REGIONAL AFFAIRS

East Africa

Kenya: The Role of Bankers in the Promotion of Compliance with Environmental Law

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Preamble:

One of the undisputable lessons learnt throughout the history of human development or existence is the fact that there can be no greater force than an idea whose time has come. The inextricable symbiotic relationship between rational economic development and sustainable use of the environment (read as the totality of nature and natural resources including the cultural heritage and human infrastructure essential for socio-economic activities) can no longer be regarded as an arguable or debatable proposition or hypothesis as was the case in the early 70s when A. R. Kasdan had to publish his paper entitled: *Third World War: Environment versus Development*, as a way of influencing the direction of international thinking on the subject. Indeed, as observed during the Earth Summit in Rio de Janeiro in 1992:

> "Economic conditions, both domestic and international, that encourage free trade and access to markets will help make economic growth [development] and environmental protection mutually supportive for all countries, particularly for developing countries and countries undergoing the process of transition to market economies; economies which are essentially characterised by economic growth, social development and poverty eradication as the first and overriding priorities".

Given the imperative nature of this fact, Bankers as key players and stakeholders in the process of economic development are expected to, and must indeed, play a critical and pivotal role in the promotion of compliance with environmental laws and regulations by industries.

1 Introduction:

Although the theme of this workshop is continental in scope, out of practical considerations I shall limit my presentation to the Kenyan situation which will be used as an illustration. Being creatures of habit, allow me also to make a cautionary statement up-front about possible personal biases originating from my professional/occupational background which will be evident during the course of this presentation.

As a prelude to my presentation I propose to briefly situate the role of banking in economic development and thereafter examine why Bankers should have responsibility, or in journalistic parlance, accept "gate-keeper" role, or in legal terms, accept to be "surrogate regulators" in promoting compliance with environmental laws and regulations. Thereafter the exposition will:

(i) explore possible implementation mechanisms to facilitate the discharge of the expected responsibility;
(ii) opine on an appropriate legal/fiscal framework that would facilitate such a role;
(iii) examine the possible effect of environmental liability on banker/industry relationship;
(iv) comment on the possible scope and limitation of lender liability for environmental injuries and/or damage;
(v) risk certain suggestions on an environmental insurance/restoration fund;
(vi) draw conclusions which incorporate certain recommendations.

2 The Role of Banking in Economic Development

It may be of interest to observe that as a term of art, there is no agreed definition of the term "Banker". However, the meaning of the term "Banker" may be usefully derived from examining what constitutes banking business or activities analogous thereto.

As we are all aware, the traditional role of banking is related to financial intermediation by facilitating the creation of a meeting point in the market place for savers and those in need of loan funds for development purposes. Thus, as defined in the Banking Act (Cap.488 of the Laws of Kenya), the terms "Bank" and "Financial Institutions" and the related activities of "banking business" and "financial business" respectively, imply a fundamental role of mobilising deposits from members of the public and employing such deposits by way of loans, investment, or in any manner for the account and at the risk of the person so employing the money. That key player can therefore be referred to as a "Banker".

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Technical definitions apart, for purposes of this presentation let us agree to apply the term “Banker” to any person who, by dint of business activity, mobilises deposits and lends on such deposits. This practical definition will therefore cover the 53 commercial banks, *17* non-banking financial institutions, 4 building societies and 2 mortgage finance companies presently operating in Kenya. By the same token, let us also agree to extend this definition to include the 38 insurance companies and approximately 3250 savings and credit co-operative societies (both formal and informal) which are also critical players in financial intermediation.

Fifty-two per cent of the total assets of the sector as at December 31, 1996 was invested in loans and advances. Of the said total loans and advances made by the sector, an average of *20.4* per cent was channeled to the industrial sector during the period August 1996–August 1997 (Source: Central Bank of Kenya: Monthly Economic Review October, 1997). Global Profit and Loss Analysis for the period ended December 31, 1996 reveals that 63 per cent of the sector's income was derived from interest on these loans and advances.

