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Environmental regulatory approach of the upstream oil and gas emerging industry in Kenya - an appraisal of the polluter pays principle

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ENVIRONMENTAL REGULATORY APPROACH OF THE UPSTREAM OIL AND GAS EMERGING INDUSTRY IN KENYA: AN APPRAISAL OF THE POLLUTER PAYS PRINCIPLE

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DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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ABSTRACT

The oil and gas (O&G) sector has been touted as being among the greatest lucrative natural resources in propelling Kenya's economic growth.[1] It is axiomatic that the O&G sector anywhere- whether in developed or developing countries brings with it succinct environmental and socio-economic challenges such as land, water and air pollution. This research is mainly concerned with the impact of upstream O&G operations with respect to the regulatory and conceptual underpinnings of the polluter-pays principle (PPP). This principle aims at preventing or otherwise remedying environmental damage through tort/delict liability leading to internalisation of costs; the costs are transferred from Governments to the actual 'polluters.'[2] Owing to the absence of sufficient sanctions in environmental laws and regulations (both regionally and internationally), it has proven difficult for the implementation of the PPP. This underscores the legal and economic importance and encumbrances associated with the upstream petroleum sector. Through historical, analytical and comparative study, this research examines the PPP's application in upstream petroleum operations in Nigeria and in the United States of America (USA). The difference between these two countries is in the nature of laws and regulations enacted to protect the environment coupled with the institutional enforcement of these laws. While the legal regime in USA is a bit more proactive, dynamic and goal setting; Nigeria's has conversely been static and largely prescriptive in approach. This will lead to an appraisal of the legal regulatory frameworks in the application of the PPP in curbing the anthropogenic impacts of O&G pollution and the responsibility of the 'polluter' thereto in relation to Kenya's emerging O&G industry. Ultimately, a predisposition will be drawn for Kenya to properly apply the PPP in its O&G related regulatory frameworks by highlighting lessons learnt from Nigeria and USA in order to forester the attainment of both the social and ecological justice stance.

[1] 'Oil and gas in Kenya: Regulatory framework'- <https://www.financierworldwide.com/oil-and-gas-in-kenya-regulatory-framework#.Xm9WCkpRVO8> on 13 March 2020.

[2] Sturma P, 'Principles of international environmental Law: Issues of international protection of the environment' AUC-Iuridica 2-4/2002, *Charles University Prague*, 2002, 24.

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LIST OF ABBREVIATIONS

BOP	Blowout Preventer
BOPD	Bunker Oil Pollution Damage
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CFRN	Constitution of the Federal Republic of Nigeria
CITES	Convention on International Trade in Endangered Species
CLC	Civil Liability for Oil Pollution Damage
CoK	Constitution of Kenya
CWA	Clean Water Act
E&P	Exploration and Production
EEZ	Exclusive Economic Zones
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EPRF	Environmental Protection and Rehabilitation Fund
ESIA	Environmental and Social Impact Assessment
EU	European Union
FEPA	Federal Environmental Protection Agency
FUND	Fund for Compensation for Oil Pollution Damage
ICJ	International Court of Justice
IMO	International Maritime Organization
IOC's	International Oil Companies
JV	Joint Venture

MECD	Ministry of Environmental Regulation Mining
MNC's	Multi-National Corporations
NEMA	National Environment Management Authority
NNPC	Nigerian National Petroleum Corporation
NOCK	National Oil Corporation of Kenya
NOSDRA	National Oil Spill Detection and Response Agency
NOSDRA	National Oil Spill Detection and Response Agency
O&G	Oil and Gas
OECD	Organization for Economic Cooperation and Development
OPA	Oil Pollution Act
OPRC	Oil Pollution Preparedness, Response and Co-operation
OSLTF	Oil Spill Liability Trust Fund
OSLTF	Oil Spill Liability Trust Fund
PPP	Polluter-Pays Principle
RP	Responsible Party
SEA	Strategic Environment Assessment
SESA	Strategic Environmental and Social Assessment
UK	United Kingdom
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention of the Law of the Sea
UNEP	United Nations Environment Programme
USA	United States of America
WHO	World Health Organization

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DEDICATION

I dedicate this thesis to my parents Dr. William K. Kiprono and Mrs. Norah J. Kiprono, who have been a source of inspiration and encouragement in my life and given me a platform to achieve my drams and realize my potential. To my entire family who have played a key role in one way or another in actualizing my ambitions, as well as for their love and care which motivated me in every step of the way.

CHAPTER ONE

INTRODUCTION

1.1 Background of Study

In Kenya's oil and gas (O&G) sector, petroleum exploration activities began in the 1950s both onshore and offshore. However, it was not until 2012 that the first commercially viable oil discovery was made by Tullow Oil, a UK- based company.[3] Currently, Kenya through the Ministry of Petroleum and Mining has gazetted 63 petroleum blocks with 26 of these blocks being licensed to 13 international oil companies (IOCs). The National Oil Corporation of Kenya (NOCK) is licensed with 1 block while 35 blocks remain open for interested oil companies.[4]

While the oil boom in Kenya presents great economic prospects, she (Kenya) should stand wary of the potentially negative environmental externalities that are bound to arise more so in the upstream phase. There are two major parts/phases in the O&G sector. The first is 'upstream'- the exploration and production (E&P) stage and encompasses all processes before the raw material (crude) is refined; exploratory, appraisal, development and production stages.[5] The second phase is 'downstream'- the sector dealing with refining and processing of crude oil and gas products, their distribution and marketing.[6] This research will however focus on the environmental regulatory application of PPP and gaps relating to the upstream pollution especially arising out of oil spillage.

Due to the nature of these upstream activities which engender high risks, international oil companies (IOC's) devote to continuously working towards significant reduction of the potentially negative environmental impacts associated with these activities.[7] Some of the environmental issues that have been the front burner of both national and international discourses have often included but not limited to: demands for significant reduction of hazardous waste, stringent regulations relation to discharge and emissions (pollution) from petroleum production, rehabilitation of production or abandoned sites (decommissioning) just to mention but a few. These ultimately expose IOC's to a rapidly growing body of national and international regulations, standards and guidelines coupled with the risks of national and cross-border environmental litigation.

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[3] Mwabu G, 'Kenya's Oil Governance Regime: Challenges and policies, in Arnim Langer, Ukoha Ukiwo, Pamela Mbabazi (eds), 'Oil Wealth and Development in Uganda and Beyond: Prospects, opportunities, and challenges', Leuven University Press, 2020, 16 - <https://www.jstor.org/stable/j.ctvt9k690.22> on 6 January 2020.

[4] 'Ministry of Petroleum and Mining',- <https://www.petroleumandmining.go.ke/> on 6 January 2020.

[5] 'Oil and gas industry overview'- <https://www.schedulereader.com/blog/oil-and-gas-industry-overview> on 6 January 2020.

[6] Oil and gas industry overview'- <https://www.schedulereader.com/blog/oil-and-gas-industry-overview> on 6 January 2020.

[7] Schneider J, 'An analysis of reported sustainability-related efforts in the petroleum refining industry' *The Journal of Corporate Citizenship*, 2011, 44.

The benefits of regulating the oil and gas industry cannot underestimate. The balance between various regulatory levels *vis-a-vis* their relative importance primarily depends on the existing interwoven web of environmental policies and practices: national (domestic), international (global and regional), and corporate-self regulation in the form of industry-wide or individual organization guidelines. The balance between the different regulatory levels and their relative importance depends primarily on the nature and type of activity involved. The greater the potential for international ramifications, whether in the form of pollution or any other subsequent trans-boundary effect, the more important the position that international law plays in attempting to prescribe interventions. As international laws on environmental matters become more centralized, the world is arguably witnessing a significant internationalization of environmental controls, thus reducing the scope for standard-setting at the individual state level.[8]

Proper regulatory structures are needed to ensure that the objectives of environmental mitigating measure are met. It is for this reason that the substance of national regulations and the general conduct between states and industry (in particular in the form of various international treaties) are often decided directly or indirectly by international regulations (through national implementation process). A large body of binding instruments and a number of (non-binding) typical soft law documents relevant to the O&G industry exist worldwide. The most important of these will be discussed in this thesis, which will provide an in-depth analysis of some selected areas of international environmental regulation of particular concern to the O&G exploration and production (E&P) activities. This will be followed by a more general overview of the national environmental legal frameworks and industry-specific environmental management practices.[9]

The regulations are ideally designed to stem the tides of environmental pollution relating to O&G. Such unprecedented events like the Santa Barbara oil spill in 1969 in California and the Deep-water Horizon disaster (Macondo blowout) in the Gulf of Mexico in 2010, point at a checkered past of systematic regulatory failures that caused spillages. Similarly, in the early 1990s, Shell's activities in the Niger Delta, Nigeria contributed to wanton contamination of the Niger River basin and exacerbated conflicts with local citizens in the state of Ogoni.[10]

In light of such fraught negative impacts, it is trite that stringent environmental protection regulations both at the international and national levels should be implemented in order to mitigate the negative

[8] 'Environmental protection in the petroleum industry',- <http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/507-524_x10.3x_ing.pdf> on 6 January 2020.
[9] 'Environmental protection in the petroleum industry',- <http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/507-524_x10.3x_ing.pdf> on 6 January 2020.
[10] *United Nations Environmental Programme, Environmental assessment of Ogoniland,* UNEP Report, 2011.

effects associated with E&P.[11] Some of the basic concepts emerging at the international front have been endorsed globally and regionally in agreements and their subsequent adoption at the national level. This seeks to enhance the legal basis in which individual countries and IOCs have to follow or factor in while implementing and/or complying with the relevant national legislations.[12]

Given the broad range of the negative environmental impacts (air emissions, water emissions, land-based pollution and disturbance, habitat disturbance and loss, and product stewardship and waste management), there is need for the integration of environmental protection and economic development associated with the O&G sector. It is for this reason that states implement the polluter-pays principle through direct regulations that creates economic incentives, leading to the polluter to bear the costs of the environmental harm caused by its activity.

The PPP is a broad concept that alludes to different meanings depending on the specific context.[13]In domestic law for instance, the principle states that polluting entities are legally and financially responsible for the harmful consequences of their pollution.[14] In Kenya, the PPP alongside the other sustainable development principles such as the prevention principle and precautionary principle are recognised and applicable by dint of Articles 2 (5) and (6) of the Constitution which permits the domestication of international law and any treaty or convention that is by Kenya.[15]

Additionally, the national values and principles of governance that are outlined Article 10 of the CoK are relevant in natural resource management. They include devolution of power, democracy and participation of the people, equity, social justice, protection of the marginalized, good governance, transparency and accountability and sustainable development.[16]

The Constitution of Kenya (CoK) 2010 vests O&G resources on the state in trust for the people of Kenya.[17] The two main legislations to govern the O&G sector in Kenya are: The Petroleum Act, 2019 and the Energy Act of 2019 which are vital in the implementation of petroleum and energy policies. The Petroleum Act seeks to draw a basis for contract negotiations, exploration licenses, field

[11] Halil H, Article 1110 of NAFTA: 'Investments to Upwards Harmonization of Environmental standards,' 2005,-<http://heinonline.org/HOL/Welcome?collection=journals> on 6 January 2020.
[12] Rexler J, 'Beyond the Oil Curse: Shell, state power, and environmental regulation in the Niger Delta', Vol xii no1, *Stanford Journal of Int'l Relations*, 2010, 29.
[13] Larson E, 'Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle', 38 VAND. J. TRANSNAT'L L. 541, 545-50, 2005, which discusses how the polluter pays principle has been implemented in such places as the United States, the European Community and in Japan.
[14] Sommers S, The Brownfield Problem*: Liability for Lenders, Owners, and Developers in Canada and the United States*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 259, 266-67, 277-91 (2008) (comparing the application of the polluter pays principle in the United States and Canada. Sommers also discusses brownfield liability in Canada and the problems of enforcing Canada's *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA)).
[15] Ratification of Treaties; See also the Treaty Making and Ratification Act, 2012, Laws of Kenya.
[16] Article10 (2), *Constitution of Kenya* (2010).
[17] Articles 61(1) and 62 (1), *Constitution of Kenya* (2010).

development and petroleum production; upstream cessation of upstream activities; and general enforcement with respect to E&P operations; and for related purposes, to implementation of relevant Constitutional provisions.[18] The Energy Act consolidates the country's governing rules relating to the energy sector and its entities, the promotion of renewable energy sources, the regulation of midstream and downstream petroleum activities *et cetera*.[19]

Kenya's principal environmental legislation relevant to the thesis is the Environmental Management and Coordination Act (EMCA).[20] The Act seeks to provide a coordination mechanism for various sectoral legislations dealing with environmental elements including planning, pollution, conservation of biodiversity *et cetera*. Kenya's present legislations mandates companies to perform environmental impact assessments (EIAs) for projects that substantially change the use of the land.[21]

Generally, an EIA is required to take into account the environmental, social, cultural, economic as well as the legal considerations, and ought to identify the anticipated environmental impacts and the scale of the impacts. This is in order to identify and analyse alternatives to the particular proposed project; propose mitigation measures to be taken during and after project implementation; and develop an environmental management plan to facilitate the monitoring and evaluation that takes into account regulatory compliance.[22]

EMCA's robust environmental management ideals are to be realised through the other Acts of Parliament governing the extractives sector in Kenya. They include: The Environment and Land Court Act of 2011, Land Act of 2012, the Community Land Act of 2016, the Mining Act of 2016, Climate Change Act of 2016, Income Tax Act of 2018, the Physical and Land Use Planning Act of 2019, the Public Health Act of 2012, Maritime Zones Act of 1989, Water Act of 2016, Wildlife Conservation and Management Act (WCMA) of 2013 Forest Conservation and Management Act of 2016, The Natural Resources (Classes of Transactions Subject to Ratification) Act of 2016 *et cetera*.

All the aforementioned sectoral laws define the various environmental management standards and stipulate the accompanying offense for non-compliance, including the prescribed penalties that are deemed appropriate. These are some of the direct control measure aimed at not only ensuring imposition of an absolute obligation for entities and individuals, but also compliance with process and

[18] *Petroleum Act*, (Act No. 2 of 2019).
[19] *The Energy Act*, (Act No. 1 of 2019).
[20] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015.
[21] Schedule 2, *Environmental Management and Coordination Act* (Act No 8 of 1999).
[22] Regulation 16, Environmental *(Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003

product standards, as well as fees or charges fixed by laws at the national and county levels for potentially non-compliant entities to follow.[23]

In consideration of the legal framework for O&G- related disputes, which are likely to occur amidst Kenya's O&G proliferating prospects and with a major focus on the PPP, one of the environmental principles/concepts to be discussed is that of sustainable development.

The Brundtland Commission has defined sustainable development as being:

> *"…development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*[24]

EMCA on the other hand has defined sustainable development as being:

> *"…development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems."*[25]

Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is equity between generations.[26]

From the above discussions, it is clear that the traditional approach to environmental problems arising out of the extractives industry in general has been rather reactive. First, the problem becomes apparent, then researchers seek to establish the cause of the problem, while the regulators seek to mitigate or eliminate that cause by obligating the polluter pay for such cost. This approach has been termed the *polluter-pays principle (PPP).*[27]

PPP imperatively plays a potent role as both an environmental principle in modern jurisprudence- it creates obligations for O&G multinationals, commonly known as International Oil Companies IOCs) to ensure that environmental safeguards are adhered to as prescribed by both international and national environmental law instruments.[28]

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[23] Ornedo G, Muigua K and Mulwa R, 'Financing Environmental Management in Kenya's Extractive Industry:The Place of the Polluter Pays Principle',16/1 *Law, Environment and Development journal* (2020), p. 1, available at http://www.lead-journal.org/content/a1601.pdf.

