



Time for Environmental Taxation in Nigeria?

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Introduction

I was recently a privileged panellist at the 2012 *University of Lagos Law Students Tax Club Annual Conference*, 'Is Environmental Taxation Possible?' Erudite environmental lawyer, Dr Dayo Amokaiye delivered a stimulating paper, *Feasibility of Environmental Taxation in Nigeria*, which set the tone for discussions. Mr. Tunde Fowler (Executive Chairman LSIRS/Tax Club Patron), as Chairman of the occasion, ably directed proceedings. Fellow panellists, Messrs Ajibola Olomola (represented) and Isaac Komolafe; with Prince Quadri, former and current President of CITN and WAUTI respectively, made up the 'high' table.

According to Dr Amokaiye, "the use of law particularly taxation to regulate environmental pollution is not novel... Economic techniques involve the use of economic incentives and disincentives, mechanisms such as fines, effluent fees, pollution tax, licences, user charges, loans and grants to reduce a level of pollution to desired standards. ... Pollution is encouraged because the polluter can discharge effluent at no cost to himself... while a cost accrues to others ... The introduction of pollution tax and other disincentives... primarily seeks to discourage firms and individuals from causing pollution... not by persuasion or by prohibiting... activity through legislation, but by imposing a price or economic cost on such conduct. By this process, environmental cost is internalized into the production process... firms who wish to maximize profits will find ways of polluting less, rather than paying more."

The *National Tax Policy* (NTP, p.13) recognised the scope to have "environmental taxes, fees charges or fines none of which exist today." Per NTP, when payments are not related to costs associated with particular participants, but more loosely related to a discrete group of participants/an industry, then it's a 'tax'. The Annual Environmental Development Charge (section 17 LASEPA Law, Lagos) which used to be vigorously challenged (also imposed practising fees on environmental management consultants), is an example. Would pollution tax on fumes from millions of "I better pass my neighbour" generators or aged vehicles on roads lacking efficient/affordable mass transit system, be fair?

Wanted: Creativity

My thesis is that we can creatively use the tax law (through grant/deferral/cancellation of incentives), to advance environmental interests, without creating new categories of environmental taxes. Example: generous mining sector tax incentives do not make

eligibility dependent on environmentally friendly operations - it is possible (nay, likely) to have polluter beneficiaries. One approach is to have minimum threshold of incentives (to 'attract' sectoral investment), whilst the graduated incentives could apply based on degree of miner's eco-friendliness. Two miners of barite need not enjoy the same level of tax incentives if one invests more on operations with neutral/ positive environmental footprint, but the *Mines and Minerals Act*, 2007 in typical fashion, does not seem cognitive of this. Given the potential negative environmental impact, generally applicable incentives is a further boon to the 'windfall' of miners considering the favourable tax regime for this extractive industry.

The criteria for designating pioneer industries/granting pioneer status should be more than section 1(1) IDTRA's prescription: "the industry is not being carried on in Nigeria on a scale suitable to the economic requirements of Nigeria... or it is expedient in the public interest to encourage the development... of [such] industry in Nigeria..." There is no IDTRA provision based on environmental considerations whether under section 7 where pioneer certificates may be cancelled/ tax relief period restricted or section 10(2) on renewal of 3-year initial tax holiday, which focuses inter alia on "rate of expansion, standard of efficiency and the level of development of the company" (section 10(3)(a)). Section 10(3)(e) brings up the rear on renewal considerations, viz "such other relevant matters as may be required." Not being express environmental criterion, it does not provide clear/forceful regulatory signal that pioneer enterprises make requisite environmental impact investments to their operations.

The converse of the 'carrot' scheme is to wield the 'stick' by applying sanctions (including financial) for breach of environmental regulations. As a first step, there is need to review the fines and penalties stipulated in legislation such as *NESREA Act 2007*. Since only defaulters are exposed to penalty/fine upon conviction, such cannot be 'tax'



because compliant businesses are unaffected. Whereas a distinct environmental tax would impact negatively on Nigerian tax competitiveness rating, fines/penalties will not.