Beside direct availment of credit, as part of their portfolio diversification, Bankers may also make direct equity investments in industries either through the Nairobi Stock Exchange or directly in the non-listed companies in the industrial sector. As a matter of fact, by virtue of section 12(b) of the Banking Act, such equity investments are limited in aggregate to *25* per cent of an institution's (Banker's) capital and unimpaired reserves. In this instance, one would be concerned with, among other things, the level of returns on the equity investments as well as the continued state of health of the relevant industry. Thus, in this presentation the terms “credit availment” and “equity investments” will be treated as financial exposures to the industrial sector and applied inter-changeably.

Between 1991–1995, GDP contribution by the industrial and financial services sectors showed a steady and significant growth trend, with the two sectors contributing *19.4* per cent and *22.6* per cent of GDP, respectively, during 1994–95 (expressed in terms of current prices).

From the statistical evidence alluded to above, it can therefore be surmised that the state of health of industries have a substantial direct bearing on the state of the banking sector and the general economy.

3 Why Bankers Should be Concerned with Environmental Issues

Having made an attempt has been made to demonstrate the correlation between the banking and industrial sectors within the context of the role of banking in economic development, I now propose to examine why Bankers should have responsibility for promoting compliance with environmental law and regulations by industries. As a starting point, I propose to cite a few examples of celebrated global environmental issues and disasters that have had, and continue to have, remarkable impact on the thinking on the subject of responsibility for ensuring compliance with environmental laws and regulations. The issues are as tabulated below:

Global Disasters	Form of Pollution
The Bhopal Disaster in India	air
Move ment for the Survival of Ogoni People (MOSOP) – the Saro-Wiwa and the Ogoni debacle.	soil, water & air
Toxic waste dumping in Nigeria	soil and water
Forest fires (Indonesian smog)	air (Global Warming)

At national level, there has been an increasing spate of complaints arising out of some of the following industrial and commercial activities:

Industrial / Commercial Activity	Form of Pollution
Extractive Industries e.g. mining	soil, water & air
Paper Processing	air & water
Fo od Processing	soil, water & air
Sugar Processing	soil, water & air
Use of Agro-chemicals	soil, water & air
Increasing Demand for Consumer Products (aerosols, fridges & form plastics)	air (Ozone Layer Depletion)

Examples cited above would have to be further examined within the overall context of global climate change. The recent massive landslides experienced in the Chania Valley of Tetu Division, Nyeri District, and Mathioya in Muranga District, are consequences of indiscriminate felling of trees and poor farming management practices in areas which had been gazetted as forest lands – thanks to the catalytic effect of the El Niño phenomenon.

To my mind, there are four basic reasons why Bankers should have responsibility for promoting compliance with environmental law and regulations, a responsibility which should be essentially perceived as participation in risk management in this vital area. The reasons may be summarised under the following rubrics:

I. Self-Serving Non-Altruistic Reasons:

(a) Balance Sheet factors – A project may run into problems as a consequence of certain environmental management liability. This may have negative impact on a borrower's cash flows which may result in delayed payments or write-offs of interest and principal. Such a situation may ultimately have negative impact on the Bank's asset quality, earnings (profitability). Other negative exposures may relate to positional risks in respect of possible dimunition in the values of securities held. In certain cases, funding risks may be experienced by way of possible reduced access to and increased costs of capital from international markets especially in internationally syndicated loans.

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Systemic Stability – Ensuring continued existence of systemic stability in the overall financial system
i.e. protection of the "goose that lays the golden egg".

II. Corporate Social Responsibility:

This relates mainly to moral obligation to discharge the responsibility by virtue of the need to observe the universal seven cardinal principles that have influenced the thinking and formulation of environmental laws worldwide. The stated principles may be exemplified by the doctrine of national patrimony or inter-generational justice or equity which essentially espouses *Principle 4* of the Rio Declaration on Environment and Development viz. "the right to development must be fulfilled so as to equitably meet the developmental needs and environmental needs of the present and future generations." These are global responsibilities, in the fulfillment of which Bankers are expected to play their due role as corporate members of the world community.

