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ECONOMIC RECESSION IN NIGERIA: AN ASSESSMENT OF LEGAL RESOLUTION OF CONTRACTS AND INSOLVENCY DISPUTES

Macaulay J. D. Akpan, Ph.D

Senior Lecturer, Law Unit, Department of Accounting, Akwa Ibom State Polytechnic, Ikot Osurua and Facilitator, NOUN, Uyo Study Centre

ABSTRACT: *This paper focused on the economy of Nigeria, which has nosedived into recession. The paper examined the huge oil revenue receipts and the application of such funds between 2011 and 2015, to grow the Nigerian economy. The paper finds that apart from systemic failure of sectoral policies, mismanagement of such huge revenues from oil exports, insurgency, militancy, corruption, the dearth of legislative capacity at Federal, State and Local Governments, to make and amend existing laws on business in the light of current best practices – so as to create ease of doing business through foreign direct investment and foreign portfolio investment, to a greater extent, contributes to low local production and market size with attendant depletion of Nigeria's foreign reserves due to over-dependence on imported goods and services. The paper, therefore, recommends, among others, that the legislatures at Federal, State and Local Governments in Nigeria, should be more sensitive and proactive in the discharge of their constitutional functions to wit: to make and amend existing laws on business, for example, for a truly good government, peace and order in the country.*

KEYWORDS: Economy, Recession, Oil Revenue, Legislature and Law.

INTRODUCTION

The Nigerian economy entered into recession in 2016 having recorded as low as 0.36%, - 1.5% and 0.8% growth rates in the first, second and fourth quarters in 2016 respectively (Noko, 2017). That is no news. What is news is that the average Nigerian does not seem to understand the word "recession". Indeed, to him, the term recession is merely a coinage of the elite and political leaders in government as excuse for their failure to grow the economy and thereby better the lots of Nigerians. Be that as it may, the phenomenon called recession could be defined but there has been no agreement among economists as to the complete and exhaustive causes and solutions of recession in any country (NBER). However, recession has been defined as a period between a peak and trough and as a significant decline in economic activity spreads across the economy and can last from a few months to more than a year (NBER Business Cycle Dating Committee). Recession is also defined as a period characterized by a sharp slowdown in economic activity, declining employment and a decrease in investment and consumer spending (Garner, 2009).

From these definitions, certain causes of recession could be distilled. For instance, it is not abnormal or unnatural for an economy to face ups and downs. Causative factors may include controllable and uncontrollable conditions and challenges. What, however, is critical is the country's proactiveness, capacity and leadership ability toward timely resolution and rejuvenation of the comatose economic activity and policies of the country with attendant right antidotes during period of recession.

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The Challenges

The Nigerian economy nosedived into recession again in 2016 due to a combination of factors and conditions which include the following:

(i) Poor implementation of socioeconomic plans.

(ii) Over-dependence on and misappropriation of the shares of oil receipts by the three tiers of government from 1999 till date.

(iii) Corruption – financial and political.

The Nigerian economy has remained a monolithic one since the State; participation in crude oil exploration and exploitation in the 70s – based on the concept and resolutions of both the United Nations General Assembly (UNGA) and Organisation of Petroleum Exporting Countries (OPEC) on permanent sovereignty of the states over their natural resources (UNGA Resolution 1803 (XVII), 1962 and OPEC Resolution XVI (1968). The result of such mono-economic attitude denied the country the opportunity to diversify its economy into other sustainable means of economic development. Consequently, the production and consumption of locally produced goods were at low ebb because most Nigerians and indeed, government at all levels in Nigeria, have depended and still on imported goods and services. No doubt such attitude only serves to create offshore jobs. With the dwindle oil production and sharp fall in international oil prices, the Nigerian economy cannot but went into recession due to all time low growth rate in more than two quarters in 2016.

Amidst the sharp fall in the production and prices of export crude receipts, have been the incidents of kidnapping in the South East and South West – where in the South Eastern region, the youths have taken to kidnapping due to huge unemployment for the teeming graduates in the region. Apart from the challenges of unemployment, the political class has lured the unemployed youths to become thugs and get paid to carry ballot boxes and papers to enable them to win in an election. When such services and payments stopped coming, these youths cannot but take to kidnapping. Militancy and oil pipeline vandalism in South-South – where militant groups in the Niger Delta, which started since 1960 to agitate against crisis of development in the oil rich region. These groups demands include the use of the oil and gas revenues generated from the exploitation and exploration of petroleum in the region by the Federal Government to develop the region.