[24] World Commission on Environment and Development, Our Common Future, GAOR, 42ndSess, Supp. No. 25, UN Doc, A/42/25 (1987), p.27; See also the Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

[25] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

[26] Weiss, E.B., "In Fairness to Future Generations and Sustainable Development," American *University International Law Review*, Vol.8, 1992.

[27] Principle 16 of the *Rio Declaration,* UN Conference on Environment and Development (1992).

[28] Faure, Goodwin & Weber (2010) point out the importance of optimal design of environmental law in developing country, rather to import Northern regulation, in order to correct the enforcement problems affecting developing countries.

It is through legislation and judicial precedents that the PPP is implemented by state governments through direct regulation that ultimately creates economic incentives, leading to the polluter/infringer to bear the costs of environmental harm arising out of its activity.[29]

1.2 Problem Statement

Kenya's existing environmental regulations/policies do not provide adequate safeguards for ecological harm with respect to upstream O&G pollution. Whereas the PPP deals with cost allocation, cost internalisation and legal liability,[30] in terms of functionality, the PPP depends on clearly articulated regulatory/policy objectives, clear liability rules and effective enforcement.

Some of the fundamental issues that tend to arise with respect to the adoption and application of PPP are to do with the extant of pollution control costs and in defining the extent of environmental damage.

1.3 Research Aims and Objectives

The core aims and objectives of this research are thus:

a. To examine the relevance of the PPP in the oil and gas sector;

b. To examine how PPP has been incorporated into both national and international environmental policies;

c. To identify the challenges in the implantation/enforcement of the PPP and the extent of their consistency with regards to the application of the principle in addressing potential upstream pollution challenges in Kenya's emerging O&G industry; and

d. To identify existing gaps and propose reforms tailormade for Kenya's environmental regulatory regime as its O&G industry advances further.

1.4 Research Questions

This thesis tries to provide answers to the following questions:

1. What are the existing legislative and institutional frameworks to govern against potential environmental pollution in Kenya's upstream O&G industry?
2. Whether the PPP is relevant in providing practical guidelines for domestic implementation, enforcement and/or compliance?

[29] Faure, Goodwin & Weber (2010)
[30] Jonathan Remy Nash, *Too Much Market? The Conflict between Tradeable Pollution Allowances and the "Polluter Pays" Principle*, 24 Harvard Env. Law Rev. 465, 2000, 465-78

3. Whether and to what extent the application of the PPP as an international environmental law principle mitigates the effects of upstream O&G pollution?
4. Which 'best practice' lessons from the US and 'pernicious practice' lessons from Nigeria as comparative countries can Kenya draw to inform good governance in its oilfield E&P activities?
5. What recommendations can be made for Kenya from lessons from the two selected comparative jurisdictions in order to effectively inform apt environmental regulations?

1.5 Hypotheses

The following hypotheses will be empirically tested:

H1: Effective application and implementation of the PPP is pegged on its desirability of providing for strict liability frameworks in the upstream O&G sector.

H2: While the primary regulatory mechanism will remain national environmental law, international environmental law is increasingly affecting the O&G related industry both directly and indirectly.

1.6 Literature Review

There is rich literature in both legal and economic terms surrounding the Polluter-Pays Principle (PPP). The legal status of Principles should be distinguished from rules as Winter rightly put it.[31] According to him, this meant that principles are used to provide interpretative rules, and to guide the institutions implementing them. It can also be described as rules being a way of solving conflicts inherent in principles or conflicts when principles contradict each other in a specific area. It is thus clear that principles do have a legal effect, derived from either regulation/legislation or court act/precedents.[32]

The recognition of this principle comes in varied forms and in other different international instruments. For example, in treaty law, the PPP has been used for constructing strict liability regimes. The Lugano Convention[33] endorsed the principle, in the preamble by recognizing "the desirability of providing for strict liability in this field taking into account the polluter pays principle". Reference is also made to the 1990 International Convention for the Protection of the Marine Environment of the North-East

[31] Winter G. The Legal Nature of Environmental Principles in Macrory, Richard (ed), Principles of European Environmental Law, Europa Law Publishing, 2004, 15.
[32] Winter G. The Legal Nature of Environmental Principles
[33] *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, 88/592/EEC* - <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> on 6 January 2020.

Atlantic (OSPAR) Convention.[34] The 2003 Kiev Protocol refers, to it as "a general principle of international environmental law, accepted also by the parties to the convention."

States being subjects of international law are obligated to protect the environment from the chronic effects of oil pollution which forms part of the general malaise of environmental damage. The discovery and exploitation of O&G resources within a state comes with both excitement and trepidation with the hope that it translates into economic prosperity. When poorly managed, it leads to the so called 'resource curse' or the 'paradox of the plenty'.[35] Karl argues that Africa's oil boom is paradoxically a frightening prospect for the continent's marginalized and poor inhabitants.[36]

From the international and domestic laws perspective, the PPP creates a doctrine of social responsibility which is somehow a semi-generic for environmental protection and regulatory regimes. Gordon points out that different legal systems may have different requirements in order to maintain a specific regulatory ambit. The legal system itself could play a critical role in determining what form of regulation constitutes a viable response to specific policy challenges.[37]

At an international level, Principle 21 of the 1992 Rio Declaration[38]and Principle 9 of the Stockholm Declaration of 1972,[39] have provided a touchstone for incorporation of the PPP for the protection of the environment and an obligation for the domestication of the same. But these are 'soft law' formulations with no binding effect on states and are couched in public interest, trade and investment caveats.[40] Despite the recognition PPP's identification as a general principle of international environmental law,[41] most of the binding provisions complementing it are relatively recent at the national and regional levels, hence casting doubts as to the principle's validity as a customary international law rule.

With PPP developing to become a fundamental area of environmental law, it brawls discussions on the specific thematic area of corporate environmental responsibility. It follows the academic and legal perspectives to create an empathic view on environmental sustainability and protection amidst oil booms. Ross highlights on the existing relationship between natural resource exploitation, economic

[34] Golon J, '*OSPAR Convention (Convention for the protection of the marine environment of the North-East Atlantic) and OSPAR Commission'* 2019.
[35] 'Africa's Natural Resources: The paradox of plenty',- <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/(E)%20AfricanBank%202007%20Ch4.pdf> on 6 January 2020.
[36] Karl T. L, 'The paradox of plenty. Oil booms and petro states', University of California Press, 1997.
[37] Gordon G, Paterson J and Usenmez E (eds), 'Oil and gas law- current practice and emerging trends', 2 ed, Dundee University Press, 2011, 206-207.
[38] *Rio Declaration on Environment and Development* (1992).
[39] United Nations Conference on Human Environment, Stockholm- Sweden 5 and 6 June, 1972.
[40] Boyle A, Freestone D, 'International Law and Sustainable Development: Past achievements and future challenges', OUP, 1999, 4.
[41] Protocol on Preparedness, Response, and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol, IMO, London) adopted 15 March 2000.

growth and development when the harnessing O&G resources on one hand and on the other, socio-economic crises.[42] Sophie Des Clers elucidates that Africa has 8% of the world's oil reserves and almost 50% of this is in Sub-Saharan Africa. The transformation attributed to O&G production on most African economies has manifestly been mixed with numerous instances of high environmental and social impacts and records of human rights violations.[43]

Advanced also in this thesis will be the case of human right to environment, which will be in the form of claims to decent, healthy, or viable environment, that is to a substantive environmental right which involves the promotion of certain levels of environmental equity. Boyle[44] argues that giving environmental quality comparable status to the other economic and social rights would create the recognition of the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights.

In assessing the development of environmental laws in Kenya, Migai[45] interrogates the Kenyan position before the enactment of EMCA which is the key legislation on matters environmental protection. The principles of sustainable development have found expression in the EMCA and they include: the principle of international cooperation, the principle of inter-generational equity and sustainable utilization, the polluter pays principle and the precautionary principle.[46] Migai further states that previous sanctions for environmental offences were lenient hence insufficient to deter and dissuade polluters. This argument by Migai was however the case before the enactment of Kenya's progressive 2010 constitution.[47]

Muigua acknowledges that the extractives industry has created and continues to create social, environmental, economic and cultural challenges.[48] Omedo states that it is unfortunate that despite progressive edicts of the CoK relating environmental conservation and protection, over 90% of extractive industry players operating in Kenya do not abide by existing environmental standards. The reasons provide for such non-compliance including but not limited to laxity in enforcement, negligence, weak monitoring, political interference in the sector and a pervasive culture due to corruption induced by an aura of invisibility. [49]

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[42] Ross, Michael L, 'Does oil hinder democracy?', *World Politics, 53*, 2001, 325-61.
[43] Des-Clers S, 'Mitigating the impacts of oil exploration and production on costal and wetland livelihoods in West and Central Africa' 2007, 7.
[44] Boyle F, "Social Justice and the Judicial Enforcement of Environmental Rights and Duties", 1996
[45] Migai A, 'Land, the environment and the Courts in Kenya', The environment and the land reports, 2006, 19.
[46] Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012); Section 18, *Environment and Land Court Act* (No. 19 of 2011).
[47] Migai A, 'Land, the environment and the courts in Kenya' The environment and the land reports, 2006, 19.
[48] Muigua K.: Reflection on managing natural resources. 2-3.
[49] Omedo G, Muigua K and Mulwa R, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle', 16/1 Law, Environment and Development Journal (2020), p. 1,- <http://www.lead-journal.org/content/al601.pdf.> on 8 August, 2020.

Omedo further opines that a strong environmental regulator (in the Kenyan context being NEMA), operating within a clear regulatory regime is avital indicator of sufficient governmental authority that is required for a well-functioning PPP regime. A strong regulator according to him ensures that adequate coherent legal framework is in place for the protection of the environment.[50]

A review of the jurisprudence in Kenya emanating from one of the most recent environmental landmark judicial decisions is that of *KM & 9 others v Attorney General & 7 others[2020] eKLR,*[51] where the Petitioners sought for a the Environment and Land Court's adjudication in a matter in which they being residents of Owino-Uhuru village within Changamwe in Mombasa County due to the Respondent's action of setting up a lead acid battery recycling factory which produced toxic waste. That the waste seeped into the village causing the Petitioners and area residents various illnesses and ailments as a direct consequence of lead poisoning with more than 20 deaths attributed to it. The Honourable Court in accordance with the PPP embedded in the Rio Declaration ruled that the Respondent were guilty of both environmental and human right violation and proceed to award 12 million USD as the total amount of compensation due to the over 3,000 residents suffering the harmful effects of the led refinery which affected them, the soil air and water for years.[52]

The Indian Supreme Court in the case of *Narmada Bachao Andolan v. Union of India*,[53] held that: "…once an activity is hazardous or inherently dangerous, the person carrying on that activity is liable to make good the loss caused by that activity to any other person." In another landmark case of *Indian Council for Enviro-Legal Action v. Union of India,*[54] the Court held that: "…redemption of the damaged environment is a part of the process of sustainable development and as such polluter is liable to pay the cost of the individual sufferers as well as the cost of reversing the damaged ecology." This essentially means, that where O&G operations cause environmental pollution, the IOC shall be responsible for reparations, clean-up and shall be liable for all expenses accruing in connection with such pollution whether it arose out of sheer negligence, recklessness or wilful misconduct.

Eckersley's position instantiates that environmental governance is not entirely *laisse-faire* and that market-based instruments in the form of waste levies, green taxes, carbon trading schemes *et cetera* are increasingly being adopted by governments to obtain sound environmental outcomes. Eckersley thus stated: "… in lieu of imposing rules of conduct and performance standards and applying criminal sanctions to environmental offenders, environmental policy makers are increasingly looking in the

[50] Omedo G, Muigua K and Mulwa R 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle'.
[51] *KM & 9 others v Attorney General & 7 others*[2020] eKLR, , http://kenyalaw.org/caselaw/cases/view/198619/>, on 6 November, 2020.
[52] *KM & 9 others v Attorney General & 7 others*[2020].
[53] Supreme Court of India, Writ petition (civil) No.319 of 1994 Judgement of 18 October 2000, AIR 2000 SC 3751.
[54] AIR 1 986 SC 1 086.

direction of bureaucratic streamlining, economic incentive, market-based instruments, tradable permits and the privatization of environmental assets and wastes."[55]

Kneese and Dales being among the first people to discuss the PPP as a way and means of reducing pollution in the 1960s (especially economic ones), proposed tradeable discharge permits which were considered the best economic tools to reduce pollution.[56] The specifics the PPP were however originally enunciated in 1972 by the Organization for Economic Cooperation and Development (OECD) to deter national public authorities from subsidizing pollution control costs of private firms. Enterprises were instead required to internalise the externalities of the atmosphere by bearing the costs of regulating their emissions to the degree required by law.

However, it is worth noting that early formulations of the PPP did not expressly obligate the polluter to internalise all environmental costs, only those it deemed necessary "to ensure that the environment is in an acceptable state."[57] In recent times, formulations of the PPP have been on the move towards the full internalisation of the costs arising out of polluting activities.[58]

Preston describes the rationale underlying the internalisation of externalities relating to environmental costs to be that the real environmental value and its components, are reflected in the costs of its usage, thus fostering sustainable usage and management and averting wasteful exploitation.[59] The internalisation of the external costs effectuated when the 'polluter' bears the cost-responsibility occasioned by its pollution. Internalisation of costs is rendered incomplete if part of the pollution costs is shifted to the community i.e. the general public, through taxes and financing of clean up and restoration from public coffers.[60]

Many governments, non-governmental bodies, businesses are now coming to the realisation that environmental safeguards and economic growth need not always be in conflict. Since the publication of the Brundtland Report in 1987,[61] businesses and scholars grappled with the question of the why environmental concerns should be incorporated by corporations in their strategic plans. However, as

[55] Eckersley R, 'Markets, the State and the Environment: Towards Integration', Robin Eckersley, Melbourne, Macmillan, 1995.
[56] Kneese A, and Dales J, 'Pollution, property and prices', University of Toronto Press, 1968, 93-97.
[57] Annex A (a)(4), Organisation for Economic Co-operation and Development (OECD), OECD Council Recommendation on Guiding Principles concerning International Aspects of Environmental Policies C(72) 128 (final), 1972.
[58] OECD Council Recommendation on the Application of the Polluter-pays Principle to Accidental Pollution C(89) 88 (final), 1989; OECD Council Recommendation on the Uses of Economic Instruments in Environmental Policy C (90) 177 (final), 1991; De Sadeleer.
[59] Preston B, 'The Role of the judiciary in promoting sustainable development: The Experience of Asia and the Pacific Asia Pacific,' *Journal of Environmental Law 109*, 2005, 193-194.
[60] De Sadeleer N, 'Environmental principles: From political slogans to legal principles', Oxford University Press, London, 2002, 1.
[61] Brundtland, G, Report of the World Commission on Environment and Development*: Our Common Future,* United Nations General Assembly document A/42/427, 1987.

it stands today, it is imperative that companies are obliged to the responsibility to do no harm to the environment.[62]

Despite existence of an effective legal system, one of the challenges is the implementation of these systems in line with PPP's objectives. Omedo acknowledges that effective implementation of the PPP in Kenya's rubric of environmental and mining laws will rely on consistent, clear and unambiguous legal provisions entrenched in law.[63]

1.7 Research Methodology

This research is based on the comparative legal analysis, which fosterers a better understanding of the conceptual bases and legal principles behind the application of the PPP. In arriving at a conclusion, the study will evaluate the adequacy of existing legal propositions and doctrines for the application of the PPP so as to recommend reforms to the existing legal framework, where found wanting.

The content of the PPP is determined, as well as the goal of its establishment and the methods used by legislator to achieve this goal. The effectiveness of the principle is pegged on an integrated regulatory approach. It includes several elements: not only the obligation to compensate for the harm caused in full, but also to take all necessary measures to prevent the possibility of harm at all stages of the activity, including design, construction, *et cetera*.