III. Globalisation and Intergration of Markets:

The growing trend for strict adherence to agreed international standards with respect to product quality, production processes, packaging, labelling etc. [through, for instance, GATT, UNCTAD, COMESA, SADC, PTA, IGADD, EAC and EEC (EU) Treaties], requires that Bankers should be in the frontline in encouraging investors borrowing money to embrace such global concepts as Total Quality Management (TQM) under ISO 9000 series, European Union Eco-Management and Audit Scheme (EMAS), and Environmental Management Systems (EMS) for commerce and industry under ISO 14000 series which are essentially based on British and American standards.

IV. Legal Responsibilities:

The legal responsibilities that could compel Bankers to ensure compliance may be grouped under the following headings:

(i) Civil/Tortious Liabilities Under the Common Law Principle of General Duty of Care. The underlying concepts may be exemplified by principal/agency relationship, vicarious liability, etc. Situations under which arious a duty to take care can arise are multiarious and for our purposes one may be persuaded to adopt the following dictum of Lord Atkin in the celebrated English case of *Donoghue v. Stevenson* [1932] A.C. 562, H.L. at page 580 which states that:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's [industrialist's] question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*" [Emphasis supplied]

Lender Liabilities arising out of Superfund or restoration fund related legislation

- Statutory/Criminal sanctions such as penalties and fines.
- Compensation claims related to contaminated sites such as cost recovery actions and clean-up costs;

Any cursory review of the above reasons will lead to the inescapable conclusion that Bankers should not only have, but also share, in the responsibility of promoting compliance with environmental laws and regulations by industry. It is emphasised that in discharging this onerous responsibility Bankers have to be competent dialogue partners with the other stakeholders in articulating their positions in what is essentially a collaborative effort.

4 Possible Implementation Mechanisms to Facilitate the Discharge of the Expected Responsibility

One sees possible implementation mechanisms at two levels. The first level mechanism relates to implementation methods that the banking sector can devise and implement at sectoral level while the second level mechanism relates to implementation methods that Bankers can undertake at individual corporate level.

I. First level implementation mechanisms

(i) Formulation and adoption of an appropriate sectoral code of ethics and conduct or 'Responsible Financing Programme' that appropriately focusses on environmental matters with particular emphasis on availment of credit to industries possibly modelled after the European chemical industry's 'Responsible Care Programme'.

(ii) Formulation and adoption of credit appraisal systems and techniques as well as loan administration procedures that encompasses Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA), and Environmental Due Diligence and Audit (EDDA) as integral parts of project feasibility study and implementation. This would demonstrate an appreciable degree of awareness on strategic approach to environmental issues.

(iii) Formulation and adoption of accounting standards and disclosure requirements that would appropriately recognise materially significant environment – related liabilities.

(iv) In conjunction with the other stakeholders:

- assist in the creation of an enabling legislative/ fiscal framework that centreplays sensitivity to environmental matters by, for instance, ensuring the establishment of a legally effective Environmental Protection Authority;
- assist in the establishment of an environmental restoration fund;
- assist in the establishment of centralised professional competencies in such fields as EIA and ERA; ➻

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- assist generally in the sensitisation and enhancing the level of public awareness on environmental management matters;
- offer support for independent private sector development of environmental management consultancy.

II. Second level implementation mechanisms
(i) Development of internal professional competencies in such fields as EIA and ERA.
(ii) Formulation and adoption of credit appraisal systems and loan administration procedures that recognise and appropriately reward projects that show sensitivity to environmental matters. Such rewards would be reflected, inter alia, in the costing/pricing of the underlying entrepreneurial risks expressed in terms of the interest rates and the other related transaction costs charged.
- Insistence on EIA, ERA, Environmental Due Diligence/Audit as a pre-requisite to initiating and subsequently sustaining loan relationships.

Use of legal documentation with appropriate protective/indemnification covenants on Environmental Risk Management.

5 Suggested legal/fiscal framework

Although the Government of Kenya has explicitly accepted *Agenda 21* adapted by the UN Conference on Environment and Development (UNCED-1992), as part of the National Environmental Policy by appropriate incorporation in the country's National Development Plans, it must be mentioned that at operational level, the legal landscape is currently characterised by fragmented sectoral laws covering approximately 32 statutes that are of a distinctive environmental character (see page 191).

