Environmental Liability in Angola

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No-one can now deny that the exploitation of natural resources is essential to our survival. The Industrial Revolution of the 19th century changed the dynamics of how we produce goods, creating new consumption habits. A significant part of said goods' production relies on natural resources and history shows that the more we consume, the more intensely we need to change our environment. Due to increasing environmental degradation, the UN ran its first conference on the environment in Stockholm in 1972. The conference called for greater awareness of how human actions were causing serious destruction, gravely threatening our survival.

Protecting the environment

This new global awareness of the environmental implications of human-related destruction motivated governments to develop better stewardship of the environment. Angolan environmental legislators, through Presidential Decree nº 194/11 of 7 July, announced, among other laws, that liability guidelines for environmental damage (RRDA – "Regime de Responsabilidade por Danos Ambientais") would be based upon the polluter-pays principle. According to polluter-pays rules, polluters must bear the costs to repair environmental damage. This means that any and all agents who, as a result of their actions, cause damage to, or degradation, destruction or dilapidation of the environment, must provide reparation and/or indemnification for the damages caused. If there's no damage, the agent is not held accountable. However, where the environment is concerned, even non-compliance with a protection rule leading to possible environmental damage, could render the agent accountable.

Environmental damage

The RRDA defines environmental damage as 'adverse change of environmental characteristics, including among others: pollution, desertification, erosion and deforestation'. However, this is a very broad definition, creating uncertainty and insecurity around the legal consequences. Whatever the human action against the environment, all the available legal means will be brought to bear on economic agents. For this reason it is agreed that by adding the adjective, 'significant' at the beginning, it gives the wording greater clarity, enabling it to be more effectively applied within an environmental responsibility context. The general consensus is that environmental damage should be categorised as subjective and ecological.

Damage is subjective when a tangible environmental component is harmed – soil, undersoil, air, water, light, flora and fauna – negatively impacting a person and their property. Ecological when it alters, spoils or destroys the components of a natural asset.

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Accountability guidelines

In order to prevent environmental harm and to ensure the person causing such damage is accountable and pays for their actions, Angolan lawmakers introduced RRDA guidelines covering subjective and objective responsibility.

For subjective responsibility, agents who, with or without intent, cause environmental damage, must remedy such damages and/or indemnify the government and citizens for losses and harm caused, through compensatory measures and environmental reparation. Instead of reimbursing the government however, the funds would be channelled into an Environmental Fund, financing studies and programmes to preserve natural resources, guaranteeing a healthy environment for citizens. This is particularly important when the person causing damage does not have the resources to prevent it worsening and/or for remediation.

Oddly enough, Angolan lawmakers have categorised oil-related activities – the ones causing the most ecological damage in Angola – under subjective responsibility. Establishing a causal nexus or connection between pollutant emissions that have caused thousands of fish to die and harmed citizens' health is, environmentally speaking, an onerous, complex and difficult task. Placing the burden on those that have been harmed is not an ideal solution as it's difficult to hold the agents who caused the damage to account.

In response, the RRDA guidelines have changed and in a preamble statement it's confirmed they 'revoke all legislation that's contrary to them'. Oil-related activities will now be categorised under objective responsibility.

For objective responsibility, an agent harming an environmental component, no matter what size, rights breached or third-party interests, must repair and prevent further environmental damage, regardless of culpability or intent.

So, even if the agent invests in and adopts the necessary measures to prevent environmental damage, the agent will always, 'ope legis', be compelled to repair and/or indemnify for the harm caused. This solution appears not only economically inefficient but restrictive to economic enterprise. To improve efficacy, there should be categories for objective or subjective responsibility according to a list of activities that respectively pose a high environmental damage risk (and therefore fall under objective responsibility). Lower-risk activities fall under subjective responsibility.

The RRDA guidelines do not specifically cover Directors & Officers' liability, however, such liability arises when an agent breaches an administrative regulation intended to protect the environment, and as a consequence, fines will be meted out. Within this context, Angolan lawmakers do not have an objective criteria for fines, the value of which ranges from a Kwanza equivalent of US$1,000.00 to US$1,000,000.00. When issuing a fine, the regulators do not make an accountability distinction between neglect and a wilful act, nor have they separated natural person from legal person.

This oversight may stimulate arbitrary fines and cause uncertainty among economic agents; a situation incompatible with modern democratic governance. Despite the mechanisms in place, environmental damage of the ecological variety is frequent. Some destruction is of a magnitude that results in extremely high fines, leads agents to insolvency and curtails their ability to repair the damage and/or compensate others for their actions. Therefore, it is mandatory for agents operating in Angola to have one or more of the following financial instruments: insurance policy, bank warranty, participation in environmental fund or provision of dedicated capital reserves. All agents must only have the above contracts, funds cannot be diverted elsewhere nor have other obligations imposed upon them due to administrative liabilities.

It is worth noting that, among the instruments above, purchasing an insurance policy meets environmental policy goals; it is the most cost-effective and gives agents risk assessment mechanisms to help them adopt the necessary damage prevention measures. Contrary to the stipulations of Angolan lawmakers however, insurance should not be mandatory. First, because these insurance policies hold inflexible clauses and demands for capital and second, environmental risks can be hugely complex, some of which are not yet fully understood by insurers (the risk of gradual pollution, for one). It is therefore preferable to adopt a case-by-case purchase model. This avoids the dilemma of adverse selection and ensures policies are designed – capital and coverage-wise – to meet the real needs of each agent. •