The analysis of international legal regulation, as well as the regulatory legal acts of the two comparative jurisdictions shows that this principle is implemented in the legislation of many countries and an effective mechanism for its application is created in developed countries. Genuine implementation of this principle lets create balance between economic and environmental relations and protect the vital interests of human and society.

The comparative analysis of the environmental regulatory approaches in the O&G sector for both USA and Nigeria, is for the purpose of critically examining the strengths and weaknesses in both jurisdictions and prescribe recommendations that Kenyan O&G sector regulators and actors can implement. USA as earlier stated is a choice for this comparative legal research because it has recorded some level of success in addressing O&G related pollution while Nigeria has been largely unsuccessful in curbing pollution through the instrumentality of regulations.

Primary and secondary sources will be used in this research;

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[62] Mazurkiewicz P, 'Corporate self-regulations and multi-stakeholder dialogue,' *Handbook of Voluntary Environmental Agreement*, Springer, Dordrecht, 2005.

[63] Omedo G, Muigua K and Mulwa R, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle', 16/1 Law, Environment and Development Journal (2020), p. 1,- <http://www.lead-journal.org/content/al601.pdf.> on 8 Augsut, 2020.

a) The primary sources will include: - Legislative Acts and other legal instruments of international and national laws.
b) The secondary sources will include: - Case laws, textbooks, journal articles, law reports, historical records, administrative regulations, newspapers/magazines and other internet-based sources.

1.8 Conceptual Framework

This thesis is founded on the for an equitable and effective regime of state responsibility for environmental harm. However, the PPP specifically aims at ensuring that the costs of dealing with pollution are borne not by public authorities but by the polluter. Since the goal of the 'polluter pays' is ensuring that the polluter pays the costs of pollution prevention and control, an internalisation of the external cost of pollution is required to make this possible.[64]Thus, the principle is primarily concerned with making the polluter the first to pay for the pollution caused by its activities rather than being focused on compensation for the damage which is a direct consequence of O&G pollution.

It is most appropriate to situate certain basic concepts in this study in their correct perspectives in order to have a common conceptual parameter from where we can examine the issues under the PPP consideration. Thus, concepts such as liability, punitive damages and the nexus between international, regional and national environmental laws among others are reviewed within the context of epistemological focus.

a. Liability has become a primary rule of international environmental law obligating a recalcitrant operator to pay compensation or make amends for the resulting pollution damage. Once this primary rule is breached, regardless of the origin of the rule whether it is derived from a Treaty or is based on a norm of customary international law, the State is responsible for secondary obligations to ensure her citizens enjoy a clean and healthy environment.

   Civil liability for environmental damage is increasingly becoming a recurrent issue in the O&G industry. For instance, the dispute between the infamous Texaco (now Chevron Corporation) and the inhabitants of the Ecuadorian Amazon regarding the Corporation's liability for oil

[64] 'OECD note on Environmental Principles and Concepts OCDE/GE (95)', 124-<www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD (95)124&docLanguage+En.> Barde J, 'An Examination of the polluter-pays principle based on case studies', in The Polluter Pays Principle: Definition , Analysis & Implementation, Paris: OECD, 1975, 93.

pollution stands out as a prime example of why most contracts in the petroleum industry express provisions on liability and indemnity.[65]

As will be discussed in this thesis, the PPP is and extension of the following liability principles: fault liability, strict liability and absolute liability. It is however important that these liability principles establish a causal link between the activity and the damage resulting to the toxic tort.

The function of liability may be said to be of a dual character, but to be more precise the primary rule of liability, as derived from the maxim: '*sic utere tuo ut alienum non laedas*'[66] which creates a secondary obligation for states to restore or restitution and to make reparation. These are measures *ex nunc* and *ex tunc* under the law of State responsibility which is engaged as soon as a primary rule of international obligation is breached.[67] The final consequences of secondary rules of State responsibility may also encompass the adoption of measures *ex ante* or preventive measures, now perfectly consistent with the precautionary principles advocated for all conducts of States in environmental law.

b. The concept of punitive damages is not favoured under international environmental law; although preventive measures could be regarded as a form of sanction, but the purpose is to prevent harm and not to punish the polluter. This does not preclude the polluting IOC from viewing the obligation to take measures *ex ante* or precautionary measures as a penalty for past misconduct, wilful or inadvertent. It is important to distinguish punitive sanctions from preventive measures, and consequently also punitive damages from mandatory precautionary measures.[68]

Furthermore, it should likewise be observed that as good O&G industry practice begins to favor the concept of offenses against humanity as including offenses against the environment, equating environmental crime or international damage to the environment as a serious international crime or a grave crime against the law of nations, there is no reason why punitive damages should not be assessed. However, the purpose of punishing an environmental offender

[65] Yanza L, *UDAPT vs. Chevron-Texaco*: Las Voces de las Victimas (Nueva Loja, Ecuador: Union de Afectados y Afectadas por las Operaciones Petroleras de Texaco (UDAPT) y Fundaciôn Regional de Asesoria en Derechos Humanos (INREDF1), 2014.
[66] Common law maxim meaning that one should use his own property in such a manner as not to injure that of another. 1 Bl.Comm. 306. *Chapman v. Barnett, 131 Ind.App. 30, 169 N.E.2d 212,* 214
[67] Vaughan, Scott, 1994, Trade and Environment: Some North-South Considerations, Cor-nell Law Journal 27, 591–606
[68] Zagata M, 'Command and Control vs Economic Incentives in Environmental Protection', 1995-1996, *2 Alb L Envtl Outlook*, 10- <http://heinonline.org> on 16 January 2020.

is not the same as awarding excessive and exorbitant compensation to the victim of environmental damage as a punishment as may be done in some domestic legal systems.

For instance, punitive damages in cases, such as the Bhopal Incident, could be awarded by a jury if the trial took place in the United States, and if the victims were American, and the negligent corporation foreign, which could be as high as US $ 45 million per head, whereas in reality the damages paid by the wrong-doing corporation in that case were nowhere near compensatory, let alone exemplary.[69] In other words, punitive sanctions in international environmental law or punitive damages for that matter would be intended to punish or penalize the offender or wrong-doer, and would take the form of 'fines' collected by the international community or as a contribution to the common fund to pay compensation to unpaid victims and never to overpay the privileged few who happen to incur environmental damage or suffering.

Thus, in *Exxon Valdez Case*, the fines collected were not only to punish the negligent misconduct but to contribute to the expenses of cleaning up the oil pollution caused by negligent navigation.[70] Fines and punitive damages are not for the individual victims or sufferers of the injurious consequences of an activity under the control or within the jurisdiction of the State, hence its liability for compensation and answerability for future recurrences of the harmful effects. Fines are not advanced payment for future damage or suffering but should contribute to preventive or pre-emptive measures.

c. The new links of international, regional and national environmental laws with intergenerational equity, sustainable development, environmental security and human rights are clearly indicative of the current perspectives on the question of responsibility and liability.[71] The links are logical and inevitable when it comes to the application of the PPP. They have always existed although unnoticed until recently when polluters have had to pay for pollution costs. More linkages will emerge as new perspectives on the fundamental question of responsibility and liability which must at all times remain evolutionary, as long as law continues to evolve for the O&G sector.

[69] Kalelkar, A, 'Investigation of Large-Magnitude Incidents: Bhopal as a case study', *Report presented at The Institution of Chemical Engineers Conference on Preventing Major Chemical Accidents*, 1988.
[70] Peterson C, 'Long-term ecosystem response to the Exxon Valdes oil spill', *Science 302*, 2082-2086.
[71] Cane P, 'The Scope and Justification for Exemplary Damages: The Camelford Case', Gibbons and others v South West Water Services Ltd, *Journal of Environmental Law*, Volume 5, Issue 1, 1993,149–172-<https://doi.org/10.1093/jel/5.1.149> on 2 February 2020.

1.9 Justification of the Study

As had been explained in the background, the oil and gas sector is relatively new in Kenya. Numerous ecological challenges are bound to arise hence the need to craft tailormade laws and regulations to curb and /or minimise environmental pollution and degradation. The regulatory angle incorporated in this thesis is in the context of general rules and specific actions to be enforced by specific agencies. A regulatory framework lays down stringent requirements to harness the efficiency of a system of governance and in this case, environmental governance.[72]

The PPP is by and large tied to the idea environmental regulation as a means of pollution prevention and in the event that pollution does occur, then the polluting entities are legally and financially responsible for the harmful consequences of their pollution.[73]

A polluter pays approach can range from "strong" to "weak" in terms of its application and scope. A weaker version of the polluter pays principle seeks only to ensure that polluters do not receive subsidies for adhering to pollution prevention and reduction measures[74] whereas the stronger version of the polluter pays principle is expanded to internalise all environmental costs.[75]

Therefore, there is the need to study the various regulations in order to establish clear liability frameworks and the scope of application to which the PPP pervades academic writing. It is important that the polluter pays principle appears not just as a principle in the preambles and purpose sections of various legislations but that clear rules and regulatory oversight and compliance need to be put in place to operationalize it.

Implementation and operationalization of PPP requires monitoring as to the efficacy of the approach and whether it meets regulatory standards and objectives. Evaluation and, as necessary, adjustment of the regulatory system is required to ensure environmental goals and outcomes are being achieved. In a polluter-pays system, it is essential to ensure that any required payments are sufficient to drive the desired behavioural change and that predetermined policy objectives are achieved.

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[72] Stavropoulos S, Wall R and Xu Y, 'Environmental regulations and industrial competitiveness: evidence from China' (2018) Applied Economics, 50(12), 1378–1394.

[73] Stefanie Sommers, The Brownfield Problem: Liability For Lenders, Owners, and Developers in Canada and the United States, 19 COLO. J. INT'L ENVTL. L. & POL'Y 259, 26667,277-91 (2008) (comparing the application of the polluter pays principle in the United States and Canada. Sommers also discusses Brownfield liability in Canada and the problems of enforcing Canada's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)).

[74] Edwin Woerdman, Alessandra Arcuri and Stefano Clo, Emissions Trading and the Polluter-Pays Principle: Do Polluters Pay under Grandfathering? (2007) University of Groningen Faculty of Law Research Paper Series No. 01/2007 at 11 [Woerdman, Arcuri & Clo].. See also Petra E. Lindhout and Berthy van den Broek, The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice (2014) 10:2 Utrecht L Rev 46 [Lindhout & van den Broek].

[75] Woerdman, Arcuri & Clo,

The importance of this research is to show through empirical evidence that if polluters in the O&G upstream sector are not held liable, E&P activities would result in pervasive environmental pollution and degradation as seen in the comparative study case of Nigeria.

1.10 Chapter Breakdown

This thesis has been divided into five chapters:

Chapter One being the introductory in nature lays the background into the nature of the upstream (O&G) activities and highlights the impacts of pollution associated therein and regulation as a means to an end, with respect to environmental safeguards. This Chapter also outlines the research problem, provides the justification for embarking on the research. It also reviews literature underlying development and scope of application of PPP and also explains the use of a comparative study as a research methodology. It also provides a justification as to the rationale of the research and reasons why the research is being conducted.

Chapter Two focuses on PPP as an environmental principle and discusses the history of the PPP, the essential terms relating to the polluter-pays principle (PPP) and its application in the upstream O&G sector. It also assesses the various regulatory provisions with respect to international and national environmental regulatory instruments propelling PPP.

Chapter Three examines the regulatory regime and the application of the PPP with respect to USA's and Nigeria's jurisdictions (comparative case study). This is aimed at evaluating the practical strengths and weaknesses of the PPP while juxtaposing enforcement mechanisms in both jurisdictions. This Chapter also aims at reviewing the statutory frameworks of both comparative jurisdictions.

Chapter Four critiques the workability of the PPP by examining the enforcement and implementation challenges by poking holes into Nigeria's regulatory inadequacies and lauding USA's regime. This serves as a basis for Kenya as an emerging O&G jurisdiction to draw valuable lessons.

Chapter Five, the concluding Chapter gives a synopsis and highlights the findings on the issues enunciated in the previous chapters. It advances recommendations for policy and legislative areas in light of the glaring adequacies and inadequacies of the regulatory frameworks in relation to the PPP. It, however does not intend to recommend that a developing country like Kenya should in a strict sense follow the application of the principle as seen in a developed country like the United States, as in reality it would be unstainable for the reason that countries are contextually different.

CHAPTER TWO:

THE POLLUTER-PAYS PRINCIPLE (PPP)

2.1 Introduction

As a general principle of international environmental law, member-states who are signatories of various environmental statutes are obliged to apply the PPP instrument in their municipal legislations. But it is expected as will be highlighted in some specific case scenarios, that PPP's intents will not be tenable unless they are adequately applied by confronting the challenges militating against its effective application/enforcement.

To better convey the in-depth substance of the PPP as an environmental protection principle, this Chapter sets the background into the understanding of the PPP and delves into the descriptive and regulatory application aspects of the principles and tries to relate it to the upstream O&G industry.

This chapter also analyses the place of the PPP within Kenya's robust but more specifically in light of the growing environmental challenges associated with the growing extractives industry portfolio in Kenya. It gives an analysis of Court decisions within the field of the PPP and based on the channelling of responsibility to the producer or previous holders in causation and negligence.

2.2 Genesis and development of the polluter-pays principle

The 'polluter-pays' as a fundamental principle of international environmental law was borne in the 1920s as an environmental management economic principle aimed at resolving the issue of improper allocation of costs emanating from environmental pollution. This was due to the fact that the disproportionate allocation of production costs arose from the environmental pollution remediation costs and were not regarded as an intrinsic part of the cost of production for the companies or individuals operating on the facility. The costs were chargeable to society (taxpayers) in general and not to polluters in particular, thus increasing the costs of production for other members of society that did not actually cause pollution.[76]

A good scenario is that of a laundry-man who was unable to wash and hang his clothes outside without the smoke-saturated air in England staining them black. At the time, the clouds of smoke emanated from the coal-powered factory chimneys and industrial parks. In order for him to keep his business running, the laundry-man had to mitigate the additional costs by finding drying alternative that would obviate the blackening of clothes. The ripple effect was that the costs associated with finding and using this new drying technique would proliferate his production costs and probably dwindle his profits. The

[76] De Sadeleer N, 'Environmental principles: From political slogans to legal principles', London, Oxford University Press, 2002, 1-5.

improper allocation of these costs ultimately then implied that the polluter ought to have paid for the additional costs incurred by the laundry-man but instead, his customers stood to pay for the additional costs. Such improper cost-allocation system negatively affected commerce and investment. The PPP is a proponent of the internalisation of such external costs by which the polluter (in this case, the factory) incorporates both public and private costs in order to achieve a genuine and reasonable cost allocation mechanisms for products and services.[77]

The Encyclopaedia of Sustainable Development describes PPP as one of the core principles of sustainable development.[78] It recognizes the polluter's obligation to pay for the environmental damage created, and that for this liability principle to be applicable, it should satisfy the following conditions:

(i) Polluters must be identifiable;

(ii) Damage must be quantifiable; and

(iii)There must be a nexus between the polluter and the damage.