Prof. Okidi notes in his article on *International Perspectives on the Environment and Constitutions* published in *The South African Journal of Environmental Law and Policy, Volume 3 No.1, March 1996*, that when it comes to establishing an appropriate legal and institutional regime for environmental law, it is a matter of firm principle that there must be a complete array of normative provisions as well as institutional and procedural arrangements for the enforcement of the now recognised universal principles governing environmental legislation. These principles may be summarised as follows;
(i) *Sustainable utilisation*: The principle restates the doctrine of inter-generational justice or equity in the use of the enviroment and natural resources.
(ii) *Precautionary measures*: The principle requires that every precaution and prudence should be exercised to prevent any possible deleterious environmental consequences of any socio-economic or military activities. Such measures would include EIA, ERA, Environmental Audit and Environmental Monitoring.
(iii) *Integration of Environmental Considerations into Development Planning and Management*.
(iv) *The promotion of Public Participation in Environmental Decision-Making.*
(v) *The Polluter Pays Principle*.
(vi) *Prior Consultation and Ultimate Co-operation*.
(vii) *Provision of Legal and Institutional Framework*s: This is a baseline principle which stipulates that when the proposals have been made, there must, ultimately, be a legal authority as well as institutional machinery for their enforcement. As explained below, in the Kenyan situation, the proposed framework statute is in line with the stated principle.

In this regard I believe that based on the experience gained from other common law jurisdictions such as U.S.A., Australia, New Zealand, Canada and U.K., the proposals regarding reform of environmental law in Kenya, contained in the Report of the Environmental Offences Committee of the Task Force on the Reform of Penal Laws and Procedures, will be debated during the Eight Parliament (1998–2002); and if adopted, will provide the initial pedestal for comprehensive environmental legislation in Kenya. In essence, the Report recommends a framework statute, i.e., a centralised legislated system of environmental management which provides the mechanisms for administrative regulation as well as criminal sanctions. The proposed Framework Legislation will put in place the vital machinery of environmental standards setting, which will, further have the capacity to control the entire sphere for the beneficial use of the environment, through its mechanisms such as environmental impact assessment and the licencing of projects. The controlling agency (Environmental Management Authority) created by the statute will be in a position to comply with its lawful orders or the terms of its licences. The Report also advocates retention of sectoral statutes provided that the operative standards and the scheme of enforcement of the statutes are to be harmonised with the framework statute.

It is further noted that the proposed legislative framework will combine the following three key elements;
(i) Rule/Command – and – Control regulation system;
(ii) Self regulation;
(iii) Market driven incentives/instruments such as tax waivers/exemption and favourable import duties.

Constitutional Framework:

Although it may be debatable whether constitutional entrenchment may be the right basis to gauge the degree of importance that a country attaches to environmental matters, given the over-riding nature of constitutional provisions, a case may be made for such entrenchment. Within the African context, Equitorial Guinea, Ethiopia, Uganda, Malawi and South Africa have clearly led the way in their path-breaking initiatives to include such entrenchment provisions. Of the five jurisdictions, the South African provisions have been found to be most appealing. Section 24 of the South African Constitution stipulates as follows:

"Everyone has the right: (a) to an environment that is not harmful to their health or well-being; and

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(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
– prevent pollution and ecological degradation;
– promote conservation; and
– secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Besides the legal hierarchical superiority, such constitutional entrenchment would give the desired visibility to environmental matters and thereby assist in the enhancement of the level of public awareness about the critical importance of such matters. In addition, by constitutionally placing individual Kenyans at the centre of environmental management, such entrenchment would redress the current impediment imposed in the development of case law through the [mis] application of the common law principle of locus standi which technically limits prosecution on environmental matters to the Attorney General and restricts the scope of individuals to sue successfully on such matters only to situations where the individual can demonstrate exemplary injuries in matters of public nuisance or injuries to proprietary interest. [Cases such as *Wangari Maathai* on Uhuru Park and *Nginyo Kariuki* on Kamiti Forest may illustrate these concerns]. In my view, circuitous stipulations via the Bill of Rights Provisions, on such a grave matter, as is presently the case in Kenya, will not suffice.