Unfortunately, the intervention agencies created by the federal government to tackle crisis of development alongside corporate social responsibility (CSR) in the region have rather embezzled moneys released for such purpose since 1971. The continued neglect of the region in the provision of social, economic and infrastructural amenities to alleviate the problems of the region has led to constant hostility between the international oil companies (IOCs) and the federal government security agencies. The impact of such hostility has reduced oil production and export with attendant budgetary challenges to the National, State and Local Governments in Nigeria. Insurgency in North East – where Boko Haram – the islamist militants, which started in 2009 with the aim to overthrow the State and establish Islamic State in the North East, has killed and maimed thousands of people as well as created thousands of internally displaced persons (IDPs) in the North East. The activities of the group have caused the destruction of churches, mosques, commercial, industrial and residential buildings in the North East with attendant effects on social, educational and economic endeavours.

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Also, the activities of cattle herdsmen have created clashes between them and farmers across the States in Nigeria. As a result, many farmers have lost their farm crops with attendant impacts on food security policy in Nigeria. These incidents have created unfriendly investment climate in many of the six regions in Nigeria. The causative factors of such incidents include crisis of development, dearth of educational access and inappropriate curriculum of education, ethnicity, corruption, dearth of political will and legal environment. This development explains why the World Bank (WB) Doing Business Report titled "Doing Business 2017 Equal Opportunity of All" – a publication of the WB, 14th series, has said that lack of enforcing contracts and resolving insolvency out of the eleven (11) composite areas surveyed in the said report, actually affect ease of doing business globally. Incidentally, in 2016, Nigeria was ranked 169th out of 190 countries in ease of doing business in the world (World Bank Doing Business, 2017). In sub-Saharan Africa, Nigeria was ranked 36th out of 47 countries in the same year in case of doing business. Mauritius, Rwanda and South Africa took first, second and third positions in sub-Saharan Africa (Udo, 2016). Currently, by 2017 World Economic Summit Report, Rwanda is now placed first and Mauritius second.

According to the World Bank (WB) report, Nigeria ranked 23rd in enforcing contracts and 28th in resolving insolvency in the region. Also, Nigeria was ranked 139th and 140th respectively in global ranking in the same areas under reference (Udo, 2016). Similarly, another report of the Resource Governance Index (2013) – a non-governmental organisation (NGO) with a strong footing in promoting good governance and transparency in oil, gas and mining globally, revealed that Nigeria scored 66% and 18% respectively in institutional and legal setting and enabling environment out of 58 countries surveyed. This goes to show that something is inherently wrong with the legal frameworks on business and investment in Nigeria. The question raised in this study is: Why is Nigeria still plagued by challenges of enforcing contracts and resolving insolvency in the face of plethora of existing laws and regulations on business and investment?

Objectives of the Study

This study will examine the capacity and responsiveness of selected existing laws on business and investment in Nigeria and make recommendations for reform.

Oil Receipts and Application Between 2011 and 2015 in Nigeria

Available records reveal that Nigeria's oil receipts between 2011 and 2015 stood as follows:

S/N	Year	Amount
1	2011	$684bn
2	2012	$629bn
3	2013	$580bn
4	2014	₦6.798trn.
5	2015	₦3.83trn.

(**Source**: NEITI 2012, 2013 Audit Report and 2014 to 2015 CBN Report – Vanguard News. www.vangaurd.com/nig_oil. Accessed 11/5/2017).

