# ANALYSIS OF POLLUTER PAY PRINCIPLE IN ADDRESSING ENVIRONMENTAL CHALLENGES IN UGANDA

BY

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## DECLARATION

I, Ogale Adnan Adeke Reg. No. 1153-01024-03395 declare to the best of my knowledge that this research report is truly my original and has not been submitted in the fulfillment for any award of a degree in any other Institution of Higher Learning or University, so it is entirely out of my own efforts.

Signature ..... Date 19-8-19

**OGALE ADNAN ADEKE**

## APPROVAL

This is to certify that this research report is done under my supervision and it is now ready for submission to the school of Law, Kampala International University with my approval.

**Signature** ..... **Date** 19-8-19

**DR. TAJUDEEN SANNI (PhD)**

## DEDICATION

I dedicate this to GOD the almighty, my mother Oundo Fatumah who dedicated all her effort and resources in educating , supporting and standing by me throughout my education and seeing that I do not lack anything throughout my studies. Not forgetting my brothers also gave me courage and hope throughout my studies. Finally I also dedicate this work to my father Adeke Mohammad who gave me encouragement and support in my studies.

*Thank You All*

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## LIST OF LAWS AND ACTS

Republic of Uganda Constitution, 1995 as Amended

Environmental Impact Assessment Regulation No 13/1998

Environmental Management Act, Tanzania.

Environmental Protection Act, 1996

National Environment (Audit) Regulations 2006

National Environment Act, 2019

***Conventions***

Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17th March 1992

Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc.

The Convention for the Protection of the Marine Environment of the North–East Atlantic, Paris, 22 September 1992

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# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.0 Introduction

This thesis examines the analysis on polluter pay principle on preserving environment in Uganda as envisaged in the Constitution of Uganda 1995, its legal underpinnings and the extent to which the same has been realized for the Ugandan people. The thesis also argues that there is need to re-conceptualize the protection and enforcement on the environment for the Uganda. Therefore this chapter covered background of the study, statement of the problem, objective, questions, methodology and literature review.

## 1.1 Background of Study

The polluter pays principle (PPP) was developed in the 1970s as an economic principle within the frameworks of the Organization for Economic Co-operation and Development (OECD)[1] and the then European Economic Community (EEC).[2] Its aim was to internalize external costs in order to avoid distortions of trade and competition. It was initially recognized in regional soft law instrument of these two organizations. In 1972, the OECD Guiding Principles Concerning the International Economic Aspects of Environmental Policies[3] first articulated PPP as a principle 'to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment'. The principle implies that 'the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state and that 'the cost of these measures ,should be reflected in the cost of goods and services which cause pollution in production and/or consumption.[4] The EEC also advocated PPP in its 1st Environmental Action Programme of 1973, which included in its statement of the general principles of EEC environmental policy, inter alia, that 'the cost of preventing and

[1] Environment Directorate, OECD, The Polluter-Pays Principle: OECD Analyses and Recommendations, at 9, Doc. OCDE/GD(92)81 (1992) [hereinafter OECD, PPP Analyses].
[2] Single European Act, 17 Feb. 1986, 1987 OJ (L 169) 1.
[3] Guiding principles Concerning International Economic Aspects of Environmental Policies; OECD Recommendation, 26 May 1972. sedac.ciesin.org/entri/texts/oecd/OECD-4.01.html.
[4] Article 4, ibid.

eliminating nuisances must in principle be borne by the polluter.[5] This principle was 'further elaborated in a Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, which stated that 'the European Communities at Community level and the, Member States in their national legislation on environmental protection must apply the "polluter pays" principle."[6] in principle, bear the cost of pollution.[7] It's noteworthy that this universal formulation is weaker than that contained in the aforementioned European instruments.

### 1.2 Statement of the problem

Objective xxvii[8] provides that the State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations. Therefore the government mandated to ensure that there is sustainable development to ensure that the environment benefits the present and future generations. The constitution further provides that natural resources in Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations. The State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes[9].

Under Article 39[10] and Sec 3 of National Environment Act[11] provide that, every Ugandan has a right to a clean and healthy environment. This means that a clean and healthy environment is to be enjoyed by every Ugandan regardless of social, economic or political statements. The NEA provides for quality standards[12]; air quality standards, water quality standards and many more. It also provides for auditing[13] and environmental inspection[14]. In addition to the national

[5] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the, European Communities on the environment OJ 1973 No. C112, 20 December 1973, at 1.
[6] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ 1975 No. L194, 25 July 1975, at 1.
[7] Principle 16, Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. NCONE151126 (Vol. I). aconf15126-1annex1.htm (emphasis added).
[8] The 1995 Constitution of Uganda
[9] Objective XXVII of the 1995 Constitution of Uganda
[10] The Republic of Uganda Constitution, 1995
[11] National Environment Act, 2019
[12] The Environmental Impact Assessment Regulation No 13/1998
[13] The National Environment (Audit) Regulations 2006
[14] Sec. 79 of the National Environmental Act 2019

environment laws in Uganda, government has put in place institutions to help in enforcement of laws like NEMA, UWA, UNBS, NFA, wetland department and many others. The enforcement of the above laws has been a challenge due to the fact that the regulations under the NEA do not reflect the current environmental status. This is because the regulations were made in 1998, 2006 and during that time there were no much pollution, encroachment, industrialization. It becomes hard to enforce such laws without regulations or with regulations which do not reflect the current nature of the environmental. Also the nature of corruption in Uganda is high to the extent that even the clear provisions which are there have failed to be enforced due to corrupt government official. An example for example is current commission of inquiry chaired by Justice Catherine Bamugemereire Catherine which is aiming at counseling all land tittles that were issued illegal in wetlands and other public land.

It is from this background that the researcher got interested in carrying out such a research to recommend to government and other public institutions to enact new laws and regulations which reflect the current status of our environment hence observing the prevention of the environment.

### 1.3 General Objective

The study examined the analysis of polluter pay principle in addressing environmental challenges in Uganda

#### 1.3.1 Specific Research objectives

*The study sought to examine the following objectives;-*

1. To examine the polluter pay principle generally
2. To examine the application of the principle in Uganda law
3. To examine how the principle helps in addressing the challenges of environmental protection

### 1.4 Research Questions

1. What is the polluter pay principle?
2. What is the application of the principle in Uganda law?

3. How the principle helps in addressing the challenges of environmental protection?

## 1.5 Scope of the study

### 1.4.1 Geographical scope

The study was conducted in Uganda

### 1.6.1 Content scope

The study was limited to the analysis on polluter pay principle on preserving environmental in Uganda.

## 1.7 Significance of the study

This study is significant because the findings if adopted, the principle could help in preserving the environment in Uganda.

The findings of the study will also fill the loopholes concerning the environment.

The findings could also help contribute to the body of knowledge in-regards to preserving the environment in Uganda.

Finally, this study will be carried out in partial requirements for the award of bachelors of laws degree of Kampala international university which will enable the researcher obtain the degree.

## 1.8 Limitations of the study

The researcher expected some challenges during the study. Poor attitude of some respondents will be one of such. For example the officers in respective departments were skeptical about responding to some questions. Some information was regarded confidential and therefore bringing difficulty in accessing it. However, the researcher built rapport and explained fully the purpose of the study, which convinced the respondents to give the confidential information.

The researcher also met some financial challenges. The process of data collection took a period of 3-4 weeks, which means that the researcher was incurring transport and other support costs. However, the researcher intended to operate on minimal expenditure.

The researcher did not get the respondents in time as planned. Some of the respondents did not respect time and appointments. Also the research faced the challenge of poor roads which were brought about the heavy floods that were evident in the region. This affected the transport system the researcher was using at that time.

### 1.9 Methodology

Methodology utilized will be qualitative in nature as, according to Leedy[15], this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin (200:134) in Patton, it usually serves one or more of a set of four purposes: description and interpretation.

In order to determine if and to what extent people in Uganda have appropriate access to information concerning the environment that is held by public authorities, the relevant polluter principle indicators were applied to the existing law and its implementation. In essence, they correspond to the good practice principles promoted by other organizations and institutions.[16] These principles recognize that law does not implement itself and that appropriate access depends on a variety of conditions such as rights awareness, capacity building, civil service structures or record management.

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[15] Leedy, P. and Ormrod, J. (2001) Practical Research: Planning and Design. 7th Edition, Merrill Prentice Hall and SAGE Publications, Upper Saddle River, NJ and Thousand Oaks, CA. Pg 148

[16] Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression to the United Nations Commission on Human Rights, E/CN.4/1999/64, January 1999; Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, June 1999; Commission on Human Rights, The right to freedom of opinion and expression, resolution 2000/38, April 2000; African Commission on Human & Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, October 2002; Recommendation Rec(2002)2 of the Committee of Ministers of the Council of Europe to Member States on Access to Official Documents, February 2002; Commonwealth Parliamentary Association (CPA) Study Group on Access to Information, Recommendations for Transparent Governance, London, 2004; Aarhus Clearing House at aarhusclearinghouse.unece.org; UNEP, Draft Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 2008

This study will utilize a descriptive approach as it will be necessary to observe and describe the analysis of the polluter pay principle environment. Thus the researcher will utilize a descriptive approach so as to be able to assess the protection of the industrial properties. The descriptive approach may be considered as inductive, according to Rhodes[17] as conclusions are drawn from repeated observations that is letting facts speak for themselves. Statements are made about causes and consequences of the phenomenon being observed.

### 1.10 Literature review

Environment is defined as all the physical, chemical and biological factors external to a person, and all the related behaviors.[18] The Environmental Management and Coordination Act (NEMA), defines environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.[19] Environment has also been defined as...the whole complex of climatic, adaptic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community...[20] The Draft International Covenant on Environment and Development[21] defines environment to mean the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities.[22]

So far, there has been scarce recognition of the principle in Universal hard law instruments, as PPP has found its way mostly into the preambles of various MEA. For example, the 1990 IMO Convention on Oil Pollution Preparedness, Response and Cooperation refers to PPP in its

[17] R. A. W. Rhodes Charlotte Dargie Abigail Melville Brian Tutt, 1995 "the state of public administration: a professional history:, First published: March 1995 https://doi.org/10.1111/j.1467-9299.1995.tb00814.x Cited by: 17
[18] World Health Organization, Preventing disease through healthy environments,l (World Health Organization, Geneva, 2006).
[19] Act No. 8 of 1999, Laws of Uganda, s.2.
[20] Webster's New World Dictionary 3rd ed (Cleveland College, Cleveland, 1998) p.454; P. Birnie & A. Boyle, International Law & the Environment, 3rd ed. (Oxford University Press, Oxford, 2009), p. 3.
[21] International Union for Conservation of Nature and Natural Resources Environmental Policy and Law, Paper No. 31 Rev. 3, Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 4th Ed., 2010.
[22] Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 1991; The Environment and Land Court Act, 2011, No 19 of 2011, Laws of Kenya, s.2.

preamble as 'a general principle of international environmental law'.[23] One exception to this rather muted recognition is the 1992 0SPAR Convention, a regional MEA for the protection of the marine environment which states in a straightforward way that 'Contracting Parties shall apply the polluter pays principle.[24] Other instruments call on their parties to be 'guided by[25] or to 'take into account[26] the polluter pays principle.

Murthur,[27] notes the interdependence of society and the need to protect the present and future generation from harmful consequences of human kinds interfere with environment. He talks about the frequent outbreaks of cholera in Pujani state as a result of poor hygiene and the failure of the local health workers to enforce the urban laws. This is the same problem in Uganda where the situation is worse especially in slums around Mukono district like Kikooza, Industrial area, Nabuti, Ggulu among others. Residents in these areas are faced with diseases like malaria, dysentery and typhoid due to poor waste disposal. He discusses the importance of related human skin diseases basically due to weak law enforcement machinery and concludes that there is a need for enforcement of the right to a clean environment in the Indian courts. However, he does not provide specific ways in which the population can depend on environment without or limited damage to the environment.

Sangal[28] emphasizes population as a cause of environmental degradation, but does not address the issue of the right to a clean and healthy environment in whole. Secondly, the consequences of human kind referred to by the author are not clear whether they are the only dangers to attaining a clean and healthy environment.

Wabhunoha[29] considered elements of public participation as a pre-condition for sustainable development in Uganda. This issue is relevant to this research to the extent that the population

[23] Preamble, International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, in force 13 May 1995, 30 International Legal Materials. (1991) 735.
[24] Article 2(2)(b), convention for the Protection of the Marine Environment of the North–East Atlantic, Paris, 22 September 1992, in force 25 March 1998, 32 International Legal Materials (1993) 1072, www.ospar.org/eng/html/convention/welcome.html .
[25] Article 2(5), Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17th March 1992, in force 6 October, www.unece.org/env/water/text/text.htm .
[26] Preamble, protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Trasboundary Waters, Kiev, 21 May 2003, not yet in force, www.unece.org/env/civil-liability/welcome.html.
[27] Murthur, LN Towards organsing clean World; (1992), CBS (Publishers and distributors) 1st Ed at pg. 46 1991
[28] P.S Sangal, the Right to Good Environment as Fundamental Right in Musharaff S (1992), (ed), Legal Aspect of environmental pollution and Is management, CBS (publishers and distributors 1st edition at 89 (1992)
[29] Wabhunoha R.A Popular participation, a pre-condition for sustainable Development planning experience in Uganda in Kaqnrad, P.10 also P230-242

will be sensitized about the need to live in a clean and a healthy environment, for example reporting those who cause harm to the environment to the relevant authorities like National Environment management Authority (NEMA). However, the author does not consider the ways in which environmental protection can be achieved without hindrance to development like adoption of new technologies which does not harm to the environment.

Ntambirweki[30] discusses the role of developing countries in the evolution of an era of generational equity. In consultancy report, it discusses the instrument of enforcement of environmental legislations in Zambia. The principles of that report are however applicable to this research to the extents that it addresses the issue of keeping the environment clean and healthy.

This is relevant because even the future generation will benefit from the environment. So the principles are applicable to this study so far as no literature analyses the right to a clean and a healthy environment in Uganda. Most publications deal with aspects of the right only. On the other hand he does not consider the differences between the states when he assumed that what applies to one state can also favorably apply to another.