A case can therefore be made for constitutional amendment on this issue through the initiatives currently being taken through the Constitution of Kenya Review Commission Bill.

6 Possible effects of environmental liability on Banker/Industry relationship

As a consequence of the attendant liabilities, it goes without saying, that depending on how the relationship is managed, there could be considerable strain in the relationship. To avoid such a situation, one would therefore advocate informed dialogue/partnership with all the other stakeholders including industries so as to create business practices/systems which are anchored on a pedestal that shows appropriate sensitivities to environmental matters. It is in this regard that initiatives such as the current workshop should be encouraged.

7 Possible scope and limitation of lender liability for environmental injuries and/or damages

As evidenced by the experience gained from US jurisdiction, lender liability should not, on policy grounds, be left open-ended. Under section 106 of the "Superfund" ...any person who willfully violates or refuses to comply with an order from the Environmental Protection Agency (EPA) without sufficient course is potentially subject to penalties of US $ 25,000 per day for each day that the violation or failure to comply continues. Given the many potential "costs of response" the average cost of cleaning up a site was recently estimated to be approximately US $ 25 million. Thus, replication of such experiences as obtainable in the US, would lead to the scarce resources, which should have otherwise been utilised in improving the management of the environment, to be misdirected into such supplementary transaction costs as legal fees, investigation fees, etc. In my view, there are three effective ways of scoping limitation of lender liability for environmental injuries and damages. These are:

(i) Incorporation of appropriate and satisfactory statutory defences/ exemptions for secured lenders;
(ii) Judicious application of the "Public Welfare Offence" doctrine to avoid creating strict criminal liability for violations environmental regulations; and
(iii) Devising compensation schemes based on a predetermined statutory scale.

(i) Statutory Defences/Exemptions for Secured Lenders

A review of the legal regimes of the other common law jurisdictions reveals that the doctrine of environmental lender liability has evolved through an extended liability approach. Under this approach, both the regulatory authorities and judicial authorities can interpret the applicable legislation as extending to Bankers (read as lenders), although Bankers may not clearly be the prime targets of the legislation in some primary sense. Lenders liability is thus an important but essentially residual aspect of the litigation driven, court-mediated model for securing environmental clean-up and the allocation of associated costs that is currently dominant in western economies. The concept addresses those situations where a secured creditor would be made liable for its debtor's (borrower's) obligations to third parties. The notions are essentially judge-made or common law concepts. So it is that such common law principles related to vicarious liability, principal/ agency relationship, product liability etc., are often invoked to provide the underlying juridical rationale.

In practical terms, as observed by Kwame Mfodwo, in his article on "the Environmental Liability of Lender and Financial Institutions in New Zealand: An Analysis of Current and Proposed Regimes" published in *The Australian Journal of Natural Resources, Law and Policy, Volume 2*, Bankers can attract liability when they play one or more of these roles: investor, investigator, profit sharer, manager, adviser, shadow director; security enforcer, receiver, receiver's appointor or indemnifier. Thus, situations giving rise to possible liability may be exemplified by, inter alia, the following:

- Lending to a project or borrower who/which subsequently becomes environmentally liable to a significant degree;
- Being de facto or de jure in control of an undertaking which subsequently becomes environmentally liable to a significant degree;
- Foreclosing on a mortgage but thereafter discovering that the property has environmental problems;
- Being the potential owner of an environmentally hazardous property in the sense that he/she has the right to realise the security it previously offered a by now finan-

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cially troubled client – but finds that it is environmentally encumbered;

- Providing guarantees or sureties for a variety of firms with potential or actual environmental liability e.g., firms which produce or handle hazardous waste; or firms which clean-up hazardous waste or provide scientific advice on such matters.

Lenders would therefore be legitimately concerned with their relationship to polluting activity; their relationship to land on which polluting activities take place or have taken place; and their relationship with enterprises engaged in polluting activities.