Mann posits that the exact legally accepted definition of PPP remains elusive.[79] However, most legal academic literatures often attribute the conception of the PPP to the 1972 Recommendation of the Council for Guidelines on International Economic Aspects for Environmental Policies (OECD). This is owing to the fact that it was among the first recognised international agreements to explicitly contribute to the 'polluters-pay' concept, by promoting the idea of distribution of emission-mitigation costs and control measures to promote the rational use of natural resources and to eliminate inequalities of international trade and investment.[80] It asserted it as:

> *"The principle to be used for pollution costs, 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 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 costs of goods and services which cause pollution in*

[77] Munir M, 'History and evolution of the polluter pays principle: How an economic idea became a legal principle', 2013- <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322485> on 13 January 2020.
[78] 'Environmental Movement, Encyclopedia of Sustainable Development',– <http://www.ace.mmu.ac.uk/esd/Principles/Polluter-Pays.html.> on 13 January 2020.
[79] Mann I and Hare F, 'A comparative study of the polluter pays principle and its international normative effect on pollutive processes', 2009.
[80] Organisation for Economic Co-operation and Development (OECD), *Council Recommendation C* (72) 128,1972, 14 ILM 236, 1975.

production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment".[81]

Margaret Russo Grossman goes further ahead to describe how the PPP has shifted meanings over time:[82]

> *"… the [polluter pays principle] is no longer solely an economic principle designed to avoid distortion of competition, but has assumed some status as a legal principle. It applied at first to preventative measures by polluters, then was extended to the cost of government administrative actions occasioned by pollution. Its goals have moved from a partial internalization of the costs of pollution (under the OECD's 1970s references to keeping the environment "in an acceptable state") toward full internalization of those costs. Polluters can be expected to pay for measures to control and prevent pollution and, in addition, to restore damage that occurred despite application of those measures. Different interpretations of the principle emphasize these approaches."*

Under the aegis of the PPP, the law has continuously obligated the polluting party or those who degrade the environment to pay punitive damages for the harm inflicted on the natural environment.[83] The idea of managing the costs of international environmental protection was established as a possible solution. The conclusion was that countries must make deliberate efforts to adequately allocate pollution prevention costs and instigate control measures to promote the rational use of scarce natural resources as means of preventing international trade and investment distortions.[84]

Sadeleer points out that the PPP essentially reflects the "curative" and "preventive" model of thought.[85] The curative paradigm compares, according to him, with earth as an ocean of endless resources. He asserts that natural resources are vast and therefore people should pay for overexploitation and abuse of the environment. He further claims that everything is capable of indemnification, restoration compensation and being cured. In Sadeleer's opinion, as a wound inflicted on the environment cannot

[81] Organisation for Economic Co-operation and Development (OECD), *Council Recommendation C* (72) 128 (1972).
[82] Grossman M. R, 'Chapter 1: The Polluter Pays Principle and Agriculture: An Introduction' in Margaret Rosso Grossman (ed.), Agriculture and the Polluter Pays Principle (London, UK: 2009, British Institute of International and Comparative Law) at 1 [Margaret Russo Grossman]. See also Aruna B. Venkat, "Polluter Pays" Principle: A Policy Principle, -< http://ssrn.com/abstract=2458284> on 8 August 2020.
[83] 'Environmental law and multilateral agreements',-
<http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Core/Environmental_Law_Definitions_rev2.pdf > on 23 January 2020.
[84] Doniga A, 'The polluter pays principle' *Law Annals from Titu Maiorescu University*, 2016, 79-91.
[85] De Sadeleer N, 'Environmental principles: From political slogans to legal principles', Oxford University Press, London, 2002, 1.

cure itself, the inflictor's help is required to help cure it (i.e. the polluter is obliged to finance the restoration of the environment he damaged).[86]

On the other hand, the preventive normative paradigm suggests that the PPP should not be seen as a policy that seeks to promotes arbitrary emissions simply because polluters/emitters are able to pay the emission costs. Alternatively, the idea should be seen as instituting an emissions management strategy that allows polluters to reduce their emission and not to be content with pollution costs.[87] The concept of environmental restoration is, however, individualistic, as the polluter, i.e. the party responsible for the damage (emitter/contaminator), is the object of blame.[88]

This principle was later reiterated in Principle 16 of the Rio Declaration on Environment and Development in 1992:

> *"National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, 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".*[89]

A fair amount of emphasis has been put on the fact that, if businesses are not held accountable for these expenses, or if host states subsidize costs for polluting industries or otherwise bear the costs of preventive measures, then foreign trade and investment could be skewed.

In its seminal case, the International Court of Justice (ICJ) in the *Case Concerning the Continental Shelf*[90] between Libya and Malta in its decision regarding to when a particular rule/provision has acquired the status of customary international law, held that the said provision should have state practice (it should be consistent to the general state behaviour as regards the provision and *opinio juris* i.e. a subjective duty that it is bound to that provision). The Court further stated that on to say those multilateral agreements had an important role to play in the establishment and implementation of laws for universal customary law.[91]

Over the years, the PPP has developed in O&G contractual provisions and directives concerning cost recovery, liability or the obligation to take compensatory measures in cases of environmental damage, hence internalising the externality. The fundamental principle that a State should ensure prompt, adequate and effective compensation for activities posing environmental hazards can be

[86] De Sadeleer N, 'Environmental principles', 2.
[87] De Sadeleer N, 'Environmental principles', 3.
[88] De Sadeleer N, 'Environmental principles', 4.
[89] *Rio Declaration on Environment and Development* (1992).
[90] *Continental Shelf (Libya V Mali)*, Judgment 1985, ICJ Reports 1985, 13, 27.
[91] *Continental Shelf (Libya V Mali)*, Judgment 1985, ICJ Reports 1985, 13, 27.

traced back to as early as the United States-Canada *Trail Smelter Arbitration (United Sates v. Canada) case* of 1905.[92]

In the *Trail Smelter Arbitration case*, it was held by the Tribunal that it was the risibility of the concerned State to protect other states against harmful acts by individuals from within its jurisdiction at all times. It was further stated that no state has the right to permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or individuals therein as stipulated under US (Plaintiff) laws as well as the principles of international law.[93]

The PPP was also the subject in the Case concerning *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997*.[94]In which the ICJ concluded that both Parties had committed internationally wrong acts which consequently gave rise to the damage sustained by the Parties; both Hungary and Slovakia were obliged to pay compensation and to obtain compensation.

Since then, several treaties, important decisions, comprehensive national laws and practices, giving significant importance to compensation claims for transboundary pollution and resultant harm with some commentators terming this as a customary law obligation.[95]

The PPP is arguably seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.[96] The aim is to avoid wasting natural resources and to put an end to the cost-free use of the environment as a receptacle for pollution.[97]

In order to fully grasp the essence of this 'principle', the following four sets of questions need to be answered: What constitutes pollution? Who is/are polluter(s)? How much is/are polluter(s) required to pay? To whom is the payment made?

2.3 Pollution

Pollution is defined by the Stockholm Declaration of 1972 as:

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[92] *Trail Smelter Arbitration (United States v Canada),* 3 RIAA, 1905.
[93] Kariuki M, 'Naturing our environment for sustainable development', Nairobi, 2016, 24.
[94] International Court of Justice, Communiqué (unofficial) No. 97/10 bis of 25 September 1997 and Judgement. Both available from the ICJ Internet Home Page *(http://www.icj-cij.org/docket/files/92/7375.pdf* [Accessed on 27/08/2020]
[95] Birnie C, Sands P, Peel J, Fabra A, and MacKenzie R, 'Principles of international environmental law', 2ed, 2003, 231.
[96] Vícha, O, The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law, *Czech Yearbook of Public & Private International Law*, Vol. 2, 2011, pp. 57-67. Available at: *files.cyil.eu/20000004387d4c88ce6/%C4%8CSMP_2011_05_vicha.pdf.* [Accessed on 27/08/2020'
[97] Vícha, O, The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law.

"…the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment."[98]

Kenya's Petroleum Act of 2019 and Energy Act of 2019 both describe pollution as being:

"…any direct or indirect alteration of the a physical, thermal, chemical, biological or radioactive properties of any part of the environment by discharging, emitting or depositing wastes or emitting noise so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare or to animals, birds, wildlife, fish or aquatic life, land, property and water sources or to plants or to cause a contravention of any condition, limitation or restriction which is subject to a license under this Act."

2.4 The Polluter

The OECD defines a polluter as one whose operations has occasioned chronic pollution.[99] At the level of the community, the polluter is the person who directly or indirectly causes the environmental deterioration, or catalyses its deplorability.[100] For pollution from an industrial plant, the polluter can range from the plant operator to the person responsible for installation operations and may be extended to the person authorizing the operation of an industrial plant.[101]

In a strict sense however, the polluter is an operator who having already done some damage to a certain environment can be held accountable by bearing the brunt of his destructive actions. Directive 2004/35/CE, describes the operator as:

"any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity".[102]

[98] United Nations Conference on Human Environment, Stockholm- Sweden 5 and 6 June, 1972.
[99] Organisation for Economic Co-operation and Development (OECD), 1972.
[100] 'The polluter-pays principle' Organisation for Economic Co-operation and Development (OECD), *analyses and recommendation.*
[101] De Sadeleer N, 'Environmental Principles', 5.
[102] 'Directive 2004/35/Ce of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage',- <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:en:PDF> on 13 January 2020.

Kenya's EMCA, describes a polluter as being:

> *"any person who discharges any dangerous materials, substances, oil, oil mixtures into land, water, air, or aquatic environment..."*[103]

2.5 What Does a Polluter Pay?

The phrase 'polluter-pays' postulates the erroneous impression that the said polluter bears the costs of externalities. On the contrary, all he does is to combine the externalities with his private expenses, but he doesn't account for them. As a norm, he transfers the costs on to the customers who end up buying his goods. Munir emphasizes that incentives must be made to encourage polluters to internalise external costs in order to reflect the full cost of production on the price of the goods paid for by the consumer for in the final analysis.[104] But before the user can pay for them, the polluter must first internalise them and, in this sense, it is said that the polluter pays for emissions.

Therefore, this internalisation of external pollution costs are completed when the polluter bears the ultimate responsibility for the costs brought about by its environmentally deleterious activities. The costs of internalisation are considered incomplete when part of the costs arising out of pollution is shifted to the community, i.e. to the public who finance environmental clean-ups and restoration by paying taxes.[105] Kettlewell emphasises on the need governmental intervention for the internalisation of costs associated with pollution in order to avoid passing the said costs to the consumer, thus circumventing the spirit of the PPP.[106] This intervention is actuated through laws or taxes schemes that compel polluters to bear liability by paying for pollution prevention and control costs.[107]

PPP however does not mean that the polluter is liable to pay for the abatement costs of every bit of pollution associated with his product. Although this is desirable, it is not feasible for several reasons; First, there is no possibility of an absolute abatement of pollution. Pollution is part of a society and cannot be entirely eradicated. It is likened to crime which no society wants to expunge but instead opting to downscale it. Secondly, any attempt to completely eliminate pollution has negative consequences for national economic productivity. This would entail more costs that could ultimately push the cost of production to exorbitant levels, such that trade and investment, both locally and internationally, would be adversely affected[108]. Emphasising this point, Munir noted that: "economic

[103] Section 142(1), *Environmental Management and Co-ordination Act* (Act No.8 of 1999).
[104] Munir M, 'History and evolution of the polluter pays principle: How an economic idea became a legal principle', 2013- < https://papers.ssrn.com/sol3/papers.cfm?abstractid=2322485> on January 13, 2020.
[105] De Sadeleer N, 'Environmental principles', 2-5.
[106] Kettlewell U, 'The answer to global pollution? A critical examination of the problems and potential of the polluter pays principle', *3 Colombia journals of international environmental law and policy*, 1992, 431- 435.
[107] Kettlewell U, 'The answer to global pollution?'.
[108] Kettlewell U, 'The answer to global pollution?'.

literature, however, does not accept the idea of 'pollution elimination' or 'zero pollution'. He puts the situation cleverly by stating that 'zero pollution' means zero economic activity.[109]

Cordato argues that, in order to determine how much the polluter ought to pay and to whom the payment should be made to, the principle should be viewed not only as one requiring payment of the costs of control and prevention, but also as one requiring the inclusion of the costs of damage suffered by others and attributable to the pollution. He further claims that: "A correct interpretation of the PPP would describe pollution as any by-product of a process of production or consumption that damages or otherwise infringes others ' property rights.[110] The polluter would be the person, company or other organization that generates that by-product from its activities. And ultimately, payment would equal the damages and be made to the injured person or persons."[111]

Clearly, the above definition runs counter to the purpose of the OECD as at the inception of this principle, the OECD's goal was to ensure that the prices of commodities were a true reflection of the actual production costs, and that no consideration was given to the payment of damages to the environment and individuals as a result of the disruptive economic activities.

Although the PPP speaks to our sense of fairness and equality due to its underlying rationale, it is problems laden more so when it comes to its application. First, the principle seems to impose a tortious liability on polluters to pay for pollution-related costs while at the same time encouraging pollution to continue by giving polluters the leeway to continue polluting by dint that they pay the said pollution costs.[112] Second, in fact, when charges are brought against the real polluter, often than not, they are no longer present.

This reality also plays out among OECD members where, despite the full acceptance of the PPP, the external costs are still not fully internalised in the organization's member states. For example, the US relies heavily on imported oil for its energy use, but the cost of gas in the US is far much cheaper than in some countries that it imports crude oil from, such as Nigeria. This begs the question, that if all external costs are not to be internalised, what then does the PPP really stand for in relation to the laws compelling the polluter to pay?

In response to this question, the OECD explicitly stated that the objects of the PPP were: "(a) to encourage the rational use of environmental resources; and (b) to avoid distortions in international

[109] Munir, M, 'History and evolution of the polluter pays principle: How an economic idea became a legal principle.'
[110] Cordato R, 'Polluter-Pays Principle: *A proper guide to environmental policy*', - <http://iret.org/pub/SCRE-6.PDF> on 13 January, 2020.
[111] De Sadeleer, 'Environmental principles: From political slogans to legal principles', Oxford University Press, London, 2002, 1.
[112] Kettlewell U, 'The answer to global pollution?'.

trade and investment."[113] Therefore, PPP does not only seek to protect the environment but to also ensures that trade and international investment interests are not compromised. Commercial interests and international investments would stand jeopardized if the costs associated with pollution eradication would make foreign investors wary and local producers unable to export. Ultimately, what a polluter pays must be balanced between these two foregoing interests. Externalities internalised by a polluter must not be such that production costs are too high to be disadvantageous in terms of trade and international investment. At the same time, the societal costs not internalised by the polluter need not be geared towards driving the cost of other economic activities so high to the extent of disadvantaging trade and foreign investments. These findings are very much in keeping with the OECD declaration that the PPP is merely a cost allocation efficiency principle and does not incorporate reduction of pollution to an optimal level of any kind, but does not rule it out either.[114]

The interests above are a clear calculus of what the polluter's costs, which are economically feasible for a nation at a given time, and not exactly what is needed to eliminate emissions. In other words, what the polluter pays is not a hard and fast figure for the amount or measure fixed It is complex, evolving and shifting, based on the prevailing economic conditions of society from time to time. Munir thus concluded that the polluter pays the governments for maintaining an acceptable environmental state.[115] And what is an acceptable state is not necessarily environmental sustainability, but also political and financial viability.[116]

In the long run, what a polluter pays is what the government deems that a polluter must pay or comply with in order to protect trade and investment with due regards to the country's policy requirements relating to environmental safeguards.

Polluters' payment mechanisms under the PPP include defraying public administrative costs to enforce anti-pollution policies by paying the fees attributed to that purpose. Potential polluters bear the cost of public administration measures to prevent and control accidental pollution. PPP is also actualized by polluters who bear the residual harm costs emanating from activities instigating residual pollution, and by them bearing trans-boundary pollution costs.[117]

2.6 Application of the Polluter-Pays Principle to the Oil and Gas Sector

[113] Organisation for Economic Co-operation and Development (OECD),1972, C (72), 128.
[114] Organisation for Economic Co-operation and Development (OECD), *Note on the implementation of the PPP by the environment committee*, OCDE/GD (92)81, 25. Munir M, 'History and evolution of the polluter pays principle'.
[115] Munir, M, 'History and evolution of the polluter pays principle: How an economic idea became a legal principle'.
[116] Dommen E (ed*),* 'Fair principles for sustainable development: Implications of the polluter pays and the user pays principles for developing countries', Cambridge, 1993, 67.
[117] Munir M, 'History and evolution of the polluter-pays principle'.