Gerald[31] he wrote about the list which was published by the national Environmental Management Authority (NEMA) regarding the top industrial polluters in 2007, these included fish factories which did not meet the required standards by National Environment Management Authority (NEMA), PAPCO industry in Jinja which discharged volume of untreated waste water into River Nile, global paper limited which discharged untreated net9i toxic effluent into the Kinawataka stream. Effluent from Rose bud flowers which did not meet the required national standards for discharge of wastes into land or water with respect of total phohiliate total nitrogen among others[32] .However, he did not provide penalties which were given to these industries in order to deter them from polluting the environment.

Luke[33] wrote in the New Vision Newspaper about swamps and forests being destroyed to grow eucalyptus trees. This practice is so dangerous to the environment because swamps and forests

[30] Ntambirweki J. Enforcement of Environmental Legislation in Zambia, Assessment and proposals to improved current systems consultancy Report UNEP (1994)
[31] Denis B.A Reported in the New Vision Wednesday September 26 2007, pg. 2
[32] Ibid
[33] Luke K a reporter in the New Vision Newspaper Thursday June 15th 2008 at pg S

are useful in excretion of water air. But the writer did not provide what should have been done to avoid since deforestation and what should be done in case such has occurred.

Patricia[34] presents fairly realistic approach toe protection of the global environment, which she maintains and depends on interplay of environmental groups which creates additional pressure for compliance by government with international obligations. She insists that there are international issues which must be viewed from international perspective because no single country has capacity to prevent pollution, from neighboring state and concludes that the commonwealth courts and in particular Singapore courts have responded to the challenge with award of punitive damages.

Her work is important to this research in that, Uganda is part of the international community therefore its capable of polluting other countries, for example via River Nile where most industries are located, this river flows from Uganda and passes through Sudan and Egypt. Another example, in 1991, dead bodies were thrown into River Katonga from Rwanda and these bodies ended up in Uganda which was disastrous to our health as the bodies were rotting. However, she presents a broad picture of the possible dangers to the environment, but does not address the need to a clean and a healthy environment and she disregards individual responsibilities in environmental protection.

Henry et al[35] deals with the maxim of Pacta "Sunt Servanda" which is core of treaty law and emphasizes that commitments made by nations publicly, voluntarily and formally should be honored. Uganda being a party to most of international treaties and conventions which provides for and protects the right to a clean and a healthy environment, it is expected to meet its obligations and duties. But, the writer does not stress the point that Uganda being a third world country, there are some of the international treaties' terms which she cannot fully abide with and to give away how Uganda can favorable balance its activities and also have available environment.

[34] Patricia W. Birnie and Allan E. Boyle International and the Environment, claredon Press Oxford (992)
[35] Henry Steiner and Delta. University case book series, Minellas N.Y. the foundations Press 1998

Okpra[36], argues that the problem in declaring a right to a clean and healthy environment as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated. Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante? However he does not give the definition of the right to clean and healthy environment or the measure to explain whether its violated or its demarcation.

Olenasha[37] Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognized first and second-generation rights.

The right to a clean and healthy environment has for a long time been grouped under the third generation rights or solidarity rights. However, the right to clean and healthy environment is not a third generation right but a fundamental right, (Emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realization of the so-called first and second generation rights. Indeed, it has been rightly argued that when people must struggle to obtain the basic necessities of life, political freedoms and human rights may appear meaningless to them.[38] This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.[39]

[36] C. I., Okpara, _Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' Journal of Politics and Law, Vol. 5, No. 1; March 2012, pp. 3-8, p.6.
[37] See W.T., Olenasha, _The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,' Thesis (LLM (Human Rights and Democratisation in Africa) ( University of Pretoria, 2001), available at http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].
[38] J.A. Downs, _A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right,' Duke Journal of Comparative & International Law, Vol. 3, 1993, pp. 351-385 at p. 351.
[39] Ibid

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment to realization of the other human rights especially the socio-economic rights.

It is important to take cognizance of Draft Principles on Human Rights and the Environment of 1994,[40] an international instrument that comprehensively addresses the linkage between human rights and the environment. The 1994 Draft Principles on Human Rights and the Environment provide for the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

Principle 5 declares that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. This is a broader description of the right to clean and healthy environment, which includes such aspects as elimination of environmental threats to life, health, livelihood, well- being or sustainable development. Indeed, this Declaration expressly states that such right must be recognized within and outside the national boundaries.

Lanna, (2003)[41] he wrote in the other countries mentioned above, the influence of the PPP in resolving who is responsible for the financial costs of pollution control appears to more restricted in its scope or at an early stage of implementation. Its application in Brazil covers all industrial sub-sectors, but is limited to wastewater discharge and is not universally applied across the country (introduced only in several but not all states). Its influence on environmental regulation in India is fairly recent with India's Supreme Court endorsing the PPP in 2005 to emphasize that mitigation of pollution from the industrial sector is the responsibility of that sector and not the government.

Lund-Thomsen, (2007) he wrote that there are only 50 to 100 operating ETPs for an estimated 8 000-10 000 major dischargers of industrial wastewater and no CETPs that completely capture the

[40] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).
[41] Lanna, A., 2003. Water Charges in Brazil: Implementation and Perspectives. In Water Pricing and Public-Private Partnerships in the Americas. Inter-American Development Bank, Washington.

wastewaters from the 80 existing major industrial estates, of which 10 are fully operational.[42] There are only two CETPs, one that provides pre-treatment of wastewater for the cluster of leather tanners at Kasur and does not comply with the NEQS and one that provides an up-flow anaerobic sludge blanket and aerobic post treatment for approximately 80 out of 130 tanners at Korangi Industrial Area (Karachi), which has approximately 2,500 industrial establishments.[43]

Hagler Bailly (2005)[44] The failure to control water pollutant discharge from agriculture, human settlements and industry, and air pollutant release from vehicles, combustion of fossil fuels in factors and power plants is imposing a high cost on Pakistani society. Two recent reports have estimated the cost of environmental degradation, one by the World Bank (2006). These studies quantify to the extent possible the damage from all sources of pollutants; it was not possible to disaggregate the damage due to industrial pollutant discharge alone.

A 'conservative' estimate by the World Bank (2006) "found that environmental degradation costs the country at least 6 percent of GDP, or about PKR365 billion (US$ 6.0 billion) per year, and these costs fall disproportionately on the poor. The most significant effects of environmental damage identified and estimated by the World Bank study are (i) illness and premature mortality caused by air pollution (indoor and outdoor) (almost 50 percent of the damage cost); (ii) diarrhoeal diseases and typhoid due to inadequate water supply, sanitation and hygiene (about 30 percent of the total); and (iii) reduced agricultural productivity due to soil degradation (about 20 percent of the total)" (World Bank, 2006:i). The World Bank study did not include a cost estimate for mitigating these environmental degradation damages. However, an approximate annual cost should be around 2 percent of GDP based on what developed countries spent in the late 1990s/early 2000s for the reduction of pollutant discharge from all sources (Luken, 1997 and OECD, 2007).

According to Hagler Bailly (2005), "the total annual health-related costs for [water pollution] range between US$ 1.8 and 4.8 billion. Of these, some 5 percent will remain no matter what wastewater system is in place, and around 35 percent could be alleviated by better in-house

[42] Author interview with the Director General of the Pakistan Environmental Protection Agency, Islamabad, March 2008.
[43] Author interview with the Chief Executive Officer, Cleaner Production Institute, Lahore, March 2008.
[44] Hagler Bailly-Pakistan, 2005. Pakistan Industrial Management Report, Prepared for the Asian Development Bank. TA 3944-PAK. Asian Development Bank, Manila.

facilities. The remaining 60 percent, the potential annual health benefit of good wastewater transport and treatment, would lie between US$ 1.0 to 2.8 billion. In addition to these health related costs are those resulting from: (i) increased costs of obtaining non-polluted water (possibly the same order of magnitude as health costs, although there might be some double-counting in adding the two); (ii) fish, etc., output lost (up to US$ 1.0 billion) and other items not yet identified or costed" (Hagler Bailly, 2005:C.33). The investment costs for reducing these damages ranged from US$ 2.1 billion with 40 percent coverage of the country to US$ 4.8 billion with 90 percent coverage of the country. Annual costs, including loan repayments, etc., are US$ 368 and US$ 828 million, respectively. Approximately 85 percent of the investment costs and 70 percent of the annual costs are for sewers and the remainder for treatment (Hagler Bailly, 2005:C.33).

## CHAPTER TWO

## THE POLLUTER PAY PRINCIPLE

### 2.1 Introduction

The fact that atmospheric pollution as a negative externality resulting from human activities into the global commons is accepted universally, without any contestation. Additionally, the fact that the sink capacity of the atmosphere is limited and that limited capacity tends to be overwhelmed is also accepted overwhelmingly by the global community of scientists and policy-makers. However, there is no consensus about the cardinal principle for solving this intractable problem, i.e., the polluter-pays-principle (PPP).The contradiction is that while it rests on the neoliberal market system for addressing the problem, the UNFCCC Article 3.1 did not directly include the PPP as its provision, though the fundamental principle of "equity and common but differentiated responsibility based on respective capabilities (CBDR + RC)" implicitly recognizes this.

The PPP makes perfectly rational economic and policy sense. The non-acceptance yet of the PPP is a testimony of material power in climate regime formation, where the industrial countries, historically as the main polluters, continue to dominate[45]. However, with the urgency of addressing the problem getting more and more intense, as we are already living in a climate changed world, the adoption of the PPP in many of its varied forms is very much on the agenda of many countries, including the major emitters. Since the problem relates to a global commons, the whole contestation is about how to apply it globally, from an equitable point of view. This article attempts to analyze the PPP as an economic, ethical, and legal principle, and show that application of PPP has the potential to take care of the climate change problem, including adaptation that will be needed for sometime to come, even with adequate mitigation from now on. However, achieving an adequate mitigation regime under the Adhoc Working Group on Durban Platform (ADP) is not likely to be very soon, at least not by the stipulated timeframe of 2015, though there is an emerging consensus on application of some forms of the PPP.

[45] David J. Ciplet, Timmons Roberts, and Mizan R. Khan. Power in a Warming World: The New Global Politics of Climate Change and the Remaking of Environmental Inequality. Cambridge: MIT Press, 2015.

## 2.2 Rationale of the PPP

Historically, the idea of PPP for environmental harm is rooted in both Western and Eastern traditions. Luppi *et al.*[46] cite, as a footnote, in The Dialogues of Plato: The Laws[47] the celebrated passage by Plato: "If anyone intentionally spoils the water of another...let him not only pay for damages, but purify the stream or cistern which contains the water". We can cite some passages from another celebrated Indian philosopher Kautiliya, who lived more or less at the same time of Plato. This dates back to 300 BC, when Kautiliya in his Arthasastra (Study of Economics) prescribed different levels of financial penalties for causing harm to the environment. The fines depended on the degree of harm caused. For example, he would prescribe "fines for voiding faeces in a holy place, in a place for water, in a temple and in royal property" [48]. Another example of property damage: "In case of damage to the ploughing or seeds in another's field channels or a field under water, they shall pay compensation in accordance with the damage".

From the above passages of Western and Eastern sages, it was clear that they have conceived of the PPP for application to address problems of pollution in the local commons, as in those days there was no such private property culture, or global commons problems the way we have them today. Gradually, it was applied as an economic instrument in domestic policy making in order to allocate costs of pollution prevention and control[49].

Fast forward more than two millennia; in the 1980s, government regulations were deemed more desirable and efficient in environmental protection[50]. Since then, some change has taken place. This is reflected in Agenda 21, adopted in 1992 at the Rio Earth Summit. The new call was for international cooperation in the use of economic instruments (Agenda 21, 252–54).The current focus in environmental policy-making is on prevention as more cost-effective, rather than cure, through incentives/disincentives to change individual behavior. However, this approach is not getting enough traction at the global level.

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[46] Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan. "The rise and fall of the polluter-pays principle in developing countries." International Review of Law and Economics 32 (2012): 135–44.
[47] Plato. The Dialogues of Plato: The Laws, 4th ed. Benjamin Jowett, trans. and ed. Oxford: Clarendon Press, 1953, vol. 4.
[48] R. P. Kangle. Kautiliya Arthasastra (Part II, English Translation). Delhi: Mitilal Banarasidass, 1986 pp. III, 9, 27
[49] Sanford E. Gaines. "The polluter pays principle: From economic equity to environmental ethos." Texan International Law Journal 26 (1991): 463.
[50] World Commission on Environment and Development (WCED). Our Common Future. Oxford: Oxford University Press, 1987. pp. 198–200, 319

Thus, application of PPP was conceived as a check against socialization of environmental costs and privatization of benefits. Its proper application may require monetary valuation of environmental damages, and their estimation through expanded versions of cost benefit analysis that includes the currently non-marketed environmental goods and services[51]. Faure and Grimeaud[52] argue that "one can say that the polluter pays principle is probably the most 'economic' of all environmental principles". This understanding of the PPP as a predominately "economic" principle is in line both with its modern origin[53] and with some of its most representative definitions that explicitly endorse the criterion of cost internalization, such as Principle 16 of the 1992 Rio Declaration and its inclusion in many international regimes. Thus, beginning with an economic principle, PPP has also become a normative doctrine of environmental law.