There is often a wrong perception that Bankers are richer or are "deeper in the pocket" than most of the potentially liable parties (PLPs) and therefore perceived by environment protection authorities as better targets when it comes to recovering costs of extensive clean-up of contaminated sites or segments of the environment. Therefore, it would be vitally necessary in the Kenyan context that lenders should vigorously advocate for appropriate statutory defences/exemptions that would recognise the function of lending in the normal course of business as a facilitative and independent activity which should be devoid of any serious consequential third party liabilities. The following exemption from liability clause modelled after the Australian Bankers Association Proposal for inclusion in Federal and State legislation would provide a reasonable starting point:

"A Financial Institution shall not incur any liability under this Act, by reason that:

(a) it makes a loan or otherwise provides or continues to provide financial accommodation to any party or parties in the ordinary course of its business, or

(b) pursuant to financial arrangement with another party or parties it holds indicia of title or is the nominal legal owner of any property, or

(c) it: (i) forecloses upon; or

(ii) appoints a receiver or receiver and manager or agent for mortgagee in possession over; or enters into possession of; or otherwise deals with;

(iii) land or any other property for the purpose of protecting, enforcing or realising upon any security or;

(iv) otherwise deals with land or any other property for the purpose of protecting, enforcing or realising upon any security, or

(d) it provides financial advice to any person or persons or otherwise carries out any *bona fide* activities to monitor or manage a loan or other financial accommodation."

Such a statutory provision would in my view provide the desired well-defined, flexible and equitable exemptions from environmental liability for lenders, a feature lacking in most jurisdictions where management of Superfund-related cases have been rendered inequitable for lenders.

(ii) Judicious application of the "Public Welfare Offence" doctrine

It is an accepted principle in criminal jurisprudence that criminal conviction can only be sustained if the element *mens rea* or criminal intent or the requisite mental state is established.

The criminal offences related to environmental management are usually drafted in such a manner that the stated criminal intent is made a critical ingredient. It is for this reason that phrases such as "Any person who knowingly, recklessly, or negligently ... shall be guilty of an offence", so generously appears in legislation related to offences which may be regarded as being injurious to public welfare in general.

In recent court decisions, US jurisdiction has set a trend in invoking the "Public Welfare Offence" doctrine which creates an exception to the established criminal law requirement of *mens rea* in the enforcement of regulatory offences, resulting in a judicially created strict liability for environmental regulatory violations. Such decisions may be exemplified by the Ninth Circuit Court of Appeal decision in the *Weitzenhoff's* case where the court refused to instruct the jury on the defendants' proposed affirmative defence that they did not know that their actions violated the National Pollution Discharge Elimination System permit. The court therefore, proceeded to sustain the felony convictions for violations of the Clean Water Act, which provides that anyone who knowingly violates certain sections of the Act or any permit condition or limitation, implementing any such section, is guilty of a felony.

In *Kelly v. United States Environmental Protection Agency* [No. 92–1312 (DC cir 1992)], the United States Court of Appeals for the District of Columbia rejected the regulation designed by the Environmental Protection Agency (EPA) to shield lenders from environmental liability through promulgation of the Lender Liability Rule. The court held that EPA lacked the authority to issue the promulgation because only Congress could define the respective liabilities of the parties under the Superfund legislation and that only courts could interpret the liabilities of given parties. The court therefore vacated the Lender Liability Rule leaving lenders to be guided by the earlier ruling in *United States v. Fleet Factors*, 901 F.2d 1550 (11th. cir, 1990), which established the principle that a lender with unexercised capacity to influence its borrower's waste disposal practices could be held liable for the cost of cleaning up its borrower's property. Thus, as observed by Edward B. Witte and Mark L. Prager in their article on "Environmental Lender Liability: Searching for Safe Harbours in the Wake of Kelly v. EPA" published in *Wisconsin Environmental Law Journal Vol. 1 No. 1.* and Kepten D. Carmichael in the article "Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint" published in the Indiana Law Journal Vol. 71: 729, considerable judicial restraint would be expected in the development of the relevant case law.