When contamination has materialized, the concept is prompted *ex post* but has an *ex-ante* effect because it provides an opportunity to prevent or otherwise remedy environmental pollution. The rationale is that potential polluters will implement measures to control pollution so as not to be responsible for pollution costs.[118] The basic tenet of the principle is that potential polluters should go 'beyond the scope prescribed by law',[119] and implement the best available pollution control techniques to avoid liabilities. As a consequence, the State will only interfere if intervention has failed. In a nutshell, a legal liability for environmental damage is applied in order to deter polluting activities.[120]

The environmental liability regime resembles traditional civil (tort) liability, but it addresses environmental damage instead of dealing with private losses.[121] Whereas traditionally, losses attributed to pollution were only recoverable by applying civil law, it was unfortunate that when the only party affected was the ecosystem, it often occurred that no one stood up to file a claim; therefore, the polluter could not be held culpable. In response, the PPP establishes a right to a clean environment, individually and collectively. Since O&G operation activities often involve various parties: licensee, operator, contractor, and subcontractor, there exists a 'trusteeship system'.[122] The licensee(state) acts as the trustee, and acts as a holder of the collective right to a clean and healthy environment for its beneficiaries. Consequently, 'regardless of the legal standing [of a site], the public authorities [can] lodge a suit against the operator who has caused significant damages.'[123]

However, if we consider the problem from a broader pedagogical perspective, the operator taunted to have actually 'polluted' is absolved from being the only person to shoulder the responsibility of pollution costs; this category also includes operators whose activities pose a risk to the environment, even though their respective companies are yet to cause an actual disaster.[124] Owing to the environmentally deleterious nature of its activities, the cost of effective preventive action to mitigate the risk will be borne by these individuals. In other words, the PPP places a duty on the polluter to

[118] Blanca-Mamutse B, 'Improving the treatment of environmental claims in insolvency', *5 JBL*, 2013, 488.
[119] Mertikopoulou V, 'Environmental liability and economic analysis: The paradigm of directive 2004/35/CE' 60 RHDI 199, 2007, 201.
[120] Monti A, 'Environmental risks and insurance a comparative analysis of the role of insurance in the management of environment-related risks' *6 OECD Publications Service 1*, 2003, 27.
[121] Reid C, Scottish planning and environmental law 2009 legislative comment-environmental liability (Scotland) regulations 2009, 7 JPL 849, 2009, 853.
[122] Reid C, Scottish planning and environmental law 2009 legislative comment-environmental liability (Scotland) regulations 2009.
[123] Reid C, Scottish planning and environmental law 2009 legislative comment-environmental liability (Scotland) regulations 2009.
[124] Reid C, Scottish planning and environmental law 2009 legislative comment-environmental liability (Scotland) regulations 2009.

avoid pollution and to cover the clean-up costs in the event of pollution. However, the principle's implementation requires that the polluter sets aside sufficient funds to fulfil these obligations.[125]

Recently, a valid argument has been put forward for the incorporation of the users themselves in the category of people who can be regarded as emission cost bearers. As a result of the internalisation of production costs, the manufacturers' preventive measures expenses are included in the final product's market price, thus ultimately being borne by consumers who procure that product or service.[126]

Another issue of paramountcy surrounding civil liability in the event of contamination is, in essence, to identify the person responsible for the damage, where often a hazardous activity consists of a wide range of individual producers, retailers, dealers, technicians and corporate managers, each of whom interferes with the production process at one stage and therefore each maintains its own responsibility.[127]

As a solution to the insurmountable task of finding the real culprit within this convoluted tangle of cause and effect, shared responsibility has been enforced by international as well as national legislation, which is an effective means of reducing the burden of proof in the case of a lawsuit, and also provides full restitution to the plaintiffs in a timely manner for the losses sustained.[128]

Joint liability stands unanimous acceptance as a method of ensuring reparations for environmental degradation. The Lugano Convention of 1993[129] is an example synthesising this principle within its Article 6:

> *"(1) If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.*
>
> *(2) If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.*

[125] Reid C, Scottish planning and environmental law 2009 legislative comment-environmental liability (Scotland) regulations 2009.
[126] Munir M, 'History and evolution of the polluter-pays principle'
[127] Munir M, 'History and evolution of the polluter-pays principle'
[128] Munir M, 'History and evolution of the polluter-pays principle'
[129] Although the Lugano Convention of 1993 never did enter into force due to a regrettable lack of signatures from the member states.

(3) If the damage resulting from a dangerous activity becomes known after all such dangerous activity in the installation or on the site has ceased, the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator...."

The Convention further provides that:

"If the person who suffered the damage or a person for whom he is responsible under internal law, has, by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances"[130]

2.7 Kenya's Obligation Under International and Regional Environmental Regulation

Regulation is made up of international/regional and national/domestic laws. The international/regional treaties which are often regarded to as 'soft laws' are intended to serve as guidelines in the drafting of national/domestic legislations and regulations to safeguard national territories from pollution.[131]

As earlier discussed, the last decade saw some considerable developments of O&G activities in Kenya hence creating obligations under some of these relevant regulations relating to pollution issues that are likely to arise. Kenya is party to several international and regional environmental agreements. However, for an international treaty to have the force of law, in addition to signature, ratification and accession, the treaty/convention has to be domesticated. Domestication in this case is the process of making an international treaty part of Kenya's national laws. The provisions on domestication of treaty or convention in Kenya are set out in Articles 2(5) and 2 (6) Constitution of Kenya, 2010 and which affirm the position of international law as part of Kenyan law.

2.7.1 International/Regional Regulations

In 1992, during the United Nations Conference on Environment and Development (UNCED) held at Rio de Janeiro, Kenya adopted Agenda 21, commonly known as the *Rio Declaration*[132] which endorsed worldwide alternative and practical solutions for the ever-pressing environmental and developmental problems. Kenya has since signed most of the international conventions, treaties and

[130] 'Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment - Explanatory Report - [1993] COETSER 2 (21 June 1993)',- <http://www.worldlii.org/int/other/COETSER/1993/2.html> on 13 January 2020.
[131] Sakyi A, Efavi J, Atta-Peters D and Asare R, '*Ghana's quest for oil and gas: Ecological risks and management frameworks,*' West African Journal of Applied Ecology, Vol 20(1), 2012, 66.
[132] UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

protocols arising from the first meeting in Rio, which are deemed to be on a par with the country's sustainable development plans.[133]

These international and regional regulatory instruments within international environmental law that are generally geared towards promoting environmental sustainability, and sustainable development. They include but are not limited to:

a) International Regulations:

i) *Ramsar convention (1973)*[134]- is an intergovernmental treaty whose mission is the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.[135] It is the overarching international legal instrument that should inform state parties' legal framework on wetlands conservation and use.

ii) *Agenda 21*[136] which was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depends for their well- being. Further, it sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.[137]The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

iii) The *Convention on Biological Diversity*[138] was negotiated with the objective of promoting the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.[139] The provisions of this Convention generally informs domestic laws on genetic resources conservation and benefit sharing framework on the accruing benefits in the member states,

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[133] 'Sustainable Development in Kenya: Stocktaking in the run up to Rio+20',- <https://sustainabledevelopment.un.org/content/documents/985kenya.pdf> on 16 January 2020.
[134] Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972).
[135] Ramsar Convention Secretariat, 2013. *The Ramsar Convention Manual: A guide to the Convention on Wetlands* (Ramsar, Iran, 1971), 6th ed. Ramsar Convention Secretariat, Gland, Switzerland.
[136] A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.
[137] Preamble of A/CONF.151/26, vol. II), United Nations Conference on Environment & Development.
[138] 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).
[139] Article 1 of the 1992 *Convention on Biodiversity*.

with the aim of ensuring that communities not only participate in conservation measures but also benefit from such resources.[140]

iv) The *Convention on the Non-Navigational Use of Watercourses*[141] applies to the use of international watercourse and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.[142] There is an obligation under the Convention for the Watercourse States to, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.[143] There is also a general obligation for the Watercourse States to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.[144]

From the foregoing, it is important to recognise the need for joint efforts in conserving and protecting international watercourses since any negative effects such as oil spillage for instance on the high seas would be transnational and would affect different states. Although the Convention does not have binding effect on the parties, it provides a good framework within which parties can collaborate in ensuring environmental health of the international watercourses for the sake of both present and future generations.

v) At the United Nations Sustainable Development Summit on 25th September 2015, world leaders adopted *the 2030 Agenda for Sustainable Development*, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.[145] The 2030 Agenda for Sustainable Development[146] is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms

[140] Article 6 of the *Convention on Biological Diversity*.
[141] *Convention on the Non-Navigational Use of Watercourses*, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).
[142] Article 1.1 of the *Convention on the Non-Navigational Use of Watercourses*.
[143] Article 7.1. of the *Convention on the Non-Navigational Use of Watercourses.*
[144] Article 8.1. of the *Convention on the Non-Navigational Use of Watercourses.*
[145] United Nations Development Programme, 'Sustainable Development Goals (SDGs),'- <*http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-developmentagenda.html*> on 24 October 2020.
[146] *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.[147]

The relevant international conventions discussed above with respect to environmental regulations place a general obligation on states to adopt necessary regulations and develop measures to prevent environmental degradation

b) Regional Regulations:

i) As far as natural resources and environmental governance within the African region is concerned, there is the *African Convention on the Conservation of Nature and Natural Resources*[148] which seeks: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields-with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.[149]

ii) There is also the *Bamako Convention*[150] which is an African region Convention aimed at preventing environmental pollution by hazardous wastes. The Convention obligates its member Parties to take appropriate legal, administrative and other measures, within the area under their jurisdiction, to prohibit the import of all hazardous wastes, for any reason, into Africa from non- Contracting Parties.[151] This is a Convention that is meant to ensure that even as African countries engage in development projects and international trade with countries outside the region, they do not engage in activities that adversely affect the environment.

iii) Chapter nineteen (Articles 111, 112 and 114) of the *East Africa Community Treaty*[152] calls for cooperation in matters relating to the environment and natural resources.

[147] Preamble of *Transforming our world: the 2030 Agenda for Sustainable Development*.
[148] African Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001 UNTS 3.
[149] Article 1 of *African Convention on the Conservation of Nature and Natural Resources*.
[150] African Union, *Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991.-
<http://www.jus.uio.no/lm/hazardous.waste.ban.afrian.import.bamako.convention.1991/portraitpdf>.
[151] Article 4(1) of *Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991.
[152] East African Community, *the Treaty for the Establishment of the East African Community*, Arusha. EAC: 2002 xiv, 111p: 230mm (EAC Publication, No.1) ISBN: 9987- 666-01-9 (amended 2006).

> The East Africa Community (EAC) Treaty Partner States are to take joint effort to co-operate in efficient management of these resources, with key priorities of the sector including climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster risk reduction and management, and pollution control and waste management.[153]

The above legal instruments are meant to guide states in their efforts to achieve environmental sustainability, for the realisation of the bigger goal of attaining sustainable development which is crucial to the O&G industry. However, it is important to point out that these are just a few of the many legal and regulatory instruments, which are mostly sectoral, selected for illustration purposes.

2.7.2 National/Domestic Regulations

As had already been pointed out, it is noteworthy that most international and regional legal and regulatory instruments on environment have spelt out mandatory obligations as well as non-binding guidelines on the international 'best practices' in environmental matters. While some of these obligations and guidelines are meant to be applied directly, especially in relation to international environmental relations in the O&G sector, others are meant to be incorporated into the domestic laws on the general environment or at least offer guidelines on the substantive and procedural contents of the domestic laws. These domestic regulatory instruments include but are not limited to:

i) Constitution of Kenya, 2010

As earlier stated, the Kenyan Constitution under Articles 2 (5) and (6) provides for the domestication of international laws and any other treaties or conventions ratified by Kenya.[154] Additionally, the CoK under Article 10 provides for the national values and principles of governance that are relevant in resource management through sustainable development.[155] These include devolution of power, democracy and participation of the people, equity, social justice, protection of the marginalized, good governance, transparency and accountability and sustainable development.[156]

[153] EAC, 'Environment and Natural Resources,' *EAC's Environment Agenda: A Healthy Natural Environment for Present and Future Generations*.- <http://www.eac.int/sectors/environment-and-natural-resources> on 3 August2020.
[154] Ratification of Treaties; See also the *Treaty Making and Ratification Act, 2012*, Laws of Kenya.
[155] Article 10 (2), *Constitution of Kenya* (2010).
[156] Article 10 (2), *Constitution of Kenya* (2010).

Further, sustainable use of natural resources is recognised under Article 69 of the CoK, which obliges the state to ensure the "sustainable exploitation, utilisation, management and conservation of the environment and natural resources."[157]

The CoK also stipulates that that all minerals and mineral oils for part of public land[158] which is vested in and held in and held by the government in trust for the people.[159] It is instructive that the CoK incorporates the principles of "conserving options, quality and access."[160] It further states that: "Land shall be held in Kenya in a manner that is equitable, efficient, productive and sustainable and in accordance, *inter alia*, consistent with the principles of sustainable and productive management of land resources, transparent and cost effective administration of land and sound conservation and protection of the ecology."[161] Such a constitutional clause advances environmental rights by ensuring its safeguards and enhancement for good and benefit of the present generations and posterity.

Additionally, Article 42 addresses the right to a clean and healthy environment. This is done through legislative and other interventions for the good of the present and future generations by ensuring the sustainable exploitation, utilization, management and protection of the biodiversity and ecosystems.[162]

Article 70 gives the *locus standi* to an individual who may feel that his/her right to a clean and healthy environment has been violated, denied threatened or infringed may apply to a Court for redress.[163] Courts are also empowered under Article 70 to make additional orders or to otherwise give directions they would deem appropriate to mitigate, halt, or discontinue any act or omission that they consider as being harmful to the environment and issue orders with respect to compensation for violation of Article 42.[164]

ii) Environmental Management and Co-ordination Act (EMCA), 1999

EMCA is Kenya's main national legislative piece in the area of environmental protection. It was enacted in order to provide for an adequate legal and institutional structure for environmental management, its relevant and incidental matters thereto. The Act is based on the prevention principle

[157] Article 69 (1) (a), *Constitution of Kenya* (2010).
[158] Article 62 (1), *Constitution of Kenya* (2010).
[159] Article 62 (2), *Constitution of Kenya* (2010). This is mirrored in Section 14 (1) of the *Petroleum Act* (Act No. 2 of 2019) which provides that all petroleum existing in its natural condition in strata lying within Kenya and its continental shelf is vested in the National Government in trust for the people of Kenya-property in petroleum.
[160] Article 60(1), *Constitution of Kenya* (2010) This is mirrored in Section 9 (3) of the *Petroleum Act* (Act No. 2 of 2019) which provides that the national government shall facilitate access to land for exploration activities in accordance with the Constitution and any other written law.
[161] Article 60(1), *Constitution of Kenya* (2010).
[162] Article 42, *Constitution of Kenya* (2010).
[163] Article 70 (1), *Constitution of Kenya* (2010).
[164] Article 70(2) (a) and (c), *Constitution of Kenya* (2010).

and incorporates several key principles of environmental protection into Kenyan law, such as the polluter-pays principle, the precautionary principle and the substitution principle.

EMCA and its plethora or regulations and guidelines embeds the 'polluter-pays' principle provisions and describes it as being clean-up costs of environmental damage occasioned by chronic pollution is to be borne or paid by the person culpable or having been proved to have caused the pollution under the Act or any other applicable law.[165] The prescribed penalties necessitates the polluter to internalise the costs of pollution prevention and for damages already caused by the pollution.[166] On the other hand, the CoK obligates polluters to bear full environmental and social costs-liability.[167]Somehow this renders the principle weak as in essence, planned discharges and emissions are only legal if the operator has sought for and obtained a permit.

Section 9 of EMCA outlines the objects and functions of the National Environment Management Authority (NEMA). Amongst these is the responsibility to publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environment degradation. Section 38 of EMCA outlines the functions of the National Environment Action Plan which includes identifying and recommending policy and legislative approaches for preventing, controlling or mitigating specific as well as general adverse impacts on the environment. The foregoing provisions play a preventive role, thus preventing environmental harm.