In response to the first UN Conference on Environment and Development in Stockholm in 1972, the PPP was first adopted by the Organization for Economic Cooperation and Development in 1972.The OECD document contained the following elaborate recommendation[54]:

*The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays-Principle". This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by the public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services that cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.*

There are different rationales or interpretations of the PPP, of which the following four can be cited as the most common: an efficiency argument, an equity argument, a judicial/legal argument

[51] Martin O'Connor. "The internalization of environmental costs: Implementing the Polluter Pays principle in the European Union." International Journal of Environment & Pollution 7 (1997): 450–83.
[52] Michael Faure, and David Grimeaud. "Financial assurance issues of environmental liability." In Deterrence, Insurability and Compensation in Environmental Liability. Edited by Michael Faure. London: Springer, 2003, pp. 194–206.
[53] OECD. The Polluter Pays Principle: Definition, Analysis, Implementation. Paris: OECD, 1975.
[54] OECD. The Polluter-Pays Principle: OECD Analyses and Recommendations. Paris: OECD, 1992.

and a pedagogical argument[55]. Cost internationalization of negative externality as its core meaning is meant for efficient allocation of resources. This is also called the full cost pricing. The idea is that once the polluters are bound to internalize the costs, they will try to reduce the cost by reducing pollution, either through using better technology or through emissions trading. Thus, there is a built-in incentive for R&D for new technology. The judicial/legal interpretation of the PPP holds that states and local governments are jointly and severally liable for environmental damage caused by parties, either private or public, allowing the public regulatory agencies to act in "sub-rogation" against industrial polluters[56]. In addition to this, Nash[57] argues that there is a pedagogical argument for this principle, both for the producers and consumers: both these groups are instilled with a sense of responsibility about the pollution load that they generate either through production or consumption of the goods and services. Nash further argues that politicians also are likely to like it, since supporting the PPP puts them on the side of the voters. Then, in its equity interpretation, it is understood in terms of fair distribution of costs. All these three meanings are extremely important for international climate policy formulation.

Again in efficiency interpretation, two versions can be distinguished, one of which is referred to by the OECD recommendation cited above: (a) a weak form (no subsidization) and (b) a strong form (cost internalization) of this doctrine. Weak form prohibits government subsidies for pollution abatement, to ensure that product prices reflect costs of pollution control. Strong form calls for governments to assure internalization of all environmental costs, including residual damage, in the form of liability and compensation. This means the strong form subsumes the weak form plus the principle of equity. Verbruggen[58] talks of the OECD light version and extended version of PPP, where the former requires polluters to pay only their own abatement expenses in meeting environmental policy obligations, and extended version adds commitment to compensate for damages inflicted occasioned to public good. Some scholars bring in the

[55] Edwin Woerdman, Alessandra Arcuri, and Stefano Clò. "Emissions Trading and the Polluter-Pays-Principle: Do Polluters Pay under Grandfathering? " Review of Law and Economics 4 (2007): 565–90.
[56] Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan. "The rise and fall of the polluter-pays principle in developing countries." International Review of Law and Economics 32 (2012): 135–44
[57] Jonathan Remy Nash. "Too much market? Conflict between tradable pollution allowances and the polluter pays principle." Harvard Environmental Law Review 24 (2000): 1–59.
[58] Aviel Verbruggen. "Preparing the design of robust cl policy architectures." International Environmental Agreement 11 (2011): 275–95

conceptions of negative and positive duties[59]. The negative duty must pay for damages and be stopped, while positive duty can be done out of beneficence. In this conception, PPP is a negative duty.

As a matter of fact, environmental pollution is a result of non-internalization of environmental costs by polluters, which then becomes a public concern. However, in the climate regime, the harm, the emissions have been commodified through emissions trading under the flexible mechanisms of the Kyoto Protocol.

In this process the concerns of public realm have been transformed into the judgement and decision process by the private authorities[60]. In fact, the climate regime reflects this philosophy. The cardinal principle laid out in the Article 3.1 of the UN Framework Convention on Climate Change (UNFCCC) is the basis for a regime formation to combat climate change: this is the principle of the CBDR + RC. This principle implicitly recognizes the PPP, and can only be operationalized through the global application of the PPP and directing the fund for introducing clean technology and adapting to the impacts of climate change. A version of compensatory PPP was considered during the Conference leading up to the Kyoto Protocol (KP) in 1997, but was rejected in favor of the CBDR + RC. The Brazilian proposal of a punitive and compensatory clean development fund (CDF) was replaced with the non-compensatory clean development mechanism (CDM)[61].

The application of PPP is currently done mainly within and across the OECD countries through many different versions of PPP, but not beyond. This "free-riding" by the major polluters is the crux of intractability of climate problem solution, which will be elaborated in the last section of this paper. Although the OECD Recommendation was not a binding document, PPP has increasingly been adopted in international treaties and laws, including codification in the European Union. Below is a list of few declarations and regimes that have internalized PPP in many different formulations:

[59] Göran Duus-Otterström, and Sverker C. Jagers. "Identifying burdens of coping with climate change: A typology of the duties of climate justice." Global Environmental Change 22 (2012): 746–53.
[60] Julian Saurin. "Global environmental degradation, modernity and environmental knowledge." Environmental Politics 2 (1993): 46–64.
[61] UNFCCC. "Proposed Elements of a Protocol to the United Nations Framework Convention on Climate Change." 1997. Available online: http://unfccc.int/cop5/resource/docs/1997/agbm/misc01a3.htm (accessed on 8 June 2013).

(a) The 1972 Stockholm Declaration Principle 21 says: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

(b) The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation declares PPP as a "general principle of international environmental law". Under this Convention, the PPP applies along with existing civil liability and compensation schemes for damages inflicted.

(c) The 1992 Rio Declaration Principle 16 urges national authorities "to promote internalization of environmental costs...taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".

(d) The 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area mandates the application of the PPP: Article 3.4 makes the parties responsible for producing pollution responsible for paying for the damage done to the environment.

(e) The 1992 Convention for Protection of the Marine Environment of the North-East Atlantic (Paris Convention, 1992). Article 2b says: "the contracting parties shall apply...the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter". Disincentives such as penalties and civil liability can also be seen as application of the PPP.

(f) Madrid Protocol to the Barcelona Convention (Article27).

(g) Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Waste Within Africa 1991 (Article 12).

(h) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1983 (Article 14).

(i) The 1996 Protocol to the London Dumping Convention.

(j) Third party liability under the Convention on Transboundary Movement of Hazardous Waste strengthened the PPP.

Other agreements, such as the North American Free Trade Association (NAFTA), Rio Agenda 21, the 2002 World Summit on Sustainable Development (WSSD) Implementation Plan, the Convention of the Protection of the Alps, and the Protocol on Water and Health also endorsed the PPP. This instrument can be applied more easily in a geographical region subject to uniform environmental laws.

### 2.3 Polluter pays principle is a push-button for environmental protection

In the pursuit of environmental protection, States have recently redefined the principles of environmental protection, including, among other measures, the 'polluter pays' principle a principle that assigns liability to the polluter. It, however, requires to prepare environmental impact assessment for activities that may have a significant harmful transboundary effect[62].

This column seeks to single out polluter pays principle. The 'Polluter Pays' principle was originally enunciated by the Organisation for Economic Cooperation and Development (OECD) to restrain national public authorities from subsidising the pollution control costs of private firms. Instead, enterprises should internalize the environmental externalities by bearing the costs of controlling their pollution to the extent required by law[63].

The principle is therefore a method for internalizing externalities. Those who benefit from air made cleaner have a positive externality if they do not pay for the clean-up. Where air is fouled by a producer who bears no cost, it is a negative externality; those who buy the product also are free riders if the fouling is not reflected in the price of the goods. Internalization requires that all the environmental costs be borne by the producer or consumer instead of the community as a whole. Prices will reflect the full cost if regulatory standards or taxes on the production or product correspond to the true cost of environmental protection and damage.

[62] Sanford E. Gaines. "The polluter pays principle: From economic equity to environmental ethos." Texan International Law Journal 26 (1991): 463

[63] OECD. The Polluter Pays Principle: Definition, Analysis, Implementation. Paris: OECD, 1975

Historically, however, pollution control costs have been borne by the community at large, rather than the polluters. Subsequently, it was realised that the obligation should be borne by a polluter, because it creates a sense of obligation to the protection of the environment. Since then, it became a universally recognised principle that has been integrated in legal and policy frameworks for environmental safeguard.

It is in this context that Rwanda, equally, has domesticated polluter pays principle in her laws. For example, Article 7, paragraph 3, of Organic Law No. 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda, provides that: 'Every person who demonstrates behaviour or activities that cause or may cause adverse effects on environment is punished or is ordered to make restitution. He or she is also ordered to rehabilitate it where possible.'

The provision places the legal liability on the polluter for not perhaps doing enough to minimize the pollution to environment. Legal liability is one way of forcing major polluters to repair the damage that they have caused, to pay for those repairs or to compensate someone for the damages if the damage is irredeemable. Liability can be seen as a mechanism for implementing environmentally friendly strategies[64].

Undoubtedly, this would ensure the prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their polluter. Once environmental damage occurs, necessary measures must be taken to ensure that adequate remediation of environmental harm is achieved[65].

In this regard, most recently, a Ministerial order n° 001/2018 of 25/04/2018 determining the list of works, activities and projects subject to an environmental impact assessment was adopted. It provides a long list of such activities, including those that have partial environmental harm. That said, any commencement of such activities without being issued an environmental impact assessment certificate by Rwanda Development Board, punitive measures are obviously imposed in accordance with the Penal Code.

[64] Aviel Verbruggen. "Preparing the design of robust cl policy architectures." International Environmental Agreement 11 (2011): 275–95.
[65] Finn R. Førsund. "The polluter-pays principle and transitional period measures in a dynamic setting." The Swedish Journal of Economics 77 (1975): 56–68. Available online: http://www.jstor.org/stable/3439327 (accessed on 2 February 2012)

This is an important mechanism to compel polluters to ensure that their activities do not cause damage to the environment. They must try as practically as possible to minimize the environmental harm. The principle doesn't only apply to an individual but also to the State. Therefore, an environmental impact assessment prior to any decision made to authorize or engage in a project, an activity, a plan, or a programme that is likely to have a significant adverse impact on the environment has been widely seen as one of the best approaches to deter environmental harm. So, liability regimes for environmental harm, therefore, serve different purposes: as economic instruments that provide incentives to comply with environmental obligations and to avoid damage; as means of penalising wrongful conduct; and they deter environmentally harmful conduct and prevent environmental damage by encouraging the party responsible for activities that may have an adverse impact on the environment to exercise caution to avoid the harm.

### 2.4 Agriculture and the Polluter Pays Principle

The nature of agricultural production makes the PPP difficult to apply, and it therefore does not always apply to agriculture. In many nations, environmental laws do not require agricultural producers to internalize all pollution costs, and environmental subsidies to agriculture sometimes interfere with allocation of those costs. Recently, however, nations have recognized serious air and water emissions from agriculture, and some have enacted stricter environmental regulation in the US, for example, new rules for large livestock facilities;[66] in the EC, the Nitrates Directive[67]. Thus, consideration of the polluter pays principle and agriculture is timely, important, and widely relevant.

Agricultural production practices affect the environment. Environmental benefits accompany some agricultural practices,[68] but negative environmental effects also occur.

These often involve the introduction of unwanted chemicals (considered pollutants) into the environment and the consequences of alteration of habitat and landscape.[69] The polluter pays

[66] 40 CFR parts 122, 412.
[67] Council Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources, 1991 OJ (L 375) 1.
[68] Generally OECD, Environmental Benefits from Agriculture: Issues and Policies (The Helsinki Seminar) (1997). See infra text accompanying notes 257-61.

principle addresses the negative effects of agriculture. In recent years, intensification of agricultural production in many nations has increased these effects, which may include pollution of surface water and groundwater (e.g., with nutrients and chemicals), emission of substances into the air (e.g., ammonia, particulates, odors), and pollution of soils. Other environmental effects, including degradation of habitat and landscape in rural areas, may also occur. Because emissions from agriculture are often diffuse, application of the principle has raised particular difficulties. But, in theory, the PPP should apply when agricultural activities impose environmental harm that affects private and public property.[70]

Another principle, the "provider gets principle," sometimes applies, particularly when producers receive government support for activities that affect the environment, either by avoiding harm or by providing environmental amenities. Agricultural activity may provide attractive rural landscapes and preserve important habitats, for example, which the public values. When producers are asked to modify their practices to provide environmental benefits, rather than harm, subsidies can be justified.[71] Payment for environmental benefits, especially when farmers carry out practices beyond required good farming practices, implements the provider gets principle.

The polluter pays principle is only one of several important environmental principles. These include the precautionary principle and the principles of preventive action and rectification of environmental damage at its source.[72] The PPP, of course, is closely related to these other principles, and the focus here on polluter pays is not intended to diminish the importance of the others. Indeed, the principles of precaution and preventive action may, at times, helps to avoid environmental damage that triggers the PPP.

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[69] I. Hodge, *Agri-environmental Policy*: A UK Perspective, in D. Helm (Ed.), Environmental Policy 216, 219 (2000).
[70] For an early analysis of PPP and agriculture, D. Baldock & G. Bennett, Agriculture and the Polluter Pays Principle: A Study of Six EC Countries (1991).
[71] OECD, Improving the Environmental Performance of Agriculture: Policy Options and Market Approaches, at 6, COM/AGR/ENV(2001)6 (2001) [hereinafter Environmental Performance].
[72] On these principles in the EU, *infra text* accompanying notes 60-62.

## CHAPTER THREE

## THE APPLICATION OF THE PRINCIPLE IN UGANDA LAW

### 3.1 Introduction

This chapter examined the application of the polluter pay principle in Uganda and in addition the study was able to also examine the other principles that are addressing the environmental challenges in Uganda. Environment defined under Section 1 of the National Environment Act to mean the physical factors of the surrounding of human beings including water, land, atmosphere, climate, sound odor, taste, the biological factors of animals and plants and the social factors up of an esthetic and included both natural and the built environment. The preamble to the 1995 Constitution, objective 25 of the national objectives and directive principles of State policy enjoins the State to promote the preservation of the environment. The right to clean and healthy environment is thus provided under Article 39 and affirmed by Article 17(1) (8)[73] which imposes a duty on every citizen to maintain a clean and healthy environment.