Carrot & Stick: Gas Utilisation and Flaring

The carrot, vide gas utilisation incentives in sections 11 and 12 PPTA/39 CITA (and VAT/import duty exemptions on gas equipment under VATA/CEMA) have not obliterated gas flaring from our national reality; in 2010 Nigeria was the 2nd global flaring leader, behind Russia. Yet the need to monetise Nigeria's extensive gas resources has never been greater; Nigeria having been aptly described as “a gas province with a bit of oil in it”. Nigeria's flaring notoriety may not be surprising because of regulatory dilution: serially moving flare-out dates, coupled with the tax deductibility of gas flaring penalties. Section 10(1) PPTA permits deduction of “... expenses wholly, exclusively and necessarily incurred” for petroleum operations and section 13(1) PPTA does not disallow such penalty.

Accordingly, upstream players could, and have oftentimes taken, 'economic' decisions to flare rather than utilise gas, where it is more 'profitable' to do so, obviating substantial expenditure in gas utilization/processing infrastructure. Operators' (pro gas utilisation) decisions are not made easier by “increasing default of NNPC... on joint venture (JV) cash calls...” (where applicable); and regulated (below market) pricing of domestic gas (arguably a strategic imperative given incentives conferred) but pricing must allow operators reasonable' return on investment.

Meanwhile, case law (typified by *Gbenre v. Shell Petroleum Development Company* (2005) AHRLR 151), is categorical that gas flaring in the course of oil extraction violates the right to life and a healthy environment.

PIB 2012's solution (current form as submitted to the National Assembly) is to restrict gas flaring by amongst others, prescribing a fine not less than the value

of gas flared, same being non tax-deductible. However, unlike some earlier versions, PIB 2012 (section 275) does not expressly set out a flare out date, instead delegating that task to the Minister. It is noteworthy that PIB 2012 intends to perpetuate only the section 39 CITA incentives (not sections 11 and 12 PPTA).

Incentivising Innovation

Dr. Amokaiye forcefully argued: “the basic idea with environmental taxation... as with emission trading is that polluters are given incentives to reduce pollution in an efficient manner and to do more than what would be required under a regulatory system...” “Also, the introduction of market oriented instruments like tradable emission rights and environmental taxes may be less suited for particular developing countries...”

Like the favourable treatment given to the agricultural loans under CITA (section 11(7)), or tax exempt dividends from small manufacturing starts-ups in section 23(1)(o) CITA, funding of renewable power projects, development and purchase of alternative technologies/products for energy efficiency could attract tax incentives, exemplified (for example) by USA's *Energy Efficiency Tax Incentives for Businesses*. The CITA incentives for R&D could also have environmental focus, currently section 26(3) grants 20% ITC for “companies and other organisations engaged in research and development activities for commercialisation” whilst generally, R&D reserve of up to 10% of total profits in any year is deductible.

Conclusion

Creating new environmental taxes may be counterproductive since multiplicity of taxes is still a business competitiveness issue for Nigeria. A better approach should be to review/plug identified gaps in the environmental regulatory landscape (including stringent financial sanctions), and strengthen relevant agencies to enhance enforcement capacity.

It is apt to re-echo Dr. Amokaiye's questions. “Another related issue in a federal system of ours is who among the tiers of government should impose pollution tax...? ... How will tax revenue be shared among the tiers of government? What will be criteria for sharing the revenue...? Should the tax revenue be shared according to number of industries in a particular state? The answers to these [will] require a restructuring of our taxation administration structure... will determine the efficiency and efficacy of environmental pollution tax in Nigeria. Even where the tax administration is restructured, will the income of Nigerian people bear this burden of such tax in the face of excessive taxation?”

Dr. Amokaiye questioned: “whether the instrument... often praised by economists, being environmental taxation, is very suited in a context of corruption” and that “in a legal system where it is not possible to rely on independent civil servants working in the public interest, it may be more suited still to use the traditional command and control instrument of environmental law instead of environmental taxes that may be much more sensitive to corruption problems.”

I agree with the ultimate view that environmental taxes in Nigeria are unnecessary. However, that without more, should not be a bar against environmental tax, because “the traditional command and control instrument of environmental law” and all other initiatives that should safeguard public interest require the civil service to enforce and are equally susceptible to corruption as environmental tax.

It is therefore fitting we should 'fix' the pervasive corruption malaise before it shuts down governance/public institutions and ultimately the nation. That way, we would have a conducive 'environment' (pun intended) to bequeath the future generations.

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