awareness programmes FEPA and environmentally conscious NGO's. However, the Agency's preferred option of compliance promotion in discharging its mandate will continuously guarantee a conducive atmosphere for foreign investment, simultaneously.

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(i) Noah Walley and Whitehead, "It is Not Being", Harvard Business Review May- June 1994 p. 46.

(ii) Ajai, O. Dr, "Conservation and Management of Marine Resources", (Paper Delivered at the National Seminar on law of the sea and Nigeria's Marine Sector, Organized by NIALS & N.M.A. August, 19- 21, 1977

(iii) Noah Walley and Whitehead, op cit

(iv) Cap. 197, L.F.N. 1990

(v) Cap. 77, L.N.F. 1990

- (vi) Cap. 395, L.N.F. 1990
- (vii) Cap. 108, L. F.N.1990
- (viii) 1963
- (ix) Petroleum Regulations 1967
- (x) Cap. 337, L.F.N. 1990
- (xi) Petroleum Refining Regulations 1974
- (xii) Cap. 26, L.F.N.1900
- (xiii) Cap 338,L.F.N. 1990
- (xiv) Ogbalu, Obi " Environmental Regulation in Nigeria", Oil and Gas Law &Taxation Review Vol. 10 Issue 6
- (xv) Akpata, O.U. "Attracting Foreign Investments Into Nigeria", (A Paper presented at an In- house Seminar of George Etomi &Partners).
- (xvi) Federal Environment Protection Agency Decree 1988, (A publication of the Federal Environmental Protection Agency).

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