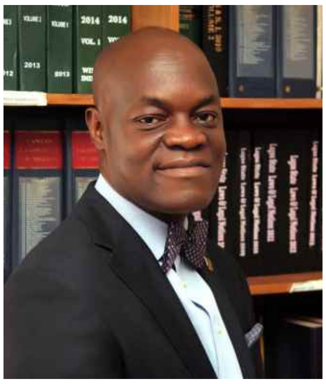
Musings: Nigerian Business Landscape Improvement Issues

'*Taxspectives*' by **Afolabi Elebiju** | Originally published as 'Why Government Must Acquire a Business Mindset…' in *ThisDay Lawyer, 29th May 2012, p.7*



a.elebiju@lelawlegal.com

Introduction

BusinessDay, 21/5/2012: *"Consolidated Breweries attributes decline in profit to increasing operational costs". "We rely heavily on generators to power our Breweries and the attendant cost of operations always affect our profitability… the country's road network still leaves a lot to be desired, resulting in frequent breakdown of our trucks and adding to the already high transportation cost."*

Same day, *The Guardian's* front page screamed: *"MAN lists woes, wants production tools duty-free"*. MAN has called for *"…removal of duty or tariff on machinery and equipment to stimulate activities in the manufacturing sector, Jamodu [President MAN]….lamented the high cost of providing independent power to factories by MAN members, stressing that power supply accounts for 40 per cent of production costs in Nigeria compared to five to 10 per cent in countries with more stable electricity supply. 'It costs twice to manufacture a product in Nigeria than in China,' … manufacturers had continued to fight against government policy inconsistency, erratic power supply, multiplicity of taxes and levies, high cost of funds, bureaucratic bottlenecks and insecurity."*

"FG Seeks Enhanced Industrial Productivity". THISDAY (22/5/2012) reported that Dr. Olusegun Aganga, the Minister of Trade and Investment *"called on the industrial sector to increase its level of industrial productivity"*! My initial 'yeah, right' reaction changed, upon reading the Minister's speech outlining many current and proposed initiatives because, the *"government's job is to create an enabling environment"*. Hopefully, the serious indication of intent to actually enhance Nigeria's competitiveness would be matched with consistent, focused action, because through organisations such as the NESG, Nigerian private sector have offered invaluable business reform advocacy to government over the years: the bane had always been execution. From a '*Taxspectives*' view point, government would record more tax revenues in the long term when it creates environment for businesses to thrive, with multiplier effects on the economy: job creation, increased GDP, diversification of our monoeconomy, better quality of life, etc.

Although we operate a federal system, there is no reason why all levels (and agencies) of government cannot pull together in elevating our competitiveness, which the WEF has defined as *"…all of the factors, institution, and policies that determines a country's level of productivity…"* For example, while the JTB (comprising FIRS and State IRS) campaigns against multiplicity of taxes/levies, and with military enacted legislation to boot, that is still a major issue that businesses contend with in Nigeria, albeit it is worse in some States than others.

Evidently, Government (and associated factors therewith) have more than any other, been keeping a lid on Nigeria's competitiveness inhibiting FDI and local investment. If in doubt, please check Nigeria's slide in competitiveness rankings (WEF, Global Competitiveness Reports, http://www.gcr.weforum.org/). Whilst Nigeria was ranked 95th (10th in Africa) in the *2007-2008 Global Competitiveness Index*, it ranked 127th (out of 142 countries, being 20th in Africa) in the 2011-2012 edition!

For example, *section 8(1)(b) Immigration Act (IA)*, a 1963 legislation typifying Government's erstwhile philosophy to "control" the economy, obligates companies with foreign participation to obtain Business Permit (BP) from Minister of the Interior (MoI). However, subsequent legislation such as *Nigerian Enterprises Promotion (Repeal) Act* and *NPC Act (both enacted in 1995)* clearly evince an intention to throw open all the sectors of the economy to all investors, save the "negative list" (*ss. 18 & 31 NIPC Act*). Since the NIPC Act has adopted the " 'promotional' rather than 'control' approach to foreign investment regulation" (Wole Abayomi, *Nigeria's New Investment Laws, 1997 JBL, 593*), why do we still have *s.8 IA* in our statute books?

Whilst NIPC is now the agency charged with tracking/monitoring foreign investment, and *section 8* has arguably been impliedly repealed by the NIPC Act such that only registration with NIPC should suffice, MoI gives effect to *section 8* by only approving expatriate quota (EQ) approvals for companies that also apply for its BP. Companies requiring EQs are therefore burdened with BP requirement which serve no other purpose than to keep some civil servants busy. The average timeline for grant of BP (4-6 weeks, EQ typically takes longer), speak volumes, albeit 'time is money'! If the MoI BP requirement applies, then businesses do not need to register with the NIPC! Any wonder that Nigeria maintains her rank of 133rd (out of 183) in the 2012 *Ease of Doing Business* rankings by the World Bank Group? How effective is the *"One Stop Investment Centre"* (OSIC) role envisioned for NIPC? Has NIPC evaluated its *"impact on investments in Nigeria"* and made appropriate recommendations (as contemplated by *section 4(k) NIPC Act*), and these formed part of the Minister's speech? *Section 4(b) & (h)* enjoins the NIPC to *"initiate and support measures which shall enhance the investment climate in Nigeria..."* and *"maintain liaison between investors and Ministries, Government, departmentsand agencies, institutional leaders and other authorities concerned with investments"*.