### 3.2 Precautionary Principle

The precautionary principle evolved from the earlier principle of preventive action. It addresses problems of environmental decision-making under conditions of scientific uncertainty. Whereas the principle of preventive action was based on the recognition of the need to act to prevent certain harm, the precautionary principle is coupled with the idea of risk avoidance. The mere existence of a risk of harm is considered a sufficient basis for the adoption of preventive measures. While the principle is now widely referred to in national and international law and policy, it remains highly controversial in its interpretation and application.[74] It is disputed, for example, whether the principle actually reverses the burden of proof, i.e. whether it puts actors under an obligation to prove that the activities which they are engaged in do not cause harm. Moreover, there has been much debate over terminology.[75] The United States, for example, has preferred to refer to the precautionary approach, while other countries have opted to speak of the

[73] The Republic of Uganda Constitution,1995
[74] Michael Faure. "Environmental Liability." In Tort Law and Economics. Cheltenham: Edward Elgar Publishing, 2009, pp. 247–86.
[75] Irina Glazyrina, Vasiliy Glazyrin, and Sergey Vinnichenko. "The Polluter pays principle and potential conflicts in society." Ecological Economics 59 (2006): 324–30

precautionary principle, a term which carries more normative weight. Also, the scope of application of the precautionary principle is unclear as well, as some states, most notably the members of the European Union, claim that it extends to issues of human health and consumer protection, whereas others maintain that it applies only to the prevention of environmental harm.

From national law, the principle made its way in Europe into regional soft law and regional MEAs in the late 1980s. However, the World Charter for Nature, a universal soft law instrument, already contained a precursor of the principle in 1982. It held that 'where potential adverse effects are not fully understood, the activities should not proceed.[76] The principle was recognized more explicitly in the 1992 Rio Declaration. Principle 15 states that 'In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities.' The status of the principle in universal MEAs is disputed. Some conventions include hortatory provisions encouraging parties to take 'precautionary measures[77] while others require their parties to be 'guided by[78] the precautionary principle or even to apply it.[79] Other instruments still refer to the precautionary approach in their preamble.[80] In a judicial context, the precautionary principle has been applied by the International Tribunal for the Law of the Sea in recent disputes concerning the management of fish stocks,[81] radioactive pollution of the marine environment[82] and land reclamation works.[83]

It should be noted that states are not always consistent in their positions with respect to the precautionary principle. In the latter case, for instance, Malaysia, which in some multilateral negotiations has sided with the US in opposing recognition of precaution as a general principle, as a claimant state whose environmental interests were threatened by land reclamation activities carried out by its neighbour Singapore, argued in its request for provisional measures: 'The rights of Malaysia....relating to the maintenance of the marine and coastal environment.....are

[76] Para. 11, World Charter for Nature, GA Res. 37/7, 28 October 1982, www.un.org/documents/ga/res/37/a37r007.htm
[77] Article 3(3), UNFCCC, infra note 40
[78] Article 2(5), Transboundary Watercourse Convention, supra note 17.
[79] Article IV, African Convention on the Conservation of Nature and Natural Resources (Revised Version), Maputo, 11 July 2003, not yet in force, www.africa-union.org/home/Welcome.htm
[80] preamble, Cartagena Protocool on Bio safety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, www.biodiv.org/doc/legal/cartagena-protocool-en.pdf
[81] International Tribunal for the law of the Sea, Order of 27 August 1999, Southern Bluefin Tuna Cases(New Zealand v. Japan, Australia v. Japan), www.itlos.org/stat2_en.html, at Para. 80.
[82] International Tribunal for the law of the Sea, Order of 3 December 2001, The MOX Plant Case(Ireland v. United Kingdom), www.itlos.org/stat2_enhtml, at para.84
[83] international Tribunal for the Law of the Sea, Order of 8 October 2003, Case concerning Land reclamation by Singapore in and around the straits of Johor(Malaysia v. Singapore), www.itlos.org/start2_en.html, at paras. 95-99.

guaranteed by... the precautionary principle, under international law, must direct any state party [to UNCLOS] in the application and implementation of [its] obligations.[84]

Article 245 enjoins parliament to make laws for protection and preservation of the environment from abuse, pollution and degradation.

Section 3 (1) of the national environment Act, 2019 puts into action the constitutional provisions by providing that every person has a right to a health environment. The right to clean and healthy environment was further reaffirmed by the supreme court of Uganda in the case of **Rural litigation and Entitlement Vs Ultar Pradesh**[85] in which the court stressed the right to live in a healthy environment is a fundamental right and issued an order to cease mining operations notwithstanding the significant investment of the money and time by the mining company. Under the treaty of East Africa community 1999 to which Ugandan is a signatory, partner States are mandated to; promote a sustainable utilization of natural resources and safe guard the right to clean and health environment.

Principle 2 of the Stockholm declaration, likewise states that, the natural resources of the earth including the air, water, flora, and fauna are representative sample of natural eco-system must be safeguarded for the benefit of present generation and future generations through careful planning and management. The principle has since been incorporated in Article 3 of United Nation Framework Convention on climate change (1992). In the final analysis, the law (pollution laws) can be used to protect the environment.

### 3.3 The concept of sustainable development

Historically before the modern developments come into existence, human family has learnt to live in harmony with the environment for thousands of years but with the emergence of modern development, there was massive environmental destruction globally, the result is global warming[86]. Also, in modern world today, it is not possible to have high quality environment without development. In addition, development can only be achieved through environmental

[84] International Tribunal for the Law of the Sea. Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia .v. Singapore) Request for provisional measures, 8 September 2003, www.itlos.org/start2_en.html, at para. 18 (emphasis added).
[85] (1978) ILR 33
[86] Brenda, Short. (2004) Nutshell on Environmental Law; Sweet and Maxwell, London

sound management and therefore, there is need to balance environmental protection and development through a sustainable manner. Sustainable development, which conserves land, water, fish, plant, and animal resources, is thus, considered environmentally sound and non-degrading, economically viable, and socially acceptable. Thus, sustainable measures under the environment Act are environmental impact assessment, collaboration with local authorities, control of pollution, restoration orders among others.[87]

The concept dictates that whatever man and woman do on this planet should not put the life of future generation into jeopardy. The protection of the environment has been perceived as being paramount importance to the future of humankind. Sustainable use is defined under section 1 of the national environment Act as present use which does not compromise the right to use the recourses by future generation. Sustainable development thus, means development that meets the needs of the present generation without compromising the rights of future generation. In Uganda, the principle has been incorporated under objective 27 of the National objectives and directives of State policy in the preamble of the Constitution, provides for utilization of the natural resource to be managed in a sustainable manner, and to meet the demands of current generation and the future generation.

Several Laws were enacted to operationalize the principle, it includes, land Act, national environment Act, water Act, forest Act, and local government Act. The authority (NEMA) which is the lead agency is also mandated to provide for environmental action plan to the formulation of sustainable development. In order to achieve this, the authorities imposed regulations in the planning system[88]. The local authority for example, introduced planning system know as development control land use, permission known as approval is required for change in the land use by the developer. Planning approval is normally granted if the application is in accordance with local development plan policies.

The planning system known as development controls land use plays a role in protecting the environment. Development control is based on laws that require planning permission through the local planning authority to change the current land use. In such a case, the planning authority also helps regulate pollution. The authorities will grant a certificate of change of land use which

[87] Kasimbazi E. Hand book on Environmental Law in Uganda
[88] Physical Planning Act.

normally attracts a statutory fee. Injunctions can also be taken against actual or anticipated breaches of planning permission. An environmental and social impact assessment (EIA) is mandatory for all major developments; EIA is the process of gathering information, which is carried out by the developer and other bodies.

Section 19 of national the environment Act provides for EIA requirement. The third schedule to the Act provides for lists of projects that requires an EIA assessment. In providing environmental study report, licensed practitioners are the only recognized body to assess the impact. The report will indicate the measures undertaken in mitigating the damage. Likewise section 10 of the investment Act provides for a mandatory investment license to be obtained before any kind of investment is undertaken in Uganda.

Section 5 (2) (a) of the national environment Act, provides for encouraging the participation by the people of Uganda, in the development of policies, plans and programmes for the management of the environment; all this are measures to protect the environment while at the same time appreciating the need for development.

### 3.4 Pollution control

There are four main principles enshrined in environmental law, these are, preventive principle, precautionary principle, polluter pays principle, and sustainable development. Principles such as these along with other environmental policies are referred to as soft law aimed at protecting the environment under the mandate of the lead agency (National Environment Management Agency). In environmental law "Polluter Pays Principle" (PPP) was enacted to make the party responsible for producing pollution responsible for paying the damage done to the natural environment[89]. In other-words, the polluter should repair the damage he or she has caused either by making actual reparation or paying the necessary monetary compensation to society[90]. Such compensation which varies depending on the degree of pollution can be paid either before or after the event (pollution). Where there is an environmental damage[91], compensation paid is to be spent on the restoration of the environment. The rationale is under Article 38 of the Constitution

[89] Michael G. Faure, and A. V. Raja. "Effectiveness of environmental public interest litigation in India: Determining the key variables." Fordham Environmental Law Review 21 (2010): 239–94

[90] Lovell. J. "Experts assert using GDP as sole economic yardstick destroys natural resources." ClimateWire, 2012.

[91] Irina Glazyrina, Vasiliy Glazyrin, and Sergey Vinnichenko. "The Polluter pays principle and potential conflicts in society." Ecological Economics 59 (2006): 324–30

which guarantees every citizen absolute right to clean health, therefore, if one causes pollution of whatever nature, the burden of pollution costs shifts from the public to the polluter. In the eyes of equity it is only fair and just that the burden in terms of costs (monetary terms) of polluting the environment should be borne by the polluter than the public to make good for the damage caused to the environment[92]. It is unjust to derive environmental benefits solo and ignoring the risk. The principle is the commonly accepted practice that those who produce pollution should bear the cost of managing it to prevent damage to human health for instance, a factory that produces potentially poisonous substance as a byproduct of its activities is usually held responsible for its safe disposal.

Pollution licenses are envisaged to be applicable where activities will or likely to cause pollution or degradation beyond the established standards.

The whole concept of "Polluter Pays" is hinged on the concept of the public trust doctrine as environment al benefit being a common heritage.

The public trust doctrine represents a viable legal tool for establishing a system of governance that provides a dynamic and interconnected framework for intergenerational responsibility for the management of natural resources.

### 3.5 Application of the principle Brief history

The first mention of the principle at the international level is to be found in the 1972 recommended by the OECD Council on guiding principles concerning international economic aspects of environmental policies, where it stated that the principle to be used for allocating costs of pollution Prevention and control measures to encourage rationale use of scarce environmental resources to avoid destruction in international trade and investment is the so called pollution pays principle. It went on to elaborate[93]. This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment authorities to ensure that the environment is in-acceptable state".

[92] International Monetary Fund. "Energy Subsidy Reform: Lessons and Implications." 28 January 2013. Available online: http://www.imf.org/external/np/pp/eng/2013/012813.pdf (accessed on 22 September 2015)
[93] B. Short, ibid Pg 79

The principle was also reaffirmed in the 1992 Rio declaration, at principle 16, national authority should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the approach polluter should in principle bear the cost of pollution with due regard to public interest. The principle has fully been implemented in Uganda laws and policies in the areas of drinking water, Development and Sewerage treatment. Pollution is defined as any byproduct of a pollution or consumption process that harms or otherwise violates the property rights of others[94]. Thus, environmentalist such as Brenda defined a "polluter" far more broadly not as someone who is simply using his own property and resources in a way that offends the environmentalist because in such cases there are no victims to compensate, the payment goes to the government inform of a tax. In such cases the principle (PPP) is used to promote an environmental agenda rather than to insure that real polluter pay compensation to the real victim of their activities, and therefore, forcing polluters to bear the costs of their activities is a good economics says Brenda.[95]

Ultimately all human activities involving damage to the natural environment can be taxed from their consumption and production activities. The tax will be paid either in the form of an emission fee or an excuse tax on the sales of products that are associated with pollution. In other jurisdiction (develop countries) the tradable permits approach would first have the government established an overall acceptable level of emissions for an industry and would then distribute permits for that level of emission to companies within industries. The companies would then buy and sell this emission permits based on their needs to emit the pollutant[96]. In so doing the polluters are made to pay for their polluting activities either through tax or through the purchase of permits from others in the industry. Pollution according to environmentalists such as Brenda Short means a contamination by a chemical or other pollutant that renders part of the environment until for intended or desired use[97].

It is triggered by industrial and commercial waste, day to day activities. Some of the common pollutions (domestic) thus are air pollution, water pollution, noise pollution, solid waste

[94] B. Short, ibid Pg 81
[95] Sam Hill. "*Reforms for a Cleaner Healthier Environment in China*" 2013. Available online: www.oecd-ilibrary.org/reforms-for-a-cleaner-healthier-environment-in-c (accessed on 21 June, 2019).
[96] Ursula Kettlewell. "The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter-Pays Principle." Colorado Journal of Environmental Law & Policy 3 (1992): 429–78
[97] Michael G. Faure, and A. V. Raja. "Effectiveness of environmental public interest litigation in India: Determining the key variables." Fordham Environmental Law Review 21 (2010): 239–94.

pollution, contaminated land and dumping of waste materials (hazardous, non-hazardous). In addition, the sources of pollution include factories, industries, quarrying, power station, power lines, among others. The "polluter pays" principle in contemporary Uganda, is evidenced in a number of legislation. It includes inter alia, the national environment Act, water Act, wildlife Act[98], land Act, (Section 43 provides for utilization of land according to various laws including, the forest Act, the mining Act, the wildlife Act, among others), penal code Act[99], fisheries Act, local government Act, investment Act, national forestry and tree planting Act, and a number of policies and regulations.

The national environment Act establishes NEMA as the overall body and principal agency responsible for coordinating and monitoring all aspects of environmental management in Uganda. NEMA is mandated inter alia, to develop standards, laws and other measures in environmental management. In addition to management of natural resources, the Act contains provisions on the control of pollution. The Act provides for mechanisms to establish environmental standards and criteria for what is considered environmentally acceptable behavior and phenomena. Where a person wishes to exceed the standards, which have been set, such a person must apply for a pollution license under part VIII of the Act. The Authority or a court may issue a restoration order requiring the person to cease the activities or to restore the environment as much as possible to its original state if the person's activities are likely to affect the environment. It must be noted that restoration order under section 67 of the Act, can be enforced by the Authority even without a court order and at the cost of the person violating the law. In **Amooti Godfrey Nyakana Vs NEMA** and 6 others restoration order was served on Nyakana by NEMA, the order required Nyakana to comply with the condition stated in the order, he failed to do so and his unfinished house was demolished. The court noted inter alia that, the purpose of the section (67) of the national environmental Act is to give NEMA powers to deal with and protect the environment for the benefit of all including Nyekana. The petition was therefore dismissed.