Section 25(1) of the Act establishes the National Environment Restoration Fund which consists of fees or deposit bonds, donations or levies from industries and other projects proponents. This fund provides further protection and mitigation of environmental damage in cases where the polluter is unidentifiable or where NEMA intervention if required.

Another issue of importance not only to the O&G industry but also the extractives industry in general under EMCA is Environmental Impact Assessment (EIA).[168]EIA procedures and guidelines are as provided for under EMCA are designed to be quite comprehensive and to ensure public participation.[169] The Act requires proponent of any project specified in the Second Schedule[170] to undertake a full EIA study and submit an EIA study report to the Authority prior to being issued with

[165] The Preliminary Section of the EMCA 1999, Interpretation, where the polluter pays principle is defined. The next reference to the polluter pays principle is in Part II - General Principles, Section 3 (5) (e) where the High Court shall be guided by the principles of sustainable development, PPP included. Not much is available to guide how the interpretation of the PPP can be used to enforce good environmental practice.
[166] Section 142(2), *Environmental Management and Co-ordination Act* (Act No. 8 of 1999).
[167] Article 70, *Constitution of Kenya* (2010).
[168] Sec. 42; Part VI – Integrated Environmental Impact Assessment (sec. 57A-67). See also *Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003*.
[169] Section 42; Part VI – Integrated Environmental Impact Assessment
[170] Second Schedule of Section 58, Act No. 5 of 2015, s. 80.- Projects Requiring Submission of an Environmental Impact Assessment Study Report.

any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the EIA study report in certain cases.[171]The Act then provides that the EIA study report shall be publicised for two successive weeks in the Kenya Gazette, a local newspaper and inviting members of the public to give their comments either orally or in writing on the proposed project within a period not exceeding sixty days.[172]However, the Authority may require any proponent of a project to carry out at his own expense further evaluation or EIA study, review or submit additional information for the purposes of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.[173] Thereafter, the Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an EIA licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.[174]

EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not.

In addition to EIA, EMCA also provides for Strategic environmental assessment (SEA), which is the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).[175] The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[176]

EMCA also provides for Strategic Environmental and Social Assessment (SESA) which should be undertaken much earlier in the decision-making process than project environmental impact

[171] Section 58 (2), *Environmental Management and Co-ordination Act.*
[172] Section 59, *Environmental Management and Co-ordination Act.*
[173] Section 62, *Environmental Management and Co-ordination Act.*
[174] Section 63, *Environmental Management and Co-ordination Act.*
[175] Environmental protection Agency, 'Strategic Environmental Assessment,'- <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> , Section 57(2), *Environmental Management and Co-ordination Act.*
[176] Environmental protection Agency, 'Strategic Environmental Assessment,'. see also *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

assessment (EIA).[177] It is a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.[178]

While the parent Act (EMCA) was initially silent on SEA and SESA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).[179] Whereas EIA concerns itself with the biophysical impacts of proposals only (e.g. effects on air, water, flora and fauna, noise levels, climate etc), SEA and integrated impact assessment analyses a range of impact types including social, health and economic aspects.[180] SEA is, arguably, not a substitute for EIA or other forms of environmental assessment, but a complementary process and one of the integral parts of a comprehensive environmental assessment tool box.[181]

iii) Petroleum Act, 2019

The Petroleum Act, 2019 was enacted to regulate Kenya's upstream O&G operations having repealed the 1984 Petroleum (Exploration and Production) Act Cap 308.[182] The defining ethos of the new Act is:

> *"...to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant Articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes"*[183]

The Petroleum Act, 2019 in conformity with environmental, health and safety regulations bestow on the contractor the obligation to undertake upstream petroleum operations in the contract area. This was to be done in accordance with all the applicable environmental health and safety laws and in conformity with 'best petroleum-industry practices. It emphasises also the contractor's obligation to

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[177] United Nations Economic Commission for Europe, 'Introduction,' avail Notably, the proposed law, *Energy Bill, 2015*, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal should, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A (1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.- < http://www.unece.org/env/eia/sea_protocol.html> on 8 August 2020.

[178] United Nations Economic Commission for Europe, 'Introduction'.

[179] *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya. The Amendment Act 2015 defines SEA under section 2 thereof to mean *a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives*.

[180] Muigua, K., *Legal Aspects of Strategic Environmental Assessment and Environmental Management*,- <*http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf*> on 8August 2020.

[181] Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006, p. 32.- <http://www.oecd.org/environment/environment-development/37353858.pdf> on 8 August 2020.

[182] 'Downloads - Energy and Petroleum Regulatory Authority' (Energy and Petroleum Regulatory Authority)- <https://www.epra.go.ke/downloads/> on 6 January 2020

[183] *Petroleum (Exploration and Production) Act* (Act No.2 of 2019).

take all reasonable steps in safeguarding the health and well-being of the people involved in the project; to use the best technology available to ensure quality environment, safety and health; to prevent contamination of the soil, air, vegetation, wildlife, and any water bodies, by the escape of petroleum, drilling fluid, chemicals, gas (non-petroleum) or any waste or effluent.[184] This provision is an evidentiary shift in attitude from placing importance of causation to no-fault liability (strict liability), a move akin to encourage caution in the conduct of the IOCs.

The Act has also established a Disaster Preparedness Prevention and Management Unit (DPPMU) within the Ministry of Petroleum whose obligation is to co-ordinate responses relating to O&G accidents during upstream operations.[185]

Section 59 of the Act also stipulates that: "where pollution occurs, it should be treated or dispersed in a manner that is environmentally acceptable; and that a comprehensive report on the technique to be used, a time-estimate to be taken, the materials to be used and appropriate safety measures to be incorporated in drilling of the well should be provided to the Authority prior to commencement of drilling; and the prevention of flaring or venting of oil and natural gas by ensuring that all reasonable mitigation steps including the harnessing or gas re-injection have been undertaken."[186]

iv) Mining Act[187]

This Act gives to the Cabinet Secretary of the Ministry of Petroleum and Mining the authority of managing the extractives sector, but requires the CS to respect and uphold the principles and values enshrined in Article 69 of the CoK.[188] The essence of this is to ensure that minerals and minerals and mineral oils are exploited in a sustainable manner.

The Act further requires investors or potential investors in this sector to carry out certain measures geared towards environmental protection and conservation that result in approved EIA report, a social heritage impact assessment and/or environmental management plan, where required.[189] It also obligates the applicants for prospecting licensee to comply with the terms and conditions of the environment restoration and rehabilitation plan.[190]

Similarly, provisions are made for the licence applicant to provide for an environment protection bond that is sufficient to cover environmental and rehabilitation obligations of the applicant.[191]

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[184] Section 59 (2), *Petroleum (Exploration and Production) Act* (Act No.2 of 2019).
[185] Section 72, *Petroleum (Exploration and Production) Act* (Act No.2 of 2019).
[186] Section 59 (2), *Petroleum (Exploration and Production) Act* (Act No.2 of 2019).
[187] *Mining Act,* No. 12 of 2016, Laws of Kenya.
[188] Section 12 (2), *Mining Act*.
[189] Section 72 (3(c), *Mining Act*.
[190] Section 77 (1)(d), *Mining Act*.
[191] Section 181, *Mining Act*.

In the context of large mineral operation such as those in the O&G sector, which investment often exceeds 500 million USD, the Act empowers the CS, in consultation with the National Treasury, to enter into a mineral agreement with holder of the mineral licenses.[192] Some of the terms to be contained in the agreement include among others environmental obligations and liabilities.[193]

v) Model Production Sharing Contract, 2019 (MPSC)

Kenya's MPSC in its provision on the 'General standards of conduct' obligates an IOC to carry out E&P operations diligently and in accordance with good international petroleum industry practice; including on the matter of waste oil, salt, water and refuse in order to avoid pollution.[194] It further acknowledges that due to the high risk E&P in the O&G industry, joint liability is incorporated as a remedial measure for pollution abatement costs, harm or loss or life and destruction of property.[195] The MPSC, 2019 thus mandates the IOC to adequately maintain third party liability insurance and workmen's compensation insurance before commencing upstream activities.[196]

2.7.3 Role of Kenyan Courts in the Enforcement of the Polluter Pays Principle

An effective regulatory function is preceded by a strong enforcement and compliance mechanisms. In this regard, the Court system in Kenya has developed progressive edicts and jurisprudence emerging on environmental matters around the extractive area presents a mixed picture. It is important to note that the CoK 2010 removed the hitherto prohibitive *locus standi* requirement allowing for any-would be litigant to sue on environmental matters in the interest of the public good.[197]

The system of Courts is presented under Chapter Ten of the CoK, titled 'Judiciary', and consists of two parts: the first deals with judicial authority and legal system, and the second deals with superior courts. The first part, 'System of Courts' is presented in Article 162, and states:

> *"Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to ... the environment and the use and occupation of, and title to, land."*[198]

Several matters have been adjudicated by the Kenyan judiciary and which affirm the sustainable development principle enshrined in Article 9 of Kenya's progressive Constitution.[199] The adherence to principles of the rule of law in environmental matters requires that legal decisions are taken

[192] Section 12 (2), *Mining Act*.
[193] Section 117 (2), *Mining Act*.
[194] Clause 8, Model Production Sharing Contract, 2019.
[195] Clause 9, Model Production Sharing Contract, 2019.
[196] Section 117 (1), *Mining Act*.
[197] Article 70, *Constitution of Kenya (*2010).
[198] Article 162, *Constitution of Kenya (*2010).
[199] Article 9, *Constitution of Kenya (*2010).

according to the strict interpretation of the law, and in the public interest, since the environment is an acknowledged public good.[200]

An analysis of Kenya's mining cycle finds an emphasis on the EIAs and the annual environmental audits (EA) as the main entry points of environmental protection. The associated environmental management plans are therefore important in ascertaining compliance by the companies to good environmental practices. At this point, rule of law considerations are broad, and range from regulatory enforcement, observance of fundamental rights, order and security, absence of corruption, limited government powers, to a functional criminal justice system and civil justice.[201]

For environmental compliance and enforcement, 'rule of law' interventions are measured by the extent to which agents have confidence in and abide by the rules of society, including the quality of property rights, the police, and the Courts.[202] Generally, in terms of rule of law tenets, a project on governance by the World Bank and Transparency International shows that between the years 2000 and 2014, Kenya had negative scores indicating poor governance as far as the rule of law is concerned.

A review of some of the environmental landmark cases particularly those relating to the PPP will be done below:

i) Rodgers Muema Nzioka v Tiomin Kenya Ltd Civil Case No 97 of 2001 (High Court of Kenya at Mombasa, 2001).

In this case, the plaintiffs sought an injunction to restrain a mining company from carrying out acts of titanium mining in Kwale District. On the grounds that they were not adequately compensated for their lands; they were also concerned about various environmental health problems that would be caused by mining activities, hence desirous that their environmental health be first secured as enshrined in the law.

The defendant, Tiomin Kenya Limited argued that there was no evidence thus far that there were ill effects from the expected mining of titanium. The Court granted the injunction. Relying on the polluter pays principle and sustainable development as provided for in the Environmental Management and Coordination act of 1999 and section 3 (1), (3) and (5) of the same Act.[203]

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[200] Omedo G, Muigua K and Mulwa R, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle', 16/1 Law, Environment and Development Journal (2020), p. 1,- <http://www.lead-journal.org/content/al601.pdf.> on 8 Augsut, 2020.

[201] 'WJP Rule of Law Index® 2016 Report' (World Justice Project 2016)- <https://worldjusticeproject.org/sitesde/fault/files/documents/RoLI_Final-Digital.0.pdf> on 8 August 2020.

[202] Principles Of Environmental Compliance and Enforcement, A Handbook' (2009) <http://www.themisnetwork.eu/ uploads/documents/Tools/inece_principles_handbook_eng.pdf> 11,12.

[203] *Rodgers Muema Nzioka v Tiomin Kenya Ltd*. Civil Case No 97 of 2001 (High Court of Kenya at Mombasa, 2001).

ii) Friends of Lake Turkana Trust v The AG & Others Nairobi ELC Suit No 825 of 2012 (2014).

The case arose out of a memorandum of understanding (MOU) which the Government of Kenya entered into with the Government of Ethiopia for the purchase of electricity from the Gibe III dam as well as the grid connection between Ethiopia and Kenya. The Gibe III dam is being built on River Omo which flows from Ethiopia into Lake Turkana in Kenya.

The petitioner's case was that the Government of Kenya had violated the constitutional rights of the communities around Lake Turkana by executing the said memorandum of understanding with Ethiopia whose long-term effect would endanger the environment around Lake Turkana without having conducted an EIA.

The respondent, Kenyan government's response was that it had no control over the construction of the Gibe III dam which was being undertaken by the Government of Ethiopia within the territory of Ethiopia which is outside the jurisdiction of the Court. The respondent argued that although the construction of the Gibe III dam could pose environmental challenges for Lake Turkana, the Court was not the proper forum for their resolution as it had no jurisdiction to rule on the actions of the Government of Ethiopia.[204]

The Court held that the parties before it were all Kenyan entities and that the subject matter concerned the alleged violation of the petitioners fundamental rights under the Constitution of Kenya. The Court further stated that the alleged violations arose in a trans-boundary context and did not, on its own, operate to limit access to the Court's jurisdiction. The Court granted the Petitioner an order of mandamus directed at the Government of Kenya to make available information on the power purchase agreements it had entered into with the Government of Ethiopia.

The Court also made an order directing the government of Kenya to take steps to ensure that natural resources around Lake Turkana are sustainably managed, utilized and conserved in any engagement it enters with the Government of Ethiopia.

Regarding the concern as to the obligation to undertake an EIA study of the project, the Court stated that this would involve the Government of Ethiopia and that Kenyan courts were not the appropriate forum to determine what obligations existed thereto.[205]

iii) Peter Makau Musyoka & others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & others

[204] *Friends of Lake Turkana Trust v The AG & Others*, Nairobi ELC Suit No 825 of 2012 (2014), para 37.
[205] *Friends of Lake Turkana Trust v The AG & Others*, Nairobi ELC Suit No 825 of 2012 (2014), para 137.

[2014].

The above matter arose out the award of mining concessionary rights to the Mui Coal Basin Deposits with respect to prospecting for and extraction of coal deposits in the Mui Basin in Kitui County.[206] In this case, the petitioners sought among other matters to get the Court to affirm that there was a breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42, 69 and 70 of the Constitution.

In addition, they claimed a threat to their right to health contrary to Article 43 from the effects of the coal mining which would also lead to environmental degradation. An additional petition asked the Court to declare the failure to seek and obtain an EIA as required by Article 69 of the Constitution and Section 58 of the EMCA before the grant of the concession rights to render the concession invalid.

The petitioners argued that "it is incontrovertible that coal mining is a pollutant necessitating very careful and robust environmental regulation and management".[207] They further averred that the harmful impacts of coal mining through preparation, combustion, waste storage and transport required a robust regime to meaningfully mitigate the environmental impacts.

In its wisdom however, the Court disagreed with the petitioners on these points, noting that before issuing conservatory orders, harm or threatened harm must first be proved by the petitioners, and hence the claim was yet to ripen since the petitioners had not provide sufficient material to trigger invocation of the precautionary principle and stop the ongoing exploration. The Court declared itself, noting well that an EIA was still being undertaken, yet an EIA ought to have preceded any actual exploration. The Court therefore dismissed the injunctions, and active exploration of coal in the Mui basin.[208]

iv) Save Lamu & others v National Environmental Management Authority (NEMA) & another [2019]

The above case concerned a proposal for the establishment of a coal power plant in Lamu County that was projected to raise over 1050 MW of electricity.[209] However, the community representatives decided to sue NEMA (as the 1st Respondent) and Amu Power Company, the company that had successfully won the bid to put up this facility.