Has NIPC been helpful in trying to resolve the N1.77 billion fine by NCC on GSM operators for poor quality of service (QoS), dependent in part on harsh operating factors beyond the control of operators? Their plea that their network infrastructure be declared critical national assets to (hopefully) reduce theft and vandalisation went unheeded. Government that promised to invest the 2001 GSM auction proceeds in telecoms infrastructure but almost immediately reneged, rather sharing the money is now levying fines with equanimity for poor QoS! And to think that the same NCC was advocating telecoms operators' position in a face-off with NESREA over environmental regulation of telecoms masts!

Conventional wisdom advices nurturing the goose that lay the golden eggs. Our telecom sector came out virtually out of nothing, and despite a harsh operating environment has been serially one of the fastest growing markets in the world. Recently an article (Emeka Oparah, '*Killing Telecoms Sector Softly' THISDAY, 15/5/2012*) referred to the cost of powering base stations in Malawi and Nigeria as 5% and 80% of Opex respectively! Funds that could otherwise go into network expansion to upgrade QoS are being spent on diesel and generators. The minimum of 15 taxes and levies allegedly enforced against telecoms operators almost smacks of sector discrimination. Prudent utilisation of these is another matter altogether.

When the President reportedly said (*BusinessDay 24/5/2012*) that civil servants were *"frustrating government policies"* many would agree he was stating the obvious. *BusinessDay 15/3/2010* reported that *"Heerema, a major shipbuilder, quits Nigeria over corrupt contract process."* And that is a company whose operations (jobs, skills transfer, foreign exchange earnings, etc) could have furthered local content goals in the oil and gas industry, apart from paying taxes to government coffers! Two years later, *ThisDay, 27/3/2012* headlined: *"Jonathan, in S'Korea, Woos Samsung, Hyundai, Daewoo."* After we have attracted investment, then what?

While Nigerian government has spent the better part of 7 years dithering over enactment of new fiscal regime for its oil and gas sector via the PIB; with several investments stalling as a result (and consequential economic losses), many countries in the Gulf of Guinea have joined or are on their way to becoming competing oil and gas provinces. In recent memory, Angola momentarily overtook Nigeria as leading African producer due to cuts attributable to Niger Delta militants, and ramping up of its production as prolific fields came onstream. The OGEFZ, Onne has not become the operational hub that will serve the Gulf of Guinea as envisaged.

Many institutions that interfere with the business sector operate with *"civil service mentality"* thus hampering their own performance, holding back the hands of business, with substantial spillover effects. Often, the Nigerian regulator will take a mile where an inch has been prescribed: the CAC is a recurrent example. Recently it insisted on sighting the original resolution appointing auditors that had just been removed even though CAMA only mandate filings, where the auditor is appointed casually. Meanwhile, *section 362(2)* prescribes notification to the CAC only where it has removed an auditor. Valuable time was lost in resolving the impasse which negatively impacted the affected company's corporate compliance status whilst it lasted.

Elsewhere, the regulatory function may be performed towards making life difficult, so that the applicant will be forced to *"facilitate"*, or engage intermediaries to *"smoothen"* the process, e.g. obtaining e-passport or driver's license at a busy centre. The attendant corruption creates negative perception (*cf.* Nigeria's *Corruption Perception Index* rating); whilst the bureaucracy of the civil service usually help drive small businesses into informality, where their opportunity to contribute to government revenues may be sub-optimal.
Do most State Governments mind what their ranking is in the *Ease of Doing Business in Nigeria Index*, rather than the prevailing multiplicity of taxes/ levies to raise IGR? Whilst IGR is key to sustenance of governance, killing the goose will only obliterate future supply of golden eggs! In the USA where there is "regulatory competition", States actively compete to attract investments, especially in being the locus of incorporation of companies. 'Thankfully' for the CAC (courtesy, *the Exclusive List of the 1999 Constitution*), there is no such competition for companies incorporation.

Lagos is to be commended for taking the partnership vehicle to another level through provision for LP and LLP options in its *Partnership Law*. Other States may emulate Lagos to capture a piece of the business start-up compliance market. Absent specific sectoral requirements, businesses may be organized other than as companies, and partnerships (and their employees) are taxable under PITA helping to shore up States' IGR.

Government should also stimulate local investment because stellar performance of Nigerian investors like Dangote Group help point the way for foreign investors, as *"money follows money"*. All options should be on the table, including intensifying the anti-corruption efforts and wise investment of recoveries therefrom.

The massive infrastructural deficit in Nigeria is a paradox: whilst a debilitating handicap to national productivity and citizens' quality of life, it also represents veritable opportunities for investment and assured returns to investors (who would pay taxes thereon). Given government's funding constraints, why haven't PPPs (in their different forms) massively come to the rescue? We have not seen a sleuth of PPPs commensurate with the infrastructure investment opportunities because investors are still wary of the 'seriousness' of Government: the imminent privatization of the power sector offers a unique opportunity which hopefully would be well utilized. Historically, the risks: policy flips-flop, changing rules in the middle of the game, self-help in contrast disputes, etc, had drawn investors' red flags.

Many Nigerian businesses have shown their grit, resilience, and ingenuity to thrive in the midst of adversity. Just surviving Nigeria's harsh environment would translate to stellar performance in a 'friendlier' clime, *ceteris paribus*. Government should reciprocate the same grit and resourcefulness in providing an enabling environment for businesses to thrive and in turn earn a share of their returns by way of taxes. If the government truly begins to function with a business friendly mindset, then we can be poised to take advantage of global capital that is currently biased towards emerging markets as a result of slowdown in Western economies. As *"the men of Issachar understood the times and knew what Israel ought to do"* (*1 Chronicles 12:32*); this may just be our God given opportunity to leapfrog achievement of the *Vision 20:20:20* goal.