[98] Cap 200
[99] Cap 120

Personal accountability in form of civil and criminal justice is another form of environmental conservation[100]. Part XVI of the National Environment Act, 2019 provides for Penalties, Fees, Fines and other Charges, among many other offences are, offences relating to environmental standards and guidelines and offences relating to hazardous waste, materials, chemicals and Radioactive substance. The objectives of the water Act include the promotion of the provision a clean, safe and sufficient supply of water for domestic use to all persons. It also provides for provision for control pollution treatment discharge and disposal of waste. The water Act also makes provision for water permits. According to section 18, it is not allowed to construct or operate any works unless authorized to do so by a permit granted by the director. A holder of a permit is not permitted to cause or allow any water to be polluted; and has to prevent damage to the source from which water is taken or to which water is discharged after use. The Act also provides for offences.

Section 31 provides that a person commits an offence who, unless authorized by the Act, causes or allows waste to come into contact with any water, such a person may apply to the director for water for a waste discharge permit in the prescribed manner[101]. Under the Uganda wildlife Act, the objectives include inter alia, to provide for sustainable management of wildlife, the Act provides for protected species under a permit. The Act further creates a number of offences in the conservation areas. Such offences may be by way of imprisonment or fines or both. The Act creates what is known as wildlife use rights established under section 29. There are classified into categories ranging from class A-F, the wildlife use rights are granted upon application and prescribed fee. The national forest and tree planting Act likewise prohibits certain activities including, destruction of forest produce among others. The Act requires a person to obtain license for any activities within the forest reserves. Such permits like, forest produce movement permit is granted payment of a prescribed fee. The mode of payment for such pollution is by way of prescribed fee, under section 58 and section 62 of the national environment Act provides for pollution licenses, the licenses are granted according to volume of pollution say, the higher the pollution the greater the fee.

[100] Evan Lehmann. "Lawmakers seeking to start talks on carbon taxes find scepticism." 2013. Available online: http://www.eenews.net/stories/1059977752 (accessed on 24 November 2018).
[101] Section 29 water Act

The fee will then be used to conserve the environment. As to whether the fee is adequate to make good the damage caused is a different matter. There are other activities which require specific permits such as, the import, manufacturers and disposal of hazardous chemicals wastes and substance. For example, polluter pays principle (also known as extended producer responsibility), (EPR) was traditionally a concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental Impacts of their products through the product of life cycle.

The principle is thus an environmental policy that requires the costs of pollution be borne by those who cause it. In its original emergence the polluter pays principle aims at determining how the cost of the pollution prevent and control must be allocated, all in all the polluter must pay.

This principle underpins most of the regulation of pollution affecting land, water, air. Today the principle is generally recognized as a fundamental principle of international environment law which has widely contributed to the protection of environment globally.

Under section 29[102], it provides that the holder of waste discharge permit to take measures at his own cost to install pollution control and to provide monitoring equipment. The protocol for sustainable development in lake Victoria Basin is also a treaty adopted in 2001 that calls for polluter pays principle. It provides, a person that causes the pollution shall as far possible bear any cost associated with it. Under Uganda national water development report of 2005, as a way of implementation of the principle, comprehensive regulatory mechanisms have been established under the government levies a pollution charge on all major pollutants. This has encouraged potential polluters to invest on efficient onsite treatment system to reduce their pollution discharge and thus minimize pollution charges. For example Uganda clays factory, in order to mitigate the high cost, the polluters (clay factory) filled the holes created as a result of bricks and tiles production with water and planted trees and fish pond. In addition, gave neighbors free seed lines to plant around the factory. Therefore, forcing polluters to bear the costs of their activities is also said to enhance economic efficiency and therefore policies based on a polluter pays shall enable us to protect the environment without sacrificing the efficiency of a free market economy system.

[102] The Water Act

The principle (PPP) as it is commonly involved becomes a tool for those who seek to expand public sector control over the use of natural resources. The idea that polluters should be made to pay for the damage that they cause pollution has a basic appeal to our sense of justice and fair play. It is just a simple extension of the idea that people should be held accountable for their actions. Proposals ranging from taxing the use of packaging materials such as glass and paper products, to establish tradable permit programs are evident of the principle.

In other jurisdictions, one way to adequately implement the polluter pays principle is the introduction of assurance bond (money put up by the polluter to insure against a worst environmental impact). The bond would be recovered only if after sufficient time, it had been demonstrated that the technology process or product in question had been deemed safe as was reasonably accepted alternative, if damage occurred, the bond would be used for environmental restoration and to pay damage. It should also be noted that, in matters to do with environmental conservation individuals, and public interest groups look to the law and the courts to help prevent pollution, environmental damage or development of land. In Ismail ***Serugo Vs Attorney*** General[103] the court was emphatic that the right to present a constitutional petition was vested not only in the person who suffers the injury but also in any other person.

Bylaws also play an important role as far as pollution control is concerned. Introduction of fines by city court for littering the city is a good example. Under the fisheries Act[104], the Act provides for the protection of fish by regulating the size of the nets[105], prohibiting fishing methods, and makes provisions for conservation through the prohibition of fishing immature fish.[106] Recently the Uganda revenue Authority passed a policy on the import of motor vehicles whose life span exceeds seven years from the date of manufacture to pay more duty in addition to the statutory duty.

### 3.5.1 Application of the Polluter-Pays Principle

In matters of accidental pollution risks, the Polluter-Pays Principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control

[103] HCCS No 5 of 2003.
[104] Cap 197.
[105] Section 28.
[106] Section 27.

specific measures to prevent accidents occuring at hazardous installations and to control accidental pollution. Although the cost entailed is as a general rule met by the general budget, public authorities may, with a view to achieving a more economically efficient resource allocation, introduce specific fees or taxes payable by certain installations on account of their hazardous nature (e.g. licensing fees), the proceeds of which are to be allocated to accidental pollution prevention and control.

One specific application of the Polluter-Pays Principle consists in adjusting these fees or taxes, in conformity with domestic law, to cover more fully the cost of certain exceptional measures to prevent and control accidental pollution in specific hazardous installations which are taken by public authorities to protect human health and the environment (e.g. special licensing procedures, execution of detailed inspections, drawing up of installation-specific emergency plans or building up special means of response for the public authorities to be used in connection with a hazardous installation), provided such measures are reasonable and directly connected with accident prevention or with the control of accidental pollution released by the hazardous installation[110]. Lack of laws or regulations on relevant fees or taxes should not, however, prevent public authorities from meeting their responsibilities in connection with accidents involving hazardous substances.

A further specific application of the Polluter-Pays Principle consists in charging, in conformity with domestic law, the cost of reasonable pollution control measures decided by the authorities following an accident to the operator of the hazardous installation from which pollution is released. Such measures taken without undue delay by the operator or, in case of need, by the authorities would aim at promptly avoiding the spreading of environmental damage and would concern limiting the release of hazardous substances (e.g., by ceasing emissions at the plant, by erecting floating barriers on a river), the pollution as such (e.g., by cleaning or decontamination), or its ecological effects (e.g., by rehabilitating the polluted environment).

The extent to which prevention and control measures can be considered reasonable will depend on the circumstances under which they are implemented, the nature and extent of the measures, the threats and hazards existing when the decision is taken, the laws and regulations in force, and the interests which must be protected. Prior consultation between operators and public authorities

[110] OECD. The Polluter Pays Principle: Definition, Analysis, Implementation. Paris: OECD, 1975

accidental pollution from that installation which are introduced by public authorities in Member countries in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment.[107]

Domestic law which provides that the cost of reasonable measures to control accidental pollution after an accident should be collected as expeditiously as possible from the legal or natural person who is at the origin of the accident, is consistent with the Polluter-Pays Principle.

In most instances and notwithstanding issues concerning the origin of the accident, the cost of such reasonable measures taken by the authorities is initially borne by the operator for administrative convenience or for other reasons. When a third party is liable for the accident, that party reimburses to the operator the cost of reasonable measures to control accidental pollution taken after an accident.

If the accidental pollution is caused solely by an event for which the operator clearly cannot be considered liable under national law, such as a serious natural disaster that the operator cannot reasonably have foreseen, it is consistent with the Polluter-Pays Principle that public authorities do not charge the cost of control measures to the operator[108].

Measures to prevent and control accidental pollution are those taken to prevent accidents in specific installations and to limit their consequences for human health or the environment. They can include, in particular, measures aimed at improving the safety of hazardous installations and accident preparedness, developing emergency plans, acting promptly following an accident in order to protect human health and the environment, carrying out clean-up operations and minimizing without undue delay the ecological effects of accidental pollution[109]. They do not include humanitarian measures or other measures which are strictly in the nature of public services and which cannot be reimbursed to the public authorities under applicable law, nor measures to compensate victims for the economic consequences of an accident.

Public authorities of Member countries that have responsibilities in the implementation of policies for prevention of, and response to, accidents involving hazardous substances, may take

[107] Michael Faure. "Environmental Liability." In Tort Law and Economics. Cheltenham: Edward Elgar Publishing, 2009, pp. 247–86.
[108] Finn R. Forsund. "The polluter-pays principle and transitional period measures in a dynamic setting." The Swedish Journal of Economics 77 (1975): 56–68. Available online: http://www.jstor.org/stable/3439327 (accessed on 2 February 2019
[109] Ibid Note 101

should contribute to the choice of measures which are reasonable, economically efficient, and provide adequate protection of human health and the environment.

The pooling among operators of certain financial risks connected with accidents, for instance by means of insurance or within a special compensation or pollution control fund, is consistent with the Polluter-Pays Principle.

**35.2 Exceptions**

Exceptions to the Polluter-Pays Principle could be made under special circumstances such as the need for the rapid implementation of stringent measures for accident prevention, provided this does not lead to significant distortions in international trade and investment. In particular, any aid to be granted to operators for prevention or control of accidental pollution should be limited and comply with the conditions set out previously. In the case of existing hazardous installations, compensatory payments or measures for changes in zoning decisions in the framework of the local land use plan might be envisaged with a view to facilitating the relocation of these installations so as to lessen the risks for the exposed population.

Likewise, exceptions to the above Guiding Principles could be made in the event of accidental pollution if strict and prompt implementation of the Polluter-Pays Principle would lead to severe socio-economic consequences.

The allocation to the person at the origin of the accident or the operator, as the case may be, of the cost of reasonable measures taken by public authorities to control accidental pollution does not affect the possibility under domestic law of requiring the same person to pay other costs connected with the public authorities' response to an accident (e.g., the supply of potable water) or with the occurrence of the accident. In addition, public authorities may, as appropriate, seek compensation from the party liable for the accident for costs incurred by them as a result of the accident when such costs have not yet been paid to the authorities.

**3.6 Effectiveness of the 'polluter pays' principle**

Between 1995 to present, I must admit that the Government made attempts to implement several measures in order to conserve the environment, despite legislations and policies in place, the

environmental pollution is at its climax today. The introduction of statutory fees and criminal sanction are of no consequences, as it does not restore the environment to its original position.

Although, the "polluter pays" principles are evidenced in a number of legislations, its application in terms of conserving the environment is not as expected. The public have concerns over pollution emitting factories and industries being sited in close proximity to residential areas because of the possible risks to human health. There are also health fears regarding radiation from power lines and transmission station. Also NEMA as the lead agency has no capacity to detect the level of pollution and therefore ending up granting permits on a wrong assumption.

### 3.7 Principle of Common but Differentiated Responsibilities

The influence of international development law and the New International Economic Order principles of the 1970s and 1980s advocating differential treatment of developing countries in economic matters, led to the advent of the principle of common but differentiated responsibilities in international environmental law in the late 1980s and early 1990s. The principle was first applied avant la lettre in an MEA in the late 1980s, namely in the Montreal Protocol's provisions granting differential treatment to development country parties with respect to the phase-out of ozone-depleting substances.[111] It was later formally recognized in general terms in Principle 7 of the Rio.

### 3.8 Declaration which states

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command[112].

Since the Rio Declaration, the principle has been enshrined in a number of universal MEAs. The principle of common but differentiated responsibilities is a two-pronged concept. It allocates

[111] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 International Legal Materials (1987) 154, www.unep.org/ozone/pdfslMontreal- Protocol2000.pdf.
[112] Principle 7. Rio Declaration. supra note 14

responsibly differently between countries and at the same time provides for a universal duty of co-operation common to all states. Thus its substantive content is based on the twin principles of partnership and of differential treatment. There is an economic as well as a temporal dimension to the principle, with reference, respectively, to the different economic capacities of developed and developing states and to their different historical and current contributions to the causes of environmental degradation. States should be held accountable in different measure according to their respective contributions to the creation of global environmental problems and to their respective financial and technological capabilities to address those problems.[113]

### 3.9 Participatory Principle

The increasing articulation of procedural environmental rights at the national and international level has gradually led to the emergence of what the author would refer to as the Participatory principle Access to information public participation and access to justice have long been recognized in many national legal systems. Moreover, such participatory rights have also been recognized in international soft law instruments such as the World Charter for Nature,[114] the Rio Declaration[115] and the Malmo Ministerial Declaration.[116] The classic statement of the participatory principle at the universal level is to be found in Principle 10 of the Rio Declaration. An increasing number of hard law instruments of a regional nature also contain provisions based on this principle.