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The oil receipts (revenues) were paid into the Federation Account (Constitution, FRN, 1999).[1] They were shared to the three tiers of government in Nigeria by the Federation Account Allocation Committee (FAAC) for the provision of good government and development in their respective areas of jurisdiction. Regrettably, available statistics have shown that the three tiers of government in Nigeria have failed to deploy such funds prudently in order to impact on the citizens positively. Hence, the upsurge in incidents of kidnappings, militancy, insurgency and farmer-herdsmen clashes in Nigeria. Nevertheless, successive governments within the period under reference, formulated and enacted a number of economic policies and laws aimed at creating business friendly and sustainable development environment in Nigeria. Such economic policies and laws include the establishment of Excess Crude Account (ECA) and Sovereign Wealth Fund (SWF) and Nigerian Oil and Gas Industry Content Development Act No. 2, 2010. The ECA was established in 2004 to hold the surplus funds accruing from the difference between budgeted oil and gas benchmark and actual selling price of crude oil at the international market (Central Bank of Nigeria (CBN), 2012). Also, SWF was established by an Act of the National Assembly in 2011, as a state-owned investment fund and as a pool of money derived from the reserves (such as the ECA), which are set aside for investment purposes to benefit Nigeria's economy for the present and future generations (CBN Policy Series No. 18, 2012).

Equally, the Nigerian Oil and Gas Industry Content Development Act 2010 was created in sum, to put the destiny of Nigeria in the oil and gas sector in the hands of Nigerians. In all, the intendment of the Federal Government (FG) as far as economic policies and laws were concerned was right. However, the then Nigerian Governors Forum (NGF) truncated such intendment. Legally speaking, it is, no doubt, believed that the ECA does not have any lawful standing but it is a mere political arrangement. Nevertheless, the seed money of $1bn with which to kick start the SWF was sourced from the said ECA (Ojameruaye, 2017). Authorised money laundering? Recently too, the Federal Government under President Muhammadu Buhari has ordered the release of $500m into the SWF (Olawoyin, 2017).

The questions then that begs for answers are, could the current recession in Nigeria not have been averted or mitigated by way of economic stabilisation, if the ECA and SWF were properly managed? In alternative, why did members of the NGF not deploy the huge funds distributed to them from the ECA, in providing critical and sustainable infrastructure and create, conducive business environment in their states during the pre-recession period under review? The necessary extrapolation from these questions based on available records of poor performances and fund deployment by most members of the then NGF, is that such revenues were misappropriated; embezzled and outrightly stolen by most Governors, their cohorts and indeed, in connivance with senior public servants, who aided and abetted high profile financial and economic crimes during the period under review in Nigeria. Quite regrettably, the security institutions in the country at the time did not carry out their statutory duties effectively, so as to check excesses in government. Unlike in developed countries like America where institutions are strong in Nigeria security institutions are tied to the whims and caprices of the President, Governors and high ranking political office holders at the Federal, State and Local Governments in Nigeria. Curiously, under the present Federal Government the security agencies have shown unusual effectiveness and responsiveness in the performance of their onerous functions. Consequently, the security agencies like the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and Other Related Offences Commission

[1] S. 162(1)(2) and (3).

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(ICPC) and Department of State Security (DSS) have since the inception of President Muhammadu Buhari administration, discovered and recovered a lot of looted funds involving former public office holders and others who alongside committed financial and economic crimes in the public and private sectors of the Nigerian economy. The present anti-corruption fight of the Federal Government of Nigeria has created much impact positively as it has revealed that so much moneys were stolen from the covers of government in contrast to the purpose for which such moneys were meant to serve. Assuming without conceding that the preceding government had continued in office with such penchant for corruption, then one can safely conclude that the economy of Nigeria would have gone into the abyss with attendant anarchy in the land.

Assessment of Legal Panacea

Enforcing Contracts Indicator in Nigeria

The World Bank Doing Business Report 2017 identities lack of enforcing contracts and resolving insolvency in Nigeria as some of the challenges which by extension impinges on and leads to recession in Nigeria. In particular, enforcing contracts is used as one of the indicators' to measure ease of doing business, in terms of the time and cost for resolving a commercial dispute through the court and the quality of the judicial system, in terms of efficiency and effectiveness (WB Doing Business, 2017). In essence, enforcing contracts indicator seeks to evaluate a country's court system in the adoption of best practices that promote quality and efficiency in the court system.