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[206] *Peter Makau Musyoka &Others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & Others* (2014) eKLR, Constitutional Petition 305 of 2012, High Court of Kenya, para 37.
[207] *Peter Makau Musyoka & others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & others* (2014) eKLR, para. 37.
[208] *Peter Makau Musyoka & others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & others* (2014) eKLR, para 37.
[209] *Save Lamu & others v National Environmental Management Authority (NEMA) & another* (2019) eKLR, National Environmental Tribunal, 26th June 2019, para 4.

It is important to note here that this project was one of the main Vision 2030 Blue Print projects envisioned by the Government to deal with the rising energy deficits in Kenya.[210] The grounds for the appeal as advanced by Save Lamu, the Petitioners, included allegations of poor analysis of alternatives and economic justification for the proposed coal power project, insufficient scoping process without proper public participation as well as contentions that continued activities in an economically sensitive area would lead to adverse effects on the marine environment through the discharge of thermal effluents through the use of a poor and outdated cooling system. Additionally, other grounds included allegations of a flawed EIA report characterised by "omissions, inconsistencies and misrepresentations",[211] and the alleged failure to include EIA for addressing coal pollution in the EIA among other reasons, basically questioning the viability of the project.

In its ruling, the Tribunal noted that as long as proper and sound ESIAs are conducted, coal energy remained a lawful means of energy in Kenya and could realize Kenya's sustainable development aspirations. On the process of obtaining the EIA, the Court deliberated extensively on the adequacy of the public participation in the EIA process, and found that wide public participation was undertaken during the scoping stage of the EIA process.[212]

The Court however found that these meetings were only of introductory nature value, and that even the experts undertaking the EIA were awaiting more specialist studies especially of the coal plants to the marine environment. The Court found the project proponent to have relied only on the information obtained prior to the EIA study as the basis for justifying the EIA study,[213] and that widespread public consultation on the foreseen impacts of the plant did not occur as expected by Section 17 of the EIA Regulation.

As to the acclaim of many environmental crusaders, the finding by the Court that it lacked accurate information and could not be a basis for proper and effective public participation,[214] as well as bring a clear breach of the subsidiarity principle, led to the declaration that public participation in Phase II of the EIA was non-existent and violated the law. The environmental regulator was also found to have bungled Phase III, by allowing the proponent to undertake public consultations, not following the guidance on the 30-day public submissions of the memoranda period by advertising in the 4 newspapers on different dates, thereby confusing the public on when the 30 days period would lapse, holding a premature public hearing within the 30-day period, and basically deliberately subjecting the public to conflicting dates and timelines. In the Court's view, this was a ploy to hurry the process and

[210] Government of Kenya, 'Second Medium-Term Plan 2013-2017' Kenya Vision 2030
[211] Save Lamu & Others v National Environmental Management Authority (NEMA) & another (2019), para 4.
[212] *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* (2019), para 4.
[213] *Save Lamu & others*, para 45.
[214] *Save Lamu & others*, para 47

lock out members of the public from the process. The Court made the following submission on the public participation failure in this case:

> *"In our view, public participation in an environmental impact assessment study process is the oxygen by which the environmental impact assessment study and the report are given life. In the absence of public participation, the environmental impact assessment study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the environmental impact assessment study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value*. "[215]

In the end, the Court annulled the EIA License (NEMA/ESIA/PSL/3798) issued to Amu Power Company and further ordered for a repeat of the EIA following the requirement of the EIA regulations. NEMA was ordered to fully comply with the regulations during this second fresh EIA process.[216]

v) Peter K. Waweru v Republic (2002)

In this case,[217]the Applicants and the interested parties had been charged with the twin offences of discharging raw sewage into a public water source and the environment and failing to comply with the statutory notice from the public health authority.

The Court observed that sustainable development has a cost element which was be met by the developers. The Court while relying on the Constitution and EMCA also held that the right to a clean and healthy environment was equivalent to the right to life which ought to be protected at whatever cost. The Court further delved on four principles which it deemed necessary in the case at hand; sustainable development, precautionary principle, polluter pays and public trust (not spelt out in EMCA).

The Court in quoting Klause Topfer, the then Executive Director of the United Nationa Enviornment Programme (UNEP) stated that:

> "*The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations."*[218]

[215] *Save Lamu & others*, para 73.
[216] *Tribunal Appeal Net 196 (*2016), para 153.
[217] *Peter K. Waweru v Republic* (2002) High Court of Kenya at Nairobi, Misc Civ. Applic. 118 of 2004, 2 March, 2006.
[218] *Peter K. Waweru v Republic*, para. 3.

The Court while pronouncing itself on the argument of the cost of environment directed the relevant authorities to apply the PPP and cause the accused to pay for its acts of pollution including any viable alternatives.[219]

As demonstrated in the first three cases above, there is clearly a pattern, where Courts are timid in upholding the progressive environmental protection edicts available within Kenya's environmental protection laws, regulations and policies. This finding is consistent with that of many stakeholders interviewed for this article. The fourth case (Save Lamu Case) and fifth cases shows a clear dissection in the application of the principle of Sustainable Development and the PPP as enshrined in Kenya's laws.

From the above select precedents, it is evident that Courts have applied the PPP laws, and made some transcendental decisions in terms of how EIAs need to be undertaken, and the thresholds for public participation that would guarantee sustainable extraction in compliance with PPP regulatory framework.

2.8 Conclusion

In the final analysis, what a polluter pays has to be balanced out between the environmental and economic interests. The externalities internalized by a polluter must not be such as to make production cost to be too high that trade and international investment would be disadvantaged. At the same time the societal cost not internalized by the polluter must not be so much as to drive the cost of other economic activities so high as to also disadvantage trade and international investment. This conclusion is well in line with the declaration of the OECD to the effect that the PPP is nothing more than an efficiency principle for allocating costs and does not involve bringing pollution down to an optimum level of any type, although it does not exclude the possibility of doing so.[220]

What a polluter pays becomes ultimately what is economically convenient for the country at a given time and not necessarily what is required for eliminating pollution. In other words what a polluter pays is not a hard and fast figure of amount or measure fixed for all times. It is fluid, it changes and varies from time to time depending on the changing economic dynamics of the society.

It is on the above premise that Munir concluded by stating that what a polluter pays is what government authorities decide that is necessary to keep the environment in an acceptable state.[221] And what

[219] *Peter K. Waweru v Republic*, para. 3.
[220] OECD Note on the Implementation of the PPP by the Environment Committee, OCDE/GD (92)81, 25. See M Munir, 'History and Evolution of the Polluter Pays Principle'
[221] Munir, M., 'History and Evolution of the Polluter Pays Principle'.

constitutes an acceptable state according to Bonus and Holgar is not necessarily the sustainability of the environment but political and economic feasibility as well.[222]

What a polluter pays in the final analysis is what government determines that a polluter should pay or the measure a polluter should comply with in order to safeguard the environment after taking into account the need to safeguard trade and investment, and taking into account also the political exigencies in the country. Measures that polluters have been held to pay for under the PPP include defraying administrative costs borne by public administration in implementing anti-pollution measures through payment of fees charged for these purposes. Potential polluters bear the costs of measures stipulated by public administration towards preventing and controlling accidental pollution.

PPP is also actualised by polluters bearing the costs for residual damage resulting from residual pollution from their activities, and by them bearing the costs for trans-frontier or trans-boundary Pollution caused by them.[223]

From the foregoing chapter, it is evident that pollution involves a complex web of actors who are deemed responsible for environmental degradation. Having interrogated the genesis and development of the PPP, its application in the O&G sector, this chapter has laid an elaborate basis including jurisprudential basis for examining the impacts of upstream operations and the application of the PPP.

As the activities aimed at tapping into Kenya's oil potential are ongoing, there is need to look into the relevant laws and policies that govern the oil extraction sector in the country, to avert the perennial 'resource curse' that has bedevilled many countries across the globe.

[222] Bonus and Holgar, "Implications of the Polluter Pays and the User Pays Principles for Developing Countries" in Edward Dommen (ed), Fair Principles for Sustainable Development, (Cambridge, 1993), 67.
[223] Munir, M., "History and Evolution of the Polluter Pays Principle…."

CHAPTER THREE

COMPARATIVE APPRAISALS OF THE REGULATORY FRAMEWORKS AND ENFORCEMENT APPLICABLE UNDER THE NIGERIAN AND UNITED STATES OF AMERICA (USA) REGIMES

3.1 Introduction

This Chapter sets out a comparative study in the regulatory application of the PPP with a specific focus on the unprecedented oil spillage disasters in Nigeria's Niger Delta and USA's Deepwater Horizon incidences. These two jurisdictions have also been chosen as comparative studies mainly due to their long-term mining history in the O&G sector coupled with upstream pollution challenges.

Whereas the PPP establishes the requirement that the costs of pollution should be borne by the person/entity responsible for causing the pollution, the principle application is on a case by case basis, particularly in relation to the nature and extent of the environmental damage or harm. According to Thornton and Beckwith,[224]the practical implication of the PPP is in the allocation of economic obligations in relation to environmentally damaging activities, particularly in relation to liability, the use of economic instrument and the rules governing civil and State liability for environmental damage.

The analysis drawn from these comparative jurisdictions will compare to Kenya's legal and regulatory regime to benchmark common features, identify relevant gaps and outline suitable recommendations.

3.2 Development of the Polluter-pays Principle in Nigeria's Oil and Gas Industry

Nigeria has and continues to experience the dual effects of oil discovery- that is, the country has reaped the benefits of the "black gold" and has also suffered immensely from the adverse externalities associated with the resource.[225]

In Nigeria, the PPP's international acclaimed efficiency in dealing with environmental pollution upsurge can merely be likened to the musical rhymes that the words make when being used, but not in its effectiveness. Most multi-national oil companies commonly referred to as multi-national corporations (MNCs) have set base in the Niger Delta Region which is described as one the most densely polluted regions on worldwide. Ironically, despite the PPP being strongly entrenched in almost

[224] Thornton J and Beckwith S, *Environmental Law*, 2nd edn, Sweet and Maxwell, London, 2004, 14-15.
[225] See S O Aghalino & B Eyinla, "Oil Exploitation and Marine Pollution: Evidence from the Niger Delta, Nigeria" (2009) Journal of Human Ecology 177 at 177.

all of Nigeria's environmental legislations, the area can barely boast of any comprehensive oil spill clean-up efforts.[226]

The year 1956 saw the discovery of viable crude oil reserves in the Niger Delta region near Oloibiri community in Ogbia Local Government Area which is located in the Bayelsa State.[227] This region has since then experienced significant environmental pollution, degradation, and a myriad of socio–economic problems associated with petroleum E&P activities.[228]

Research shows that in Nigeria, oil leakages, pipeline fires, gas flaring and venting, the improper disposal of large quantities of hazardous and noxious substances from oil-derived sources including drilling mud and toxic oil sludge, the breakdown of machinery, petroleum spills due to ageing installations, and vandalism or perforation of crude oil facilities (including illicit crude bunkers) *et cetera* have been the primary environmental problem.[229] These have continued to pose potential risks to the biosphere and generally to host communities around the Niger Delta region.[230] .

The National Oil Spill Detection and Response Agency official data indicates that from January 2010 to August 2015, there were 6,333 known oil spills in the Niger Delta region, in which about 294,352 barrels of oil spilled.[231] Further, the scale of pollution in the region is typified by the severely degraded Ogoni environment as revealed in the 2011 UNEP's Report on the Environmental Assessment of Ogoniland.[232]At one site within Ogoniland, it was found that there was a heavy contamination that was still present 40 years in the aftermath of an oil spill. At another site, an 8-centimetre layer of oil was evidently floating on the groundwater which serves the community wells. Some well samples were found to have at least 1,000 times lead content which was significantly higher than the Nigerian drinking water recommended standards of 3 µg/l. As a consequence of such massive pollution, the study further found that a number of entrepreneurs who had set up fishing farms in or close to the creeks had their businesses being been ruined by an ever-present layer of floating oil[233]; and that

[226] Okenabirhie T, *Polluter-pays principle in the Nigeria oil and gas industry: rhetoric or reality?*, Centre for Energy, Petroleum and Mineral Law and Policy Dundee, 2009, 1,- <www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13> on 15 January 2020.
[227] Pearson S, 'Petroleum and the Nigerian Economy', Stanford University Press, 1970.
[228] Ite, A, and Ibok U, 'Gas flaring and venting associated with petroleum exploration and production in the Nigeria's Niger delta,' *American Journal of Environmental Protection,* 1 (4), 2013, 70-77.
[229] Opukri C, 'Oil induced environmental degradation and internal population displacement in the Nigeria's Niger Delta' *Journal of Sustainable Development in Africa*, 2008, 173.
[230] Scheren, P, Ibe A, Janssen F, and Lemmens A, "Environmental Pollution in the Gulf of Guinea – A Regional Approach," *Marine Pollution Bulletin,* 44 (7), 2002,633-641.
[231] 'Improving oil spill response in Nigeria-comparative analysis of the forms, data and related process of the JIV', Stakeholder Democracy Network, 2016, 31- <http://www.stakeholderdemocracy.org/improving-oil-spill-response-in-nigeria-comparative-analysis-of-the-forns-data-and-related-processes-of-the-joint-investigation-visit-jiv-and-suggestions-on-how-these-could-be-improved/> on 12 January 2020.
[232] United Nations Environmental Programme, *Environmental assessment of Ogoniland*, UNEP Report, 2011.
[233] United Nations Environmental Programme, *Environmental assessment of Ogoniland.*

members of a particular Ogoni community were drinking benzene contaminated water from wells that was at levels over 900 times above the World Health Organization's (WHO) guideline.[234]

The Nigerian oil industry is run majorly on a joint venture basis which is between the Nigerian federal government and the major multinational oil companies, in which the government through the Nigerian National Petroleum Corporation (NNPC) holds the major stake in its various joint venture arrangements with the said oil companies.[235] Such an arrangement creates something of a conflict of interest, considering that the environmental laws and standards applicable to the oil industry and the regulatory agencies in place to enforce them are established and controlled by the same federal government which is a part of the ventures to be regulated. With such a structure in place, it is quite obvious why the Niger Delta environment is being degraded without sufficient consequences for the liable oil companies to turn a new leaf, as ensuring the latter would be tantamount to the federal government 'shooting itself in the foot' (which it is highly unlikely to do).

Be this as it may, the historical underpinning of the PPP in regulating and protecting Nigeria's ecosystem is much older than the 1999 National Policy on the Environment (revised in 2016).[236] In fact, after the 1988 Koko toxic waste incident,[237] the PPP can be regarded as one of the tools adopted by Nigerian legal system for the protection of the environment. The principle is entrenched under Section 12(1) of the Harmful Wastes (special Criminal Provisions) Act, 1988, providing that:

> *"Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contagious zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage…."*

The visibility of the principle in environmental protection legislation is in the Federal Environmental Protection Agency (FEPA) Act 1988. Every industry was directed to install anti-pollution equipment as a means of detoxifying wastes and chemical discharges emanating from the industrial plant.[238] The National Environmental Protection (Pollution Abatement in Industries and Facilities Generating

[234] Bassey N, 'Oil Politics: Echoes of ecological wars', Daraja Press, Montreal, 2016, 11.
[235] International Business Publications, Nigeria: Mineral, *Mining Sector Business Investment Guide – Volume 1– Oil and Gas Industry Strategic Information and Regulations*, Washington DC, 2013 76-77.
[236] Article 3.3 (IV) , *National Policy on the Environment* (1999).
[237] Lkhariale M, 'The Koko incident, the environment and the law' in Shyllon, F, (ed) *The Law and the Environment in Nigeria,* Vintage Publishers, lbadan, 1989, 73-75.
[238] National Environmental Protection (Effluent Limitation) Regulations 1991, reg 1(1).