The first was the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, which unfortunately has not entered into force twenty years after its adoption and signing. The most well-known instrument implementing the participatory principle is a pan-European MEA, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[117]. The most recent is the African Union's 2003 African Convention on the Conservation of Nature and Natural Resources. The participatory principle essentially calls for environmental information to be made public and

[113] generally Ph. Cullet. Differential Treatment in International Environmental Law (Ashgate Publishing: Aldershot. 2003).
[114] World Charter for Nature, supra note 19.
[115] Rio Declaration, supra note 14.
[116] Malmo Ministerial Declaration, 31 May 2000, www.unep.orglmalmo/malmo_ministerial.htm
[117] For more detailed analysis, see M. Pallemaerts, 'Proceduralising Environmental Rights: The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context', Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable (UNEP: Geneva, 2004) 14-22.

disseminated as widely as possible, for public participation to be guaranteed in decision-making projects, plans and programmes with significant environmental implications, and for access to justice to be granted to the public in environmental matters.

### 3.10 The International Treats on polluter pay

The years since the 1972 UN Conference on the Human Environment in Stockholm have witnessed ever increasing priority given to environmental protection and an increasing recognition of the need for international cooperation to this end. This cooperation has been undertaken in a variety of contexts not the least of which is the codification of new legal obligations in the form of an impressive array of global, regional and bilateral international environmental agreements[118]. These agreements address all forms of pollution of the marine environment, conservation of wildlife and their habitats, transboundary air pollution, desertification. Together with related international developments and the efforts of international organizations and the NGO community, international environmental agreements prescribe basic obligations of states. The agreements also frequently establish rulemaking procedures intended to supplement those agreements.

At the outset, it is important to note the distinction between international law and domestic law. This distinction has a direct bearing on enforcement issues. International law, despite the quasi-legislative nature of some international organizations and agreements, does not have the same hierarchical structure as do national legal systems.

National legal systems have legislative bodies, courts and the executive that create, define, and enforce legal obligations. Notwithstanding the establishment and operation of the international law has been characterized by one commentator as a "horizontal system" without enforcement mechanisms that operate from above. Although the international system has a relatively developed structure of institutions, there is no international police force and international bodies do not possess ultimate sanction authority to issue and enforce decisions.

[118] George Wamukoya. Dr. George Wamukoya is the Director, Development and External Relations WWF, Eastern Africa Regional Programme Office, Nairobi, Kenya. Paper presented at the Judicial Symposium on Environmental Law, 11-13th September, 2005 at Imperial Resort Beach Hotel, Entebbe, Uganda.

In general, international law, including agreements, is based on the voluntary acceptance of sovereign states that recognize it to be in their interest to sacrifice some degree of sovereignty in return for commitment from others. At the same time, comply with international legal obligations in order to maintain good standing in the international community.

For the most part, states do comply with their international obligations. They consider the longer term advantages of compliance to outweigh shorter term gains obtained as a result of noncompliance in any specific instances. In many ways, these motivating factors are not dissimilar from those of individuals responsible for complying with domestic laws at the national level. Nonetheless, although governments are created in part to ensure adherence with the rule of law, at the international level many facets of "government" exist only on a "good faith" or rudimentary levels. As a general rule, international environmental agreements have not yet evolved to the extent of having sophisticated, centralized enforcement mechanisms to ensure strict compliance. As a result, their viability remains dependent upon the good faith efforts of parties to comply with stated obligations with respect to both the agreements itself and decisions by bodies established thereunder.

While states generally comply voluntarily with their international obligations, there is an additional, supporting principle of international law that treaties must be observed. That principle has been codified in the 1969 Vienna Convention on the Law of Treaties.

Article 26 of the convention, entitled "Pacta Sunt Servanda" provides that every treaty in force is binding upon the parties to it and must be carried out by them in good faith. This principle of customary and conventional international law underpins all the other mechanisms embodied in international agreements concerning compliance and is the most fundamental legal basis for the requirement that states meet their treaty obligations.

In addition, it is worth noting the informal means that states use to seek compliance from other parties to agreements. These means include informal persuasion and consultation, as well as what has been termed the "Mobilization of Shame" the public identification and dissemination of specific acts of noncompliance or questionable compliance. States generally prefer to settle their differences through dialogue and quiet diplomacy, and usually resort to more formal and public means only after all other methods fail. Under these less formal procedures there may be

dialogue and consultation among the parties to agreement, identification of potential problems by a Secretariat to an agreement and possibly discussions concerning a state's compliance with the findings subsequently published in a report.

## CHAPTER FOUR

## POLLUTER PAY AND THE CHALLENGES OF ENVIRONMENTAL PROTECTION

### 4.0 Introduction

The chapter discussed the polluter pay principle and challenges on environmental protection in Uganda. The governments have developed these principles in treaties, protocols, and national statutes while international organizations, both intergovernmental and nongovernmental, including the scientific community, have promoted dialogue in these matters in a variety of tasks in respective mandates. Such include in formulation of their own programmes, and in adoption of decisions in soft law instruments such action plans, principles, guidelines, declarations and resolutions. Some instruments are referred to as charter, for example the World Charter for Nature adopted by the United Nations General Assembly[119] or covenant such as the one developed by the IUCN on sustainable development. In deed since the 1972 Stockholm human environment conference[120] landmark developments have taken place in environmental law and policy at global, regional and national levels.

A full discussion of the topic would necessarily embrace international, regional and national levels. Of course such a discussion would be rather vast. Accordingly only general remarks and observations would be made at the global level with deliberate bias at regional level to Africa and close home to the three East African States.

According to Section 2[121] is to the effect that the polluter of the environment is to bear costs for his actions further a license may be denied by the granting authority if the polluter is unable to compensate the victims of such pollution and clean up the environment in accordance with the polluter pays principle[122].

[119] UNGA res. 37/7
[120] UN/CONF 48/14 Rev.1
[121] National Environment Act 2019
[122] S.58(6) of the National Environmental Act and in line with Principle 3.9 of the National Environment Management Policy 1994

### 4.1 Sources and Approaches

The title depicts two broad themes namely:-

The national law points out the basis of environmental law, premise and roots in which the study examined nuisance, negligence and the development of tort law and the impact of the Donald Kaniaru. Mr. Donald Kaniaru as an advocate, Kaniaru & Kaniaru Advocates and Special Adviser UNEP. Paper presented at Judicial Symposium on Environmental law at Imperial Resort Beach Hotel Entebbe, Uganda. 11th -13th September 2005. Common law and statutes, at international law one would look at the off-shoot of sources of law as articulated in article 38 (1) of the ICJ Statute, below.

The General principles. Since the examples given by the organizers of such principles derive from the Stockholm and Rio declarations of June 1972 and 1992[123] of twenty six principles and twenty seven principles respectively, it is clearly intended that focus be based on these complementary set of principles.

Needless to say general principles are not only contained in the two declarations mentioned. A lot of soft law instruments have been agreed in forms of the charter, covenant, guidelines and principles which we cannot address in the time available. Suffice it to say that these have influenced the development of the resulting environmental law and policy.[124]

It should be noted that environmental law is part of public law and at international level if one wishes to look at the sources of international law, it is appropriate to refer to the UN Charter particularly article 38 (1) of the Statute of the International Court of Justice. The four primary sources are:-

a) International conventions whether general or particular.

b) International custom as evidence of general practice accepted as law.

[123] UNCED Doc. A/CONF.151/26 (Vol. I)

[124] paper on the Role of UNEP in the Development of Environmental Law by Donald Kaniaru presented as key note speech at the 6th International Conference on Environmental Law, Sao Paulo, Brazil 3-6 June 100 UNGA res. 217 - A (III) of December, 1948. UN Doc. A/810, pp 71 –77. 101 Statute of the ILC, UN Doc. A/CN.4/4 Rev. 2.

c) The general principles of law.

d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations.

These sources underline the development of international environmental law as part of public law. Incidentally the UN charter does not explicitly address the environment.

However, it does focus on human rights in the articles under the Economic and Social Council (ECOSOC), whose subsidiary bodies like the Commission on Human Rights have done splendid work on the subject over the years. Action on human rights started early. The universal declaration on human rights was developed and adopted by the United Nations General Assembly in 1948 and subsequently inspired numerous global human rights conventions as well national constitutional provisions on bill of rights making international human rights law a leading component of public law. This is not the only aspect that ECOSOC and the United Nations General Assembly have spearheaded in elaborating specific aspects of the sources of law.

In 1947 the General Assembly established the International Law Commission (ILC) with the express mandate to promote the codification and progressive development of international law[125]. Notable in the area of the environment was its seminal draft articles tabled at the first UN Conference on the Law of the Sea held in Geneva in 1958 in which four conventions on territorial sea and the contiguous zone, on the high seas, on the high Seas, on fisheries and living resources and the continental shelf were adopted. The commission was and is seized with environmental topics[126] but clearly the importance, urgency and interest of states does from time to time dictate that they take charge of negotiations of key environmental issues in and under the General Assembly or in UN Programmes so directed, or in the context of a particular specialized agency of the United Nations.

[125] The commission, in over 50 years, did some splendid work in this See paper by Prof. Charles Okidi, Judicial Colloquium, Mombasa 2-4 June, 2004. 78 respect.

[126] See Professor Stephen C. McCaffrey "The fifty-Sixth Session of the ILC", in Environmental Policy and Law, 35/3 [2005]. He points to relevant environmental work already done as the four 1958 Geneva Convention on the Law of the Sea and the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, and the two still on the agenda of the Commission, viz International liability for Injurious consequences arising out Acts not prohibited by international law, from 1978 and shared natural resources, from 2002.

In the decades of the sixties and thereafter, for example, the process of the third law of the sea conference was taken over by the General Assembly. In that period the United Nations conference on the law of the sea concluded the Convention on the Law of the Sea at Montego Bay, Jamaica in 1982 after over a decade of complex negotiations in the most important global convention as a constitution of the oceans law. It took another twelve years for the convention to enter into force on 16 November 1994.

More Conventions were to follow this trend with the General Assembly also taking up the process, among others, of the United Nations Framework Convention on Climate Change, 1992 and United Nations Convention on Desertification Control 1994. Also worth mentioning in passing is the General Assembly negotiations on important declarations such as on sovereignty over natural resources 1962 and 1972 for developing countries and the declaration on the new international economic order, among others.

In parallel to the above general developments other bodies were established both within the United Nations generally or outside the United Nations framework but cooperating with the United Nations. Of the former are UN programmes and offices for example:

UNEP, regional economic commissions and specialized agencies: all destined to play a crucial role in environmental matters. Such specialized agencies include FAO, IMO, UNESCO, WHO, ILO, the World Bank. Outside the United Nations regional organizations also emerged, for example, the Organisation of African Unity currently African Union, European Union, Council of Europe and others. Nongovernmental organizations dealing with specific issues also emerged e.g. the IUCN established in 1948 to deal with conservation of natural resources issues. Others are specialized institutions of a scientific nature such as the international council of scientific unions (ICSU).

All these bodies and others were and still are players in international environmental law evolution. In Marine Pollution and Shipping matters, IMO concluded the earliest instrument on marine pollution: the convention of 1954, later building up several such instruments in subsequent decades. Before the 1960s and into the 70s such activities were carried out on an ad hoc basis. Virtually no consultations among all the interested parties, both at national and

international levels, took place. The initiation of dialogue on Oceans by Malta in 1967[127] and on the degradation of the human environment by Sweden in 1968[128] and the subsequent action on the two issues prompted the UN system and governments to work closely together on such issues of considerable complexity. Two international processes on these matters were set in motion: on the law of the Sea negotiations for over one decade, and on the human environment, Stockholm, 1972 agreeing Plan of Action, 109 recommendations, the Declaration of Principles, and institutional and financial arrangements that form the basis of UNEP.[129]

The emergence of practice of states addressing issues together and acting consistently in the field of the environment emerged and is actively alive today. For example at the start of the preparation of the Stockholm process there were a handful of states with clear policy and law in environmental matters. These were Sweden, the United States of America and Japan. After Stockholm 1972 the situation dramatically changed and environmental ministries, commissions, councils have been established by over 150 states. National environmental laws have been developed by practically all states and internal consultation and cooperation are in effect generally even though they are not without difficulties and challenges.[130]

As stated at the opening environmental discussions on policy and law at all levels is a given in most universities and scientific bodies. Environmental law has become an important discipline of law, and generally and widely accepted as a mover of environmental law development and implementation. Thus several instruments are science-driven, e.g. the Ozone and Climate treaties. As also stated during the opening session, the judiciary is fully embraced as this national symposium, which is one of several held in Uganda, demonstrates.

### 4.2 General Principles

The Stockholm and Rio Declarations have provided the engine of environmental law development at global, regional and national levels. The concepts and principles of sustainable development wrap up several principles, in fact a third of them into the totality of the concept of

[127] The basis of the principle of common heritage of mankind
[128] UNGA resolutions between the 23rd & 27th Sessions namely res.2398 (XXIII) of 3rd December 1968; res. 2581 (XXIV) of December 1969; res. 2857 (XXVI) and res. 2997 (XXVII) of 15th December 1972.
[129] Established by UNGA res. 2997(XXVII) of 15 December 1972.
[130] In Africa all states able to do so have environmental machineries: Ministries, Departments, Commissions and Councils as well as constitutional or statutory provisions. The exception are those countries that have been, or are in conflict, e.g. Somalia.

sustainable development.[131] The Brundtland commission of 1987 publication, Our Common Future,[132] popularized the principle, which it defined as "development that meets the needs of the present generation without compromising the ability of future generations to meet their needs." This is stated verbatim in the National Environment Act, 2019 of Uganda. The same is the case in Kenya's Environmental Management and Coordination Act (EMCA) number 8 of December 1999 and Tanzanian Mainland Act the Environmental Management of November 2004 both of which add to that definition by maintaining the carrying capacity of the ecosystems.

In these laws the topics of this discussion are embraced in sustainable development namely the Principle of Public participation, The Polluter Pays Principle, the Precautionary Principle and that of Intergenerational Equity. These and other Rio principles are expressly recognized in national laws of many countries including the East African one. The broad sustainable development principle naturally has possibility of development by national courts because its precise content and it's what I may call, constructive vagueness, would allow judges to give local application taking into account the prevailing circumstances and needs in a given country. A lot is written on these principles and of more interest is attention given or to be given to them in their implementation and enforcement.