(iii) Devising Compensation Schemes based on a Predetermined Statutory Scale

As mentioned above, there is a general misconception that of the PLPs, lenders are richer or are deeper in

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the pocket than most PLPs. Indeed, in the Kenyan situation there is a firmly held, although mistaken belief that banks and stakeholders such as industrialists have unlimited resources. It is quite often forgotten that as a business enterprise, when confronted with additional costs in doing business and the range of compensation we are alluding to here would constitute such costs, banks would invariably pass on such costs to the consumers (read as borrowers). It is therefore strongly advocated that Superfund-related compensation schemes should be anchored on predetermined statutory scales that would incorporate formulae aimed at facilitating granting of realistic and pragmatic compensation awards. Otherwise, as Christopher Wood cautions in his book on *Environmental Impact Assessment – A Comparative Review*, incurring uncontrolled expenses as is the case in the USA would have disastrous consequences on the continued viability of managing the relative regulatory regime. It may also be instructive to note Larry A Reynolds' observation made in his article: "New Directions for Environmental Impairment Liability Insurance in Canada" published in *Journal of Environmental Law and Practice, Volume 6.* that for similar and other reasons it has not been possible for Canada to devise an effective environmental impairment liability insurance scheme. In addition to the above, Bankers should be concerned with some of the following further key policy issues:

- application of the principle of retrospective or retroactive liability;
- apportionment of liability in respect of historically contaminated sites in view of the fact that such liabilities are supposed to be joint and several and such sites would frequently have multi-party character in terms of causation; and
- limitation periods.

8 Establishment of an environmental insurance/restoration fund

To my mind, some of the key issues to be addressed in the establishment of an environmental trust/restoration fund would be related to the funding arrangements and the responsibilities to be discharged by such a fund.

For comparison purposes, under US jurisdiction, "The Comprehensive Environmental Response Compensation and Liability Act" ('Superfund' or 'CERCLA'), constitutes the necessary medium for funding environmental restoration. The Act establishes liability for classes of parties who are associated with contaminated sites. In Superfund terms the following are the four classes of potentially responsible parties (PRPs):

- any person who currently owns or operates a property contaminated by hazardous substances (a "current owner" or "current operator");
- any person who owned or operated a property presently contaminated with hazardous substances at the time the same hazardous substances were disposed of (a "prior owner" or "prior operator");
- any person who arranged for disposal of hazardous substances which are later identified as a contaminated site (a "generator"); and
- any person who transports hazardous substances to any site which is later found to be contaminated with the same hazardous substance (a "transporter").

Courts in the United States have endorsed the aggressive interpretation of these categories by the EPA and other private third party plaintiffs to cast a broad net of liability on a wide array of businesses and individuals. Most disturbingly for lenders, the term "owner" or "operator" has also been liberally construed to potentially include parties who take a security interest in properties which are found to be contaminated.

Sectoral Statutes on Environmental Management in Kenya

(i)	Agriculture Act (Cap.318);
(ii)	Antiquities and Monuments Act (Cap.215);
(iii)	Explosives Act (Cap.115);
(iv)	Factories Act (Cap.514);
(v)	Fertilisers and Animal Foodstuffs Act (Cap.545);
(vi)	Fisheries Act (Cap.378);
(vii)	Food, Drugs and Chemical Substances Act (Cap.254);
(viii)	Forests Act (Cap.385);
(ix)	Government Fisheries Protection Act (Cap.379);
(x)	Grass Fires Act (Cap.327);
(xi)	Kerio Valley Development Authority Act (Cap.441);
(xii)	Lake Basin Development Authority Act (Cap.442);
(xiii)	Lakes and Rivers Act (Cap.409);
(xiv)	Land Planning Act (Cap.303);
(xv)	Malaria Prevention Act (Cap.246);
(xvi)	Mining Act (Cap.306);
(xvii)	Pest Control Products Act (Cap.346);
(xviii)	Petroleum (Exploration and Production) Act (Cap.308);
(xix)	Plant Protection Act (Cap.324);
(xx)	Prevention of Cruelty to Animals Act (Cap.360);
(xxi)	Protected Areas Act (Cap.204);
(xxii)	Public Health Act (Cap.242);
(xxiii)	Radiation Protection Act (Cap.243);
(xxiv)	Seeds and Plant Variaties Act (Cap.326);
(xxv)	Suppression of Noxious Weeds Act (Cap.325);
(xxvi)	Tana and Athi Rivers Development Authority Act (Cap.371);
(xxvii)	Town Planning Act (Cap.134);
(xxviii)	Trout Act (Cap.380);
(xxix)	Use of Poisonous Substances Act (Cap.247);
(xxx)	Water Act (Cap.372);
(xxxi)	Wildlife (Conservation and Management) Act (Cap.376);
(xxxii)	Coast Development Authority Act (Cap.449);