In Nigeria, there are certain laws that regulate incorporation, operations, management and winding up processes of companies. However, there is no specific court designated to hear and determine disputes arising from commercial transactions. The Constitution of the Federal Republic of Nigeria (CFRN) 1999, provides for Exclusive Legislative List (ELL)[2] wherein contained 68 items, which the National Assembly (NASS) alone can legislate upon (CFRN, 2004). The incorporation, regulation and winding up of bodies corporate and the hearing and determination of the Companies and Allied Matters Act (CAMA),[3] (which is the extant legislations on incorporation of companies in Nigeria) or any other enactment replacing CAMA or regulating the operation of companies incorporated under CAMA are to be handled by NASS for the purpose of making an Act and the Federal High Court (FHC) for the purpose of adjudication of dispute arising thereto. Those stated items are contained in the ELL and subject to the jurisdiction of the FHC (CFRN, 2004). Equally, the Investment and Securities Act (ISA)[4], which repealed the ISA 1999, establishes in section 274 (formerly section 224 of ISA 1999) the Investment and Securities Tribunal (IST) in section 284 (formerly in section 234 of ISA 1999), similar to the United Kingdom (UK) and Indian versions, that is, the Financial Services Market Tribunal (FSMT) 2000 (Now abolished in 2010 but its functions have been transferred to the Upper Tribunal) and Securities Appellate Tribunal (SAT) (sat.gov.in) respectively.

The jurisdiction of the IST is founded in section 284(1) of ISA, 2007. For completeness, the section states that:

[2] 2nd Schedule Pt. I
[3] C20 LFN 2004.
[4] Act No. 29, 2007.

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Subsection 1: The Tribunal shall to the exclusion of any other court of law or body in Nigeria exercise jurisdiction to hear and determine any question of law or dispute including:

(a) a decision or determination of the Commission in the operation and application of this Act and in particular relating to any dispute:

(i) between capital market operators;

(ii) between capital market operators and their clients;

(iii) between an investor and a securities exchange or capital trade point or,

(iv) between capital market operators and self regulatory organisations;

(b) the Commission and self regulatory organisations;

(c) a capital market operator and the Commission;

(d) an investor and the Commission;

(e) an insurer of securities and the Commission; and

(f) disputes arising from the administration, management and operation of collective investment schemes.

Subsection 2: The Tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of NASS.

(3) In the exercise of its jurisdiction, the Tribunal shall have the power to interpret any law, rules or regulation as may be applicable.

In line with the foregoing, IST Act equally asserts its powers in section 8(a – v), to hear and determine disputes arising from or under its enabling Act – ISA, 2007. Indeed, ISA clearly states that this Act is an addition to any other enactment on business and investment. However, the Act further states that where any other existing enactment is inconsistent with the provision of this Act the provision of this Act shall prevail. Nevertheless, the IST that used to serve as an appellate body for pension matters under section 93(1 – 2) of the former Pension Act 2004, has been dispossessed of such power, which is now saddled with the National Industrial Court (NIC) pursuant to section 107(1 – 2) of Pension Act 2014. Indeed, the IST is a creation of NASS and cannot be directly or indirectly be superior to courts established under the Constitution. To this end, the FHC is generally seized with the powers to hear and determine disputes arising from the operations of CAMA or any other enactment regulating the operation of companies incorporated under CAMA. It is of note that all quoted companies that are necessary parties before the IST, are first and foremost registered or incorporated under CAMA before being registered by the Securities and Exchange Commission (SEC),[5] to participate in the capital market. In view of such statutory requirement and the extant Constitutional provision, which saddles FHC with the powers to hear and determine disputes in relation to any other enactment regulating companies incorporated under CAMA, IST is subject to the

[5] SS. 1(1) and 13.

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jurisdiction of the FHC[6] for only case stated and that of the Court of Appeal, on matters of appeal from its decisions.