### 4.3 Rio Principle 10

This principle embraces Access to Environmental Justice, Information, Public Participation. This is one of the most intensely discussed and legislated principles at all levels. The three pillars it underlines are access to environmental justice, access to information and access to public participation in decision making. Its core aspects are environmental awareness, enhancement and empowerment. Everyone must be able to enjoy his or her clean environment. They must be able to protect, unhindered their and others interests, in courts, tribunals and judicial processes. The pillars are briefly touched on below.

Access to justice; this means that issues of locus standi should not stand in their way to Courts and Tribunals dealing with environmental issues. Traditionally the common law approach required that to pursue a matter in Court, a plaintiff had to show he/she had a legal interest in the

[131] In the time available focus is on the principles selected by the Organisers.
[132] Oxford University Press, 1987.

matter or had suffered personal injury, otherwise one was shut out in Courts. This rigidity was exercised by the Kenya High Court again and again; for example in the **Wangari Maathai** cases. Nigerian Courts followed similar approaches even as the UK relaxed the application of the same and as the Indian Supreme Court quit such rigidity. In this respect the laws of Uganda,[133] Kenya and Tanzania have opened the way for all.

Environment is not static: it is interdependent and no wall can be built to deter links between environment on one side and the other. For the courts the issue of costs of filing a suit, the cost of counsel to assist, the fear of being saddled with the costs of the suit if one loses are all integral to the access to justice aspect. If these are prohibitive, access would be illusory. Happily most national statutes are providing for waivers in these respects save for clearly frivolous interventions and abuse. So far there have been no problems in the East African countries.[134] Advocate K. Kakuru points out that taken together, The Constitution of Uganda, article 50 and the National Environment Act, 2019 sections 4(4); 68, 72 also relax the locus standi rule, and the Courts should apply the law the straight forward way allowed in Kenyan and Tanzanian Acts.

Access to information is of course, crucial. Information is said to be power. Consequently its denial to whoever may be interested or the public means denial of discussion and contribution to a pertinent issue and its resolution. It is of paramount significance that environmental information be broadly available on a timely basis and the culture of secrecy built over time by public authorities must give way save in limited and clearly defined areas such as security or bona fide personal or proprietary information.

Public Participation in decision making; this is, of course, again critical. Those decisions that affect the public must also be subject to scrutiny by the public. This is an aspect in the environmental impact process that is subject to contest when information is not broadly shared or issues raised on a timely basis to enable whoever may be interested to comment, question and intervene. At international level this principle has found expression in legally binding instruments while at national level it is a principle to be found in recent national constitutions

[133] Advocate K. Kakuru points out that taken together, The Constitution of Uganda, Article 50
[134] Ibid 84

and statutes. Uganda has this in its law and Kenya has it both in its draft constitution and its EMCA. The same is true in most (about 40) African countries laws.

At international level mention could be made of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environment Matters, concluded in June 1998[135] under the auspices of the UN Economic Commission for Europe. This convention, though regional, is open for accession by states outside the jurisdiction of the UNECE. In fact I understand that Uganda and Mexico have decided to follow the accession process permitted by article 19 (3).

### 4.4 Principles 15 and 16

The Precautionary Principle (PP 15) and The Polluter Pays Principle (PPP 16) respectively state: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (PP15).

National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear cost of pollution, with due regard to the public interest and without distorting international trade and investment (PPP 16). These two principles are integral part of national laws of Uganda, Kenya and Tanzania per their statutes earlier referred to.[136]They are applied in other developing countries quite prominently. The Indian Supreme Court has applied them in its numerous decisions.

For example in Vellore Citizens Welfare Forum[137] vs. Union of India Supreme Court in the 1996 case where the Vellore citizens petitioned it to stop tanneries in Tamil Nadu from discharging untreated effluent into agricultural fields, open lands and waterways. The Supreme Court held that the sustainable development and in particular the Polluter Pays Principle and the

[135] UNEP, 2005 – Selected Texts of Legal Instruments in International Environmental Law, Section III-Regional Agreements; pages 549 – 561.
[136] Uganda, Cap 153, 1995; Kenya – EMCA, No. of 1999; Tanzania, Act of 2004
[137] Environmental Law Case Book for Practitioners and Judicial Officers [Greenwatch/UNEP, Sept 2005] pp. 347 – 369.

Precautionary Principle have become a part of customary international law. It ordered the central government to establish an authority to deal with the situation created by the tanneries and other polluting industries in Tamil Nadu "This authority shall implement the Precautionary Principle and the Polluter Pays Principle", the Court ordered.

It should also be noted that South Asian Courts have followed the example and lead of the Supreme Court of India. [*Bangladesh, Pakistan, Sri Lanka, Nepal*]. The application of the principles at national will remain topical in establishing applicability in Courts. In PP 15, full scientific certainty may be far fetched in developing countries, and the shift of the burden of proof from plaintiff to respondents will be a matter to argue. The same is true on remedies, levels of compensation and restoration in PPP 16. Of the two principles the Precautionary one is the more controversial. The US in particular is apprehensive in its use and prefers approach to principle. This is also reflected in the use of principle and approach in the title and body of the principle. The Polluter Pays Principle is much older in Europe having been developed by the OECD countries in the 1970s. This principle has been in reservedly embraced in developing countries, and certainly in Africa.

### 4.5 Principle 17

Environmental Impact Assessment (EIA) Process: Principle 17 states that "[EIA], as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority." Again the statutes from the three East African countries contain the thrust of this principle followed by regulations that underline the steps to be taken in the process whose examination by an expert or experts would determine whether or not a programme, activity or a project would have any adverse impact on environment. Both Uganda and Kenya have EIA regulations in place and a proponent of a project of a given magnitude has to fulfill the requirements per Act and regulations. The experts are registered by the pertinent authorities. Additionally Uganda has A Guide to the Environmental Impact Assessment Process in Uganda.[138]The steps include:

- Screening to determine whether a certain project should be subject to EIA;

[138] Kenneth Kakuru and Others, Sustainable Development Series number 1 (September 2001).

- Scoping to decide which impacts should be taken into account by EIA;
- Impact analysis to evaluate the type of likely environmental impacts;
- Mitigation and impact management to develop measures to avoid, reduce or compensate for negative environmental effects;
- Reporting to catalogue and track the results of EIA for decision makers and other interested parties, including the public;
- Review of EIA quality to examine whether the EIA report includes all the information required by decision makers and the public;
- Decision making to approve or reject project proposals and, if needed, to set the terms and conditions under which a certain project can proceed; and,
- Implementation and follow-up to ascertain whether the project is proceeding as planned, monitor the effects of the project, and take actions to mitigate problems that arise during the course of the project.[139]

In the statutes of the East African countries, the environmental authorities established under respective Acts are charged with responsibility on deciding on the EIAs to be and undertaken as audits and monitoring. The decisions taken are subject to appeals in case of Uganda administratively as provided and supervision of the High Court.[140] For a full discussion of the EIA law and procedures in Uganda, attention is drawn to interested readers to a comprehensive and erudite paper titled The Environmental Impact Assessment by **Hon. Rubby Aweri Opio**, Judge of the High Court, Uganda.[141] In the case of Kenya[142] and Tanzania[143] Mainland appeals are made to the national environment or appeals tribunal.

The looming problem is whether the decision making process is good or fast enough for investors with the claim that decisions are taking too long. This in itself is already raising political overtones. In Kenya the Minister of Planning is on record expressing dissatisfaction with the performance of National Environment Management Authority (NEMA). The point is that people including investors have come from a background where there was no intervention of

[139] From upcoming UNEP Training Manual....2005.
[140] During the Judicial Symposium, Entebbe, 11 – 13 September 2005, it was indicted appeal(s) are beginning to trickle to the Court of Appeal. No decision has been reached and no case is in the Supreme Court.
[141] Presented to the Mombasa Colloquium on 2-4 June 05
[142] Part XII of EMCA.
[143] Part XVII of the Environmental Management Act, Tanzania.

any kind whatsoever by the authorities. Consequently the changes in the law, welcome as they are, are construed as constraints.

EIA is essentially a national procedural tool fairly widely used in Africa and beyond. However, UNEP in 1987 developed environmental impact assessment guidelines which UNECE subsequently developed into the Convention on Environmental Impact Assessment in Transboundary Context popularly known as "Espoo Convention"[144] in force since 1997. This instrument is currently backed up by a protocol on strategic environmental assessment of 2003 which, though open to all UN member states, is yet to come into force.

Nearer home in East Africa, environmental impact assessment is known not only in national statutes as earlier stated but in the treaty for the establishment of the East African Community[145] in its chapter 19 titled Cooperation in Environment and Natural Resources Management article 111, paragraph 1 (d) which provides:-

*"The Partner States recognize that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development.*

*(d) "Shall provide prior and timely notification and relevant information to each other on natural and human activities that may or are likely to have significant trans-boundary environmental impacts and shall consult with each other at an early stage".*

It should be noted also that article 112 on management of the environment paragraph 2 in acknowledging paragraph 1 covering five agreements by the partner states to develop a common environmental policy, to develop special environmental strategies, to take measures to control transboundary air, water and land pollution, to take necessary disaster preparedness, management protection and mitigation measures and to integrate environmental management and conservation measures in all development activities provides that partner states undertake to develop special environment management strategies to manage fragile ecosystems, terrestrial and marine resources, noxious emissions and toxic and hazardous chemicals. Thus, EIA is a fundamental

[144] UNEP, 2005 - Selected Texts of Legal Instruments in International Environmental Law, Section III – Regional Agreements; pg. 455 – 468.
[145] Of 30th November 1999 which entered into force in 7th July 2000

aspect in the facilitation of environmental and sustainable development in the region. The treaty also acknowledges the EIA in a Memorandum of Understanding (MoU) between the three countries for cooperation on environment prepared under the auspices of PADELIA and two protocols for Environment and Natural Resources Management and for Sustainable Development of Lake Victoria Basin.

### 4.6 Inter & Intra-generational Equity

Several Rio principles, notably 1, 3 as well as several treaties and declarations refer to the responsibility to protect and improve the environment for present and future generations.

Principle 1; the natural resources of the earth must be safeguarded for the benefit of the present and future generations. The thrust of Principles 3 and 5 as well as several other international efforts springing from 1987 Brundtland report, Our Common Future, which balanced the interests of present and future generations in the definition already stated. Of course the concern of this principle is not only inter-but intra-generational equity as well. It is the core of sustainable development.

The best and widely known national judgment on this matter is the **Oposa**[146] **and Others vs Factoran and Another** issued by the entire Supreme Court of the Philippines. The Petitioners, a group of minors brought the action on their own behalf and on behalf of generations unborn through their parents together with Philippine Ecological Network Incorporated. They protested the imminent total destruction of the country's forest resources to the detriment of their interests. The Supreme Court recognized that the case raised the right of the people of the Philippines to a balanced ecology and the concept of the intergenerational responsibility and inter-generational justice. The Supreme Court upheld the action and in part stated:-

*"The Petitioners had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology."*

[146] Environmental Law Case Book for Practitioners and Judicial Officers; pp 281 – 297; UNEP Compendium of Judicial Decisions on Matters Related to Environment – National Decisions; Vol. 1 Pages 22 – 36.

Although this right was incorporated in article 16 of the country's Constitution, the Supreme Court observed:

*"As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generations which stand to inherit nothing but parched earth incapable of sustaining life."*

The United Nations Environment Programme, in updating a 1997 Training Manual will shortly provide a new Manual[147] embracing generally and specifically the above principles as well as an entire discussion on global, regional and national themes covering no less than 26 chapters of environmental current concerns. The principles discussed or raised above are covered as follows:

1. Principle 10 on access to justice, information and public participation in chapter 7 of the manual;

2. Precautionary and Polluter Pays Principle and Intergenerational Equity in chapter

3 of the same manual and

3. EIA in chapter 21of the same.

This publication is obviously recommended for all interested in the scope of environmental law globally with relevant sampling of examples at regional and national levels.

[147] Under print.

### 4.7 Doctrine of Public Trust[148]

This I will touch briefly. It has its beginnings in Roman Law but obviously in other traditional and customary laws where no benefit of writing is in evidence, for example, amongst our African societies. Of course the common law knows the doctrine and the UK, US evidence this in several judicial decisions whose discussions of the doctrine are in more limited areas than, I believe, our countries would endorse. The Indian Supreme Court has discussed this doctrine in the late 1990s and I recall here the case of **M. C. Mehta vs. Kamal Nath[149] and Others of 1997**. In this matter the Court took notice of an article appearing in a newspaper spotting the family of Kamal Nath, former Environment Minister in India where some motel had encroached on additional area of land adjoining the authorized place and used earth movers and bulldozers to turn the cause of the river to create a new channel and divert the river's flow to prevent future floods destroying the motel. The Supreme Court addressed the issue of Public Trust Doctrine under which the government is the trustee of all natural resources which are by nature meant for public use and enjoyment.

The Court reviewed public trust cases from the United States and noted that: "under English common law this doctrine extended only to traditional uses such as navigation, commerce and fishing but the doctrine is now being extended to all ecologically important lands, including freshwater, wetlands and riparian forests. The Court relied on these cases to rule that the government committed patent breach of public trust by leasing this ecologically fragile land to Span Motels when it was purely for commercial use."

The principle is inherent in the management of public and community goods through governments and local authorities. In many developing countries, these inherent interventions are expressly provided for in national constitutions,[150] statutes[151] and in customary practices.