The Superfund PRPs are responsible for all costs of "removal or remedial" actions (also known as response costs") to investigate and clean-up a "release" of a "hazardous substance" from a "facility." Superfund also provides private parties who investigate and clean-up contaminated sites in a manner consistent with the EPA's national contigency plan with a private right of action against other PRPs, known as a Cost Recovery Action, and also a right of contribution against other PRPs.

In the Kenyan context, one would be persuaded to support the proposals contained in the Framework Legislation: *The Environmental Management and Coordination Bill* which suggests the separate establishment of an environmental trust fund and environmental restoration fund, both possibly modelled after the Superfund. The main object of an environmental trust fund is the facilita-

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tion and maintenance of rational management of the environmental and natural resources by covering the project and operational expenses. The funding would be sourced from:

- appropriation by the National Assembly for the purposes of the trust fund;
- donations, endowments, grants and gifts from whatever source and specifically designated for the trust fund; and
- such sums or other assets as may be donated to the trust fund.

On the other hand, the object of the environmental restoration fund would be a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where the exceptional circumstances require the Environmental Management Authority to intervene towards the control or mitigation of environmental degradation.

The funding would be sourced from:

- such proportion of fines, fees, grants as may be determined by the Authority; and
- such sums as may be donated or levied from industries and other project proponents as a contribution towards the restoration fund.

As evidenced above, the sourcing of funds reflect collective responsibility and collaborative effort from an array of stakeholders and the proposal should therefore be easily acceptable to Bankers. It is also hoped that the insurance industry will develop appropriate environmental impairment liability products to complement the above initiatives.

9 Conclusion

This presentation has attempted to demonstrate that, to the extent that there is an inextricable symbiotic relationship between rational economic development and sustainable use of the environment, Bankers as key players and stakeholders in the economic development process are expected to, and must indeed play a critical and pivotal role in the promotion of compliance with environmental laws and regulations by industries. Given the worldwide trend, it is my view that it is a role that Kenyan Bankers can not afford to escape or ignore.

In view of the various conflicting interests and the general mis-perception that Bankers have deeper pockets than the other PLPs, the presentation strongly advocates the need for Bankers to be competent dialogue partners in negotiating their position in the discharge of the expected role. Informed partnership is seen as the key to bridging any possible communication gaps in this vital subject that requires a collaborative effort all round.

An attempt has also been made to identify possible implementation mechanisms that Bankers could consider in the discharge of their responsibilities as surrogate regulators. Such mechanisms, at sectoral level, include formulation and adoption of credit appraisal systems and techniques as well as loan administration procedures that encompass strategic approaches to environmental issues by specifically incorporating Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA) and Environmental Due Diligence and Audit (EDDA) as integral parts of project feasibility study and implementation.

The existence of an enabling legal/fiscal environment has been identified as a prerequisite to an effective environmental management regime. To this end, a case has been presented for debate and possible adoption of the *Environmental Management and Coordination Bill* within the context of the proposed Framework Legislation. A case has also been made for introduction of an appropriate constitutional entrenchment provision so as to elevate the visibility of environmental matters in the public policy arena.

Finally, cognisance has been taken of the fact that as Bankers and other stakeholders do not have unlimited resources, compensation / re-mediation schemes to be devised should be governed by realism and pragmatism as to resource limitation. ❐

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