In Mufutau Ajayi V. SEC in Suit No. FHC/ABJ/M/285/2004, the FHC, Abuja had to transfer a case on capital matters related issue to the IST on August 2, 2006 for trial. However, the Applicant/Appellant proceeded to the Court of Appeal (CA) challenging the legality of the FHC's transfer but the CA on an appeal by the applicant/appellant affirmed the correctness of such transfer as SEC being the apex regulator of the capital market could have the matter tried by IST (Guardian, 2007). Curiously, the case from its suit number commenced at the Abuja FHC in 2004, transferred to the IST in 2006 and CA affirmed the transfer in 2007 respectively. This implies that the appellant could still ventilate his grievances upto the Supreme Court (SC). Already, about 4 years have been spent on this matter between the FHC, IST and CA. Indeed, the FHC rightly transferred the case to IST based on its constitutional powers to hear and determine disputes relating to any other enactment regulating companies incorporated under CAMA and not the operations of companies in the capital market, which are regulated by ISA and subject to the adjudicational powers of the IST. However, the delay of such a matter for four years, needlessly, impinges on enforcing contracts in Nigeria and work hardship on investors.

Based on distillations from the court processes, it could be argued that the matter ought to have been heard and determined during pre-trial with possible order of transfer by the judge in chamber, to the IST. This way, the matter could have been expeditiously settled between SEC/Respondent and the Applicant/Appellant at the FHC, Abuja. Pre-trial conference usually takes place shortly before trial and results in the issuing of pre-trial order by the court. It affords the judge and the parties the opportunity to agree on matters of evidence and elimination of issues that are frivolous and which may prolong the matter during trial (Eze and Eze, 2015). Better still, it has been observed that the carrying capacity of FHC in Nigeria is lower than the 68 items and/or incidental matters thereto contained in the ELL, for which it is established to handle under civil and criminal jurisdictions. Beyond this, the FHC also hears and determines certain matters contained in the Current Legislative List (CLL) (CFRN, 2004). In view of this enormous functions and powers, the various FHCs in the States and Federal Capital Territory (FCT) have had judges over-worked themselves in order to reduce numerous case files usually assigned to them. This scenario usually leads to delay in the administration of justice. However, in Nigeria, matters in count of law are delayed due to many controllable factors like dearth of infrastructure, logistics and personnel, constitutional challenges, low funding, unethical behaviours by legal practitioners and high cost of litigations.

In Nigeria, unlike in developed countries and some developing countries in Asia, few non-governmental organisations (NGOs) usually institute public interest litigations on behalf of indigent persons and vulnerable groups. Under section 46 of CFRN, 1999, the Federal Government (FG) has established the Legal Aid Council (LAC) to provide financial or legal aid to indigent persons to enable them to afford legal representation in courts and tribunals, in order to engender fair hearing and quick dispensation of justice. At the States level, Multi-Door Courts have been established to handle civil cases based on alternative dispute resolution (ADR) concept. Be that as it may, the volume of cases at the various FHCs across Nigeria continues to grow geometrically while the institutional capacity of the FHCs continues to grow arithmetically. In view of these challenges, it is suggested that all company related matters should be transferred to the IST or in the alternative, a Commercial Court, like the NIC, which

[6] FIR V. SEC (2004) INISLR 116.

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has exclusive jurisdiction over industrial matters, should be established, through amendment of the relevant sections of the Constitution, to hear and determine, exclusively and expeditiously, all company related disputes in Nigeria.

Resolving Insolvency Indicator in Nigeria

The phenomenon called insolvency has not been defined but merely described by CAMA, which is the extant legislation on incorporation and winding up of companies in Nigeria (Okolo, 2016, Idigbe and Kalu, 2015). According to Okolo (2016), insolvency is a situation where a natural or legal person is unable to pay debt. This definition is narrow and fails to distinguish between the generally known two types of insolvency in Nigeria, to wit; bankruptcy and winding up (Agbakoba, 2017 and Nwobike, 2017). This is so because bankruptcy insolvency deals with an individual or partnership firm/ debtors (in personam) while winding up insolvency focuses on a limited liability company (in rem) (Agbakoba, 2017). The purpose for the two is different. The definition in CAMA of insolvency envisions a situation whereby it is only a court that can declare a legal or natural person insolvent, whereas in real and practical situation, corporate insolvency is the inability of a debtor to meet with its commercial commitment to its creditors (Okolo, 2016).