[148] Handbook on Environmental Law in Uganda 2nd Edition 2005...Section 3.3 and 3.3.1, pages 24 – 28.
[149] UNEP National Decisions on Compendium of Judicial Decisions on Matters Related to Environment Vol. I pages 259 – 274
[150] Uganda and Ghana Constitutions articles 237 (2) (b) and 257 (2) respectively.
[151] For example Uganda Land Act, Cap 227, section 44. In several Countries the law on this subject has been abused

### 4.8 Environmental Treaties and Players

In two recent interventions two professors have addressed this subject. In the judicial colloquium for East African countries and the East African Court of Justice based at Arusha, held in Mombasa on 2- 4 June, facilitated by **Prof. Charles Okidi** of the University of Nairobi, he presented a paper on "the concept, structure and function of environmental law"[152] which may have already been shared with some of you by the many judges from Uganda who took part in the symposium. In the event it was not shared, I leave a copy with the organizers to avail to the participants of the meeting. In part VI title "Treaty Law on the Environment" **Okidi** underlines a number of global and regional treaties of relevance to the Africa region. These are part of the compilation of the text of treaties that UNEP has compiled over the years in its treaty series[153] volumes 1 and 2 as well as its recent compilation titles "Selected Text of Legal Instruments in International Law". In the paper **Prof. Okidi** reviews the evolution of environmental law at both national and international arenas.

The other presentation titled "An Introduction to the Resources Principles and Regimes of International Environmental Law" by **Prof. Marc Pallemaerts** of University of Libre de Bruxelles and Vrije University Brussel, was done on 24th August 2004[154]. In that note under treaties the Professor gives an interesting analysis of multilateral environmental treaties or agreements that form most significant development in environmental law. In this respect this article and that of Professor Okidi are complementary. He sums up the different faces and outputs in similar fashion to **Prof. Okidi** but giving precise numbers of treaties concluded in the different phases. Prior to 1960 some 42 MEAs mainly in the management of the natural resources area. After the Stockholm Conference, in the 70s he cites another adoption of 75 new MEAs. In the 1980s, another 40 additional MEAs. In the 1990s, another 75 MEAs. Thus summed up the number of environmental treaties is conservative.

[152] See footnote number 3. The paper has national sources as well as international ones
[153] Selected Multilateral Treaties in the Field of the Environment, UNEP 1983 edited by Alexandre C. Kiss; UNEP Reference Series 3. This is Volume 1. Selected Multilateral Treaties in the Field of the Environment, Volume 2: Cambridge Grotius Publications Ltd, UNEP 1991, edited by Iwona Rummel-Buska and Seth Osafo. UNEP, 2005 – Selected Texts of Legal Instruments in International Environmental Law
[154] The first University of Joensuu UNEP Course on International Environmental Law-Making and Diplomacy Review.

Different authors give the number at 500; some even as many between 900 and 1000 global and regional treaties. The differences come in as a result of what each author characterizes as environment and sustainable development. I will also leave the copy of each of the papers to share because these two papers are illuminating. There are other interesting materials to read from the same meeting in August 2004[155] that is shared with organizers for the participants.

The recent publication titled "Making Law Work" edited by **Durwood Zaelke, Donald Kaniaru** and **Eva Kruzikova**[156] is well worth reading because its focus on implementation is responsive to the 2002 World Summit for Sustainable Development[157] focus on Implementation as well as UNEP's Montevideo III of the current ten year period of review and development of environmental law which gives priority to Implementation and Enforcement as well as Capacity Building. Again I will avail the two volumes to the organizers for their Library.

With respect to treaties, I mentioned at the outset that many players and partners have responded to this subject more comprehensively and cooperatively in initial stages of the 1950s and 1960s. The players and partners in the process have been many but UNEP has played its major part in over 40 global and regional agreements since its establishment following the Stockholm Conference. Even for the conventions that others played a lead role UNEP was a partner in many cases at the global and regional levels.[158] That was certainly the case in the negotiations of those conventions like the Climate Change 1992 and the Desertification Convention 1994 where it provided personnel and scientific support in the case of the former and scientific information and support to developing countries in negotiations in the case of the latter. The same is true in several regional agreements for Africa and Asia and Europe. From 1981 UNEP also established a ten year programme starting with the Montevideo I for the 80s, II for the 90s and III for the current decade.[159] These were and are geared to systematic, rather than the ad hoc intervention that prevailed before, in the development of the international environmental law and its Implementation at national level and in Capacity Building programmes to developing countries and countries whose economies are in transition.

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[155] Donald Kaniaru a paper on "The Concept of Sustainable Development: From Theory to Practice"- International Environmental Law-making and Diplomacy Review – University of Joensuu – UNEP Course Series 1 , 2004
[156] Published in 2005 by Cameron May
[157] www.un.org/esa/sust.dev/documents/wssd-PoI -PD/English/PoI Toc.htm.
[158] See footnote number 5 above.
[159] 10/21; 17/25 and 21/23. GC decisions.

### 4.9 Concluding Remarks

Broadly the above highlights, albeit without extensive discussion, the concerns and theme that the organizers asked that I share during this symposium. Before concluding and opening the floor for discussion it may be necessary to underline a few points which I do below:

Focus on role of the judiciary already was referred to during the opening and no doubt Uganda is aware of the programme that UNEP is carrying out globally, regionally and at national level for judiciaries and legal fraternity.

The three East African countries, individually and together, have been significant players in the field of environment in the past three decades. I have witnessed Uganda's active participation in this matter at the UN General Assembly in the law of the Sea negotiations during the 3rd Law of the Sea Conference, in the UNEP Governing Council and its Committee of Permanent Representatives, at its national or East African Environmental activities held in Uganda from 1976 when the first national conference was held and subsequently as mentioned in administering a project that gave initial capacity those years to Uganda and in the PADELIA which has held no less than four meetings in Uganda. From the project's inception I was and still am associated with it as its chairman of the steering committee to date.

This symposium is one of many from 1996 that I have taken part in. I have mentioned that in East Africa, Uganda took the lead in the enactment of its chapter 153 in 1995 and it may be contemplating amending it to strengthen it or to bring it in line with the more current developments during the one decade its Act has been in force and to attune the law to the needs and evolving circumstances of Uganda. It should be noted that any adjustment in the law should be to strengthen, rather than weaken it; this approach should not be negotiable. Elsewhere I have mentioned the Kenyan Act and the Tanzanian Mainland Act which is the youngest having been adopted in late 2004 and come into force in February 2005.

Making such Acts operational does take time, and the Tanzanian case is no exception. The three laws have significant approaches to the development of environmental jurisprudence. Let me underline or comment on this. Ugandan Act calls for challenges to decisions taken by the institutions created to be appealed administratively and for the High Court to supervise such. In

deed already a number of cases have been before the High Court. I am not aware whether if a party is further dissatisfied can, under normal procedures, appeal to the higher Courts, and have not seen a case form either the Court of Appeal or the Supreme Court[160]. In this respect Uganda has taken a different path and it is not surprising that a comment was made that Uganda revisits this aspect to approximate what is happening in the other two countries or taking into account what is happening elsewhere in the commonwealth. On the other hand, Ugandan superior Courts may interpret the current law in such a way that they do not feel inhibited in the development of environmental law. Such an approach would be great. The route taken by the two countries is briefly mentioned hereunder.

The situation is Kenya's EMCA came into effect in January 2000. The organs[161] established under the Act did not, however, take off until 2002. Nevertheless, there have been discussions of making amendments to the Act to clarify some points and to streamline the Act. The current draft Constitution envisages the establishment of an environmental commission with defined responsibilities[162] It also envisages the enactment of an Act of parliament to implement the different aspects. If the new Constitution is ratified through the referendum scheduled for November 21 any amendment to the Environment Coordination Act could usefully implement what is anticipated. Be that as it may, EMCA establishes a National Environment Tribunal (NET), among other institutions, e.g. the National Environment Council (NEC); the Public Complaints Committee (PCC), and NEMA, to hear appeals and to be able to give opinions in matters referred to it. The tribunal is chaired by a chairman nominated by the judicial service commission and qualified to be appointed a judge of the High Court. Two other members are senior lawyers and the other two are senior scientists. It has dealt with one appeal and is hearing another three. Indications are that it is in business. Another Act of parliament " The Forest Act" adopted this year and yet to be assented by the President mandates the tribunal to hear appeals arising from the decisions of the organs established under that Act. Appeals from the tribunal go to the High Court; one judge sitting on the matter and whose decision is final. It does not indicate whether the appeal is on a point of law only. Consequently the appeal can be on both facts and law. The one ruling so far made is subject to appeal. The members of the tribunal including the

[160] See footnote number 21 above
[161] NEC, NEMA, PCC, NET etc.
[162] Article 92. See Chapter Eight, articles 87-93; the right to environment, article 67

chairman are gazetted for a 3 year period that may be renewed by the Minister for the time being responsible of the Environment.

The Tanzanian appeals tribunal is different from Kenya's in the significant respect both to the appointment of the chairman and the handling of appeals. The chairman qualified to be a judge is appointed by the President of the Republic. The appeals go to the High Court for final determination by a Court constituted by three High Court judges. The administrator of the Tribunal is a registrar named by the Chief Justice.

These features are certainly an improvement on Kenya which could find itself with an appeal going to the High Court for final decision from the tribunal and yet a parallel appeal from a matter that may first have gone to the High Court which has unlimited jurisdiction and which matter was not at the time rerouted to the national environment tribunal. Such a matter would, of course, be appealable to the Court of Appeal or higher to the Supreme Court should the new Constitution come into force. Thus, this matter needs to be clarified on the Kenyan side.

Of course Uganda does not need to only look at the two East African countries.

There are several developing countries with such structures in place. Nor does Kenya only need to look at the Tanzania example. There are also developed commonwealth countries with different structures, for example, New Zealand and Australia. In the latter the New South Wales Land and Environment Court is the oldest and best known and whose judges rank as the High Court judges. Let me refer to three other developing countries. One in Africa and two in the Caribbean. Mauritius is the case in Africa which follows the example of Kenya more or less. It cannot therefore be the best example for Uganda. Then two other cases are Guyana and Trinidad and Tobago. In the former, its Act is of 1996 and Trinidad and Tobago Act[163] is of 2000. The two correspond to each other. The Appeals tribunal in Guyana and the Commission in Trinidad and Tobago are superior Courts of record and the judges are High Court Judges. The appeals go to the respective Courts Appeal and other provisions are similar to those of judges of superior courts with secure tenure, salaries and remuneration, some members full time or part time as the case may be and so on.

[163] Guyana, Act No. 11 of 1996, Environmental Protection Act. Trinidad & Tobago, Act No. 3 of 2000, Environmental Management Act.

Quite clearly then, the development of environmental jurisprudence in East Africa is a matter that does deserve attention by the relevant authorities if harmony is to be achieved at both the national level and at the East Africa Court of Justice level in environmental matters.

These unsolicited comments have been given in the interest and spirit of further developments and cohesive attention that the important issue of environmental jurisprudence in the context of sustainable development should receive in its consistent future growth.

# CHAPTER FIVE

# CONCLUSION AND RECOMMENDATION

## 5.0 Introduction

This section examined the analysis of polluter pay principle on preserving the environment in Uganda. This included the conclusion and recommendations required to enhance understanding of polluter pay principle. Furthermore, the polluter pay principle gives the magnitude on preserving the environment in Uganda.

## 5.1 Conclusion

From the foregoing, it is clear that it is possible for the right to clean and healthy environment to be enjoyed in Uganda. The same is protected by the Constitution and has been judicially interpreted. There is however a need to reconceptualise the right to a clean and healthy environment by clearly defining it and according it the correct place in the human rights discourse.

The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

When established procedures are used to collect evidence, it is often easier to defend the scientific reliability and legal acceptability of the procedures. Witness interviews should be recorded along with other field activities such as sampling and environmental measurements. When assisting in the execution of a search warrant, the investigative team should ensure that the evidence collected is authorized by that warrant. Each person collecting evidence could ultimately be called as a witness later.

Marking, labeling, preservation (if appropriate) of exhibits should all be part of the permanent record of the crime scene visit. Chain-of-custody records should include a standard form documenting the delivery and the receipt of each exhibit. Personnel handling the exhibits are recorded from the initial contact at the crime scene through each exhibit transfer until the exhibits are received in the laboratory. Under chain-of-custody procedures, exhibits are to be

under the control of the investigative team at all times. The location of each exhibits from the time of collection through the time of laboratory analysis, should be documented.

The realisation of the right to clean and healthy environment for the Kenyan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

The realisation of the right to clean and healthy environment for the Ugandan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. Through encouraging use of traditional knowledge in conservation and production to active and meaningful participation in decision-making, the citizenry can hopefully appreciate the fact that the creation of a clean and healthy environment is not a State's responsibility only but there is a requirement of cooperation between the State actors and the individuals. It is to be recalled that Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically

sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions.

### 5.2 Recommendation

Member countries continue to collaborate and work closely together in striving for uniform observance of the Polluter-Pays Principle, and therefore that as a general rule they should not assist the polluters in bearing the costs of pollution control whether by means of subsidies, tax advantages or other measures[164].

The granting of any such assistance for pollution control be strictly limited, and in particular comply with every one of the following conditions:

> *a) It should be selective and restricted to those parts of the economy, such as industries areas or plants, where severe difficulties would otherwise occur;*
>
> *b) It should be limited to well-defined transitional periods, laid down in advance and adapted to the specific socio-economic problems associated with the implementation of a country's environmental programme;*
>
> *c) It should not create significant distortions in international trade and investment;*

If a Member country, in cases of exceptional difficulty, gives assistance to new plants, the conditions be even stricter than those applicable to existing plants and that criteria on which to base this differentiation be developed.

In accordance with appropriate procedures to be worked out, all systems to provide assistance be notified to Member countries through the OECD Secretariat. Wherever practicable these notifications would occur prior to implementation of such systems.

Regardless of whether notification has taken place, consultations, as mentioned in the Guiding Principles [C(72)128] on the implementation of such systems, will take place at the request of any Member State.

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Recommends that, in applying the Polluter-Pays Principle in connection with accidents involving hazardous substances for instance extracted Oils from the engines, rusted metals, Member countries take into account the "Guiding Principles Relating to Accidental Pollution.

Instruct the Environmental Committee to review the actions taken by Member countries pursuant to this Recommendation and to report to the Council within three years of the adoption of this Recommendation.

The study recommends that the government should employ strong strategies to have polluter pay principle work effectively, this is reduce on ineffectiveness of the laws that already in place in preserving the environment especially in central Uganda.

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