Presently, Nigeria does not have a single and comprehensive legislation on insolvency besides CAMA and Assets Management Company of Nigeria (AMCON) Act 2010.[7] Quite regrettably, while AMCON Act has been amended in 2015 within its short life span, to whittle down some of its draconian provisions in relation to its rescue mission in the banking sector, in particular, CAMA for 27 years, has not witnessed any amendment in its pro-creditor and liquidator oriented insolvency provisions (Idigbe & Kalu, 2015). The insolvency provisions in CAMA have been described by scholars as lazy, obsolete, inadequate and laughable when compared with similar law in other climes. For example, in England, a creditor can commence insolvency proceedings against a debtor company in a sum exceeding £750 then due, while in Nigeria, it is the sum of ₦2,000 then due. CAMA has not also established any code of practice for insolvency practitioners in Nigeria, with negative attendant result that sharp practices ensue against the interest of their clients (Okolo, 2016). In UK, the Insolvency Rules of 1986 and all their subsequent 26 amendments have been modernised from 6th April 2017 in order to usher into the insolvency industry in England and Wales such changes as:

(i) the use of electronic communications by all creditors;

(ii) removing the requirement to hold physical creditors meetings (creditors can still request meetings).

(iii) creditor can opt out of further correspondence.

(iv) small dividends are paid by the office holder creditors to raise a formal claim (Modernised Insolvency Rules, 2017).

Indeed, the court pronouncements especially in respect of debtor insolvency proceedings are lacking because of the technical nature of going through the procedure outlined in parts XIV,

[7] No. 4.

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XV and XVI of CAMA[8] relating to appointment of receivers and managers and up to management and compromise (CAMA, 2004).

However, it has been observed that the Corporate Affairs Commission (CAC), SEC, Judiciary and NASS in Nigeria have not been responsive and sensitive toward correcting the inadequacies in the insolvency provisions in CAMA. Nevertheless, SEC has recently threatened to prosecute any investor using false identity for share subscription in Nigeria. It has also vowed to transfer shares and dividends of non-existent names and multiple shareholders to the newly established Nigerian Capital Market Development Fund (NCMDF) (Tell Magazine, 2017). Also, unlike the IST established under ISA, to handle dispute arising from the operations of ISA, there is no such similar body created under CAMA as it is the case in the UK (Okolo, 2016).

From the foregoing appraisal of insolvency viewed as indicator in ease of doing business, it means that the Nigerian business environment may not entice investor because of its present legal framework in relations to enforcing contracts and resolving insolvency. This therefore calls for reforms in CAMA or the enactment of a single and comprehensive body of law on insolvency in line with good practices. This will create investors confidence and thereby attracts more foreign direct investments (FDIs) and foreign portfolio investments (FPIs) with attendant job creation and an enhanced critical infrastructure development in Nigeria.

CONCLUSION

Recession in Nigeria started in 2016 almost a year into the life of the administration of President Muhammadu Buhari. This administration, arguably, inherited an unhealthy economy, which had already experienced a global downward trend in FDIs. For example, FDIs in Nigeria declined from $4.7bn in 2014 to $3.1bn in 2015. In South Africa, Austria and Canada, same went down from %5.8bn to $1.8bn, $39.6bn to $22.3bn and $58.5bn to $48.6bn respectively within the same period. Also, apart from the low rates of growth in the first, second and fourth quarters, the third quarter of 2016 recorded no FDI at all (Oguh, 2016). This means that current administration was not only oblivious of the condition of the economy it met on ground and it also failed to roll out its economy blueprint timeously in order to mitigate and stabilise the economy with funds perhaps from the ECA and SWF.

RECOMMENDATIONS

(i) A Commercial Court system should be established to handle disputes arising from companies operations or in the alternative, such disputes should be subjected to the jurisdiction of the IST only, through constitutional and statutory amendments.

(ii) Infrastructural and human capital challenges bedeviling in the judiciary should be addressed holistically to reposition the court and its personnel to deliver on its mandate more efficiently and effectively.

[8] SS. 387 to 537.

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(iii) Anti-corruption agencies in collaboration with the NGOs should educate the public on whistle blowing policy in order to get everyone on board the anti-corruption vehicle.

(iv) Government policies, plans and their execution should not be paper and arm chair affairs.

(v) Legislature, courts and regulatory agencies should be alive to their statutory and constitutional functions and duties.

(vi) Economy should be diversified with value chain content.

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