Wastes) Regulations of 1991 provided a prerequisite for every industry or facility to set up machinery intended to curb pollution hazards.[239]

The inclusion of the PPP as one of the guiding principles of the National Policy on Environment in Nigeria gives it a key placement in inclining government initiatives towards environmental protection. Though not explicitly stated in most cases, it stands extensive implementation in environmental-protection enactments and regulations. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) encapsulates liability as prescribed by the PPP. It states in paragraph 8.1 that: "A spiller shall be liable for damages from a spill for which he is responsible." The punitive measure for failure to remediate pollution effects is contained in Section 6(2)(3) of the National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act[240] which states that: "the failure to clean up the impacted site, to all practical extent including remediation shall attract a fine of one million Naira."[241]

The basic provision of the PPP is that the polluter is responsible for cleaning the affected site and not necessarily for fines. Under the Minerals and Mining Act 2007, PPP is applied through the following three channels: first, the polluter(s) pay for the public administration costs for the control and prevention of environmental pollution; second, the polluter(s) pay for the specified pollution control and prevention measures for compliance; and third, the polluter(s) pay for the general pollution prevention and control obligations.[242]

Administration costs for the prevention and control of environmental pollution are the costs incurred by the entities specifically created by the Act for the above-mentioned reasons. Such entities include the Mineral Resources and Environmental Management Committee (MREMC)[243] and the Ministry of Environmental Regulation Mining (MECD).[244] The first payment channel shall be through the fees payable to the administration by the polluters as stipulated in the Act[245] and for the restoration and reclamation of impacted areas.[246] The second channel is to make polluters bear the costs associated with their pollution is through compliance with public administration initiatives set up for pollution control and prevention. These initiatives include: The Environmental Impact Assessment (EIA) Statement,[247] the Environmental Protection and Rehabilitation Fund (EPRF),[248] the Environmental

[239] NEP (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991, reg 8.
[240] *National Oil Spill Detection and Response Agency (Establishment) Act,* (Act No 15 A411 of 2006).
[241] *National Oil Spill Detection and Response Agency (Establishment) Act.*
[242] Section 112&113, *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[243] Section 19(1). *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[244] Section 16(1)(b), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[245] Section 10(b), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[246] Section 90(2), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[247] Section 119(c)(i), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[248] Section 121(1), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).

Protection and Rehabilitation Program, and the Community Development Agreement,[249] which tasks the hosting community to participate in pollution control and prevention in their locality. The third channel is through cost-bearing for the general obligation for pollution prevention and control, which polluters typically bear in their respective mineral exploitation stages.

An infringement of any of the above duties gives rise to the compensation of the victim by the liable polluter. For example, a holder of an exploration license is bestowed with the obligation to conduct exploration operations in a manner that is environmentally responsible.[250] He is tasked with the maintenance and restoration of the land that is the subject of the license to a safe state and addressing disturbances arising from exploration and production activities, which include but are not limited to filling up any shafts, wells, trenches and/or holes made by the titleholder.[251] He is liable to compensate the land user(s) or occupant(s) for the resultant damage arising from activities.[252]

The principle found succour in some Nigerian landmark Court decisions. For example, in *Shell PDC Ltd v Chief G.B.A. Tiebo & Ors*,[253] the trial Court stated: "…it is noteworthy that the Rule in *Rylands v. Fletcher*[254] which is alternatively pleaded by the plaintiffs in this case applies to the circumstances of this case. The crude oil which passed through the pipelines could not naturally had been there. The defendant gathered the crude oil into pipes and it was a substance which was dangerous and likely to escape. It was not a natural user of the land but was brought in there by the act of the defendant. Since therefore, it has happened and caused damages the defendant is liable for the consequences of its act. In the circumstances of this case, the Rule in *Rylands v. Fletcher* applies and there was no third-party act which caused the escape of the oil."

An award of six million naira (N6,000,000.00) in damages was given against the appellant (defendant). The damages were settlements for environmental pollution affecting the respondent's (plaintiff's) community, Peremabiri, that are found in the Yenegoa Local Government Area, in the present day Bayelsa state. Owing to the appellant's (defendant's) negligent act which resulted to a major crude oil

[249] Section 116(1), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[250] Section 61(1)(b), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[251] Section 61(1)(d), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[252] Section 61(1)(g), 98(3), 107(a &b), *Nigeria Minerals and Mining Act* (Act No 20 of 2007).
[253] 6 NWLR (Pt 159) 693, (1990); *Abel & 2 Ors v. Shell Petroleum Development Coy. Nig. Ltd* (2001) 6 NSCQR 542 or (2001) 11 NWLR (Pt. 723) 168.
[254] *Rylands v. Fletcher* (1866) LR 1 EX. 265, also *Ogiale v. Shell BP Nig. Ltd (1997)* 1 NWLR (Pt. 48) 148. Apart from the strict liability rule, the oil company is statutorily liable to pay compensation generally for damages arising from pollution from its facilities and operations, only exceptions being if the pollution is due to the default of the person suffering damage or an account of malicious act of a third person - Sections 1 1(5)(a),(b) &(c) of the Oil Pipelines Act, CAP 07, LFN, 2004; also Paragraph 37 of the First Schedule to the Petroleum Act CAP P10 LFN, 2004 which makes the holder of an oil exploration license liable to pay fair and adequate compensation. J. FININE FEKUMO, "The Problem of Jurisdiction in Compensation for Environmental Pollution and Degradation in Nigeria (Oil and Gas): A Fundamental Rights Enforcement Alternative - being a paper presented at the Nigerian Bar Association 2004 Annual Delegates Conference at Abuja; 8-11 & 17-23.

spillage approximated at 600 barrels. The spillage affected the community's (plaintiff's) ecosystem including lands, shrines, and water bodies like creeks, ponds, swamps and lakes. Though PPP was not expressly referred to as a principle swaying the Court's decision, it was imperative that the polluter was culpable.[255]

Similarly, in the celebrated case of *Gbemre v Shell PDC Ltd & Ors,*[256] the respondents (herein Shell PDC and the Nigeria National Petroleum Corporation) were held as being jointly liable for their actions. The applicant, in this case being one Jonah Gbemre alleged *inter alia* for self and his Iwherekan Community in Niger Delta State, that the respondents' actions of continued perpetrations of gas flaring were in violation of the applicants' enjoyment of their fundamental rights to: A clean and healthy environment and that of their dignity as guaranteed under Sections 33(1) and 34(1) of the CFRN, and backed by Articles 4, 16 and 24 of the African charter on Human and Peoples Rights (Ratification and Enforcement) Act.[257] The Court's finding *inter alia* was that the first and second respondents were in violation of Section 2(2) of the EIA Act,[258] which if complied with, would have illegalised the flaring. The Court held that the gas flaring action by the first and second respondents constituted a gross violation of the community's fundamental right to life and dignity as enshrined in the CFRN.

Consequently, the Court granted the applicant's prayer restraining further flaring by the respondents themselves, their servants and/or their employees or otherwise. Despite the PPP not being explicitly referred to in the case, it was applied implicitly. The polluters, being the respondents were held as being jointly liable for the pollution precipitated by the gas flaring and were barred from any further gas flaring in the region. The particular restriction was owing to their failure to comply with the EIA Act,[259] which is a statute inspired by the PPP.

The PPP is translated from a mere declaratory principle of national environment policy into a principle with a binding legal effect by these statutory provisions and by the relevant Court decisions; it thus metamorphosises from a 'soft-law' declaration to being a "hard-law" obligation. However, only when effectively enforced is the adequate binding effect of the principle achieved. It is often stated that enforcement is nine-tenths of the law,[260] and in this case, it is nine-tenths of the PPP.

[255] Olaniyan A, 'Imposing liability for oil spill clean-ups in Nigeria: An examination of the role of the polluter-pays principle' *40 Journal of Law, Policy and Globalization*, 2015, 79.
[256] *Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others(2005),* AHRLR 151 (NgHC 2005)-<http://www2.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-156302.pdf> on 20 January 2020.
[257] Cap A9 vol 1 *Law of the Federation of Nigeria*, 2004.
[258] Cap E12 vol 6 *Law of the Federation of Nigeria,* 2004.
[259] Cap E12 vol 6 *Law of the Federation of Nigeria,* 2004.
[260] 'The right rights' future',- <https://therightsfuture.com/t20-enforcement-nine-tenths-of-the-law/> on 20 January 2020.

3.3 Overview of the Legal Framework Applicable to the Polluter-pays Principle in Nigerian Oil and Gas Industry

As in many other jurisdictions, Nigeria's environmental legal framework regulating the O&G is a hybrid of both national and international legislations, with the former being the dominant component of the petroleum industry.

The Government of Nigeria initiated its first environmental policy in 1989, which was known as the National Environment Policy, whose essence was to act as a general environmental law principle in the implementation of the PPP instrument.[261] In 1999, the National Environment Strategy was amended and subsequently updated as one of Nigeria's guidelines on environmental protection and remediation policies in 2016.[262]

In 2009, Vision 20:2020 (NV20:2020) was launched with the aim of environmental protection. It was a blueprint for Nigeria's economic transformation from 2009-2020. Some of the broad goals laid out in NV20:2020 are to reduce environmental hazards from incidence and consequence, including the elimination of contamination of land and water of all sorts.[263] This essentially focused on the reduction of land and aquatic pollution. As the expiry of the NV20:2020 is approaches, it remains uncertain to meet these goals, that is, to protect the environment from emissions. This is because the National Technical Working Group (NTWG) of Vision NV20:2020 identified 'pollution control', and 'weak environmental governance' as some of the challenges in Nigeria.[264]

The other key legislations regulating the Nigerian petroleum industry, include the Constitution of Nigeria 1999, Petroleum Act,[265] Associated Gas Re-injection Act,[266] Land Use Act,[267] Environ-mental Impact Assessment Act (EIA),[268] Oil Pipelines Act,[269] Petroleum Act,[270] Hydrocarbon Oil Refineries Act,[271]Harmful Waste (Special Criminal Provisions) Act[272] and Petroleum (Drilling and Production) Regulations, *et cetera*.

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[261] 'Review of the national policy on the environment 1999' Federal Ministry of Environment, 2014,- <http://environment.gov.ng/index.php/downloads/3-environmental-policies> on 28 December 2019.
[262] Section 1, 5(3), *National Policy on Environment*, 1999 (revised in 2016).
[263] Report of the Vision 2020 National Technical Working Group on Environment and Sustainable Development' (Federal Ministry of Budget and National Planning), 2009, 26,-<http://www.nationalplanning.gov.ng/index.php/national-plans/nv20-2020> on 26 December 2019.
[264] Report of the Vision 2020 National Technical Working Group on Environment and Sustainable Development'.
[265] *Petroleum Act*, (Chapter P10, Law of the Federation of Nigeria of 2004).
[266] *Associated Gas Re-Injection Act* (Chapter 20 Law of the Federation of Nigeria of 2004).
[267] *Land Use Act* (Chapter 202, Laws of the Federation of Nigeria of 2004).
[268] *Environmental Impact Assessment Act* (Chapter E12, Law of the Federation of Nigeria).
[269] *Oil Pipelines Act* (Chapter 07, Laws of the Federation of Nigeria of 2004).
[270] *Petroleum Act* (Chapter P10, Laws of the Federation of Nigeria of 2004).
[271] *Hydrocarbon Oil Refineries Act* (Chapter H5, Laws of the Federation of Nigeria of 2004).
[272] *Harmful Waste Act* (Chapter H1, Laws of the Federation of Nigeria of 2004).

3.3.1 The Constitution of the Federal Republic of Nigeria, (1999)

Section 44(3) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999 grants control/ownership of mineral resources such as O&G solely on the federal government, as well as exclusive authority to enact laws and regulations relating to the governance of the industry.

The Section thus states:

> *"Notwithstanding the foregoing provisions of this Section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."*[273]

A replication of this constitutional clause is seen in a number of legislations such as; the Exclusive Economic Zone Act,[274] the Minerals and Mining Act[275] and the Land Use Act (LUA),[276] *et cetera.* Ako posits that due to the unique impacts of the LUA on the inhabitants of the Niger Delta(especially in regards to land expropriation by the government), the Act was the final jigsaw confirming the totality of the federal government's ownership of mineral resources in Nigeria.[277] It is worth noting that LUA is attached to the CFRN by dint of Section 315(1)(5)(d) and it can only be changed through constitutional amendment procedures, which are cumbersome.[278] Ayodele-Akaakar similarly contends that, the totality of the federal government's ownership and exclusive control of mineral resources in Nigeria was confirmed with the enactment of the Offshore Oil Revenue Decree in 1971.[279] The Oil Decree Act abrogated states' ownership rights over mineral resources in their extant continental shelves, title to territorial waters and accruing revenues (rents) from the petroleum or O&G operations

[273] *Constitution of Nigeria* (1999),- <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> on 20 January 2020.
[274] *Exclusive Economic Zone Act* (Chapter E11, Laws of the Federation of Nigeria of 2004).
[275] *Minerals and Mining Act* (Chapter 202, Laws of the Federation of Nigeria of 2007).
[276] Section 28 *Land Use Act* (Laws of the Federation of Nigeria of 2004).
[277] Ako R, 'Nigeria's Land Use Act: An Anti-thesis to environmental justice' *53 Journal of African Law*, 2009, 289.
[278] To buttress this assertion that the Land Use Act is difficult to amend, the Deputy Senate President of the Nigerian Senate, who is also the Chairman on the Review of the 1999 Constitution, averred that it was impossible to amend the LUA and that the amendment process failed to scale through the Third Reading during the Senate amendment process of the Constitution. Omololu Ogunmade, Ekweremadu Advocates Removal of the Land Use Act,- <http://www.thisdaylive.com/articles/ekweremadu-advocates-removal-of-land-use-act/170938/> on 16 January 2020; Ofo N, 'Amending the Nigerian Constitution' *4 African Journal on Legal Studies*, 2010, 123-48, (Discussing the difficulties in amending the Nigerian Constitution).
[279] Ebeku K, 'Oil and the Niger Delta, People in international law' *Resource rights, environmental and equity issue*, 2001, 7-8,- <http://www.jsd-africa.com/Jsda/Fallwinter2001/articlespdf/ARC%20-%20APPRAISING%20THE%20OIL%20and%20Gas.pdf> on 13 January 2020.

in such states.[280] By dint of the aforementioned laws, exclusive ownership and control of mineral resources were now vested in the federal government.

Whereas the CFRN confers ownership rights as highlighted above, it recognizes the indispensable environmental dependence of human life by imposing the state with the ultimate responsibility for environmental protection and improvement.[281] The phrase to 'protect and improve' used by Section 20 of the CFRN literarily imposed an obligation on the legislature to enact new laws and amend the existing rules to protect the Nigerian environment from all kinds of pollution. This provision of the CFRN has been fulfilled as the Nigerian parliament made a series of environmental protection laws.[282]The most relevant laws enacted by the Nigerian parliament in relation to this piece of work are the National Oil Spills Detection and Response Act,[283] Oil Pipelines Act,[284] the Petroleum Act, [285] which is about to be amended by the Petroleum Industry Bill,[286] the Oil Navigation Act,' Environmental Impact Assessment Act[287] and Freedom of Information Act.[288]

3.3.2 The Substantive Laws Enacted by Parliament to Protect the Environment from Pollution

The crux of substantive laws enacted for Nigeria's environmental can be traced to the incorporation of Article 24 of the African Charter in 1982,[289] which was ratified by the Nigerian parliament in 1983.[290] Article 24 of the African Charter bestows Nigerians with the right to a general satisfactory environment that is favourable to their development. This provision prompted activists' quest for Nigerian environmental protection as it forms the source of the enunciated case of: *Social and Economic Rights Action Centre v. Nigeria*.[291] In this case, the complainants alleged *inter alia* that the Nigerian Federal government was involved in reckless production of crude oil in Ogoni Land

[280] Ebeku K, 'Oil and the Niger Delta, *People in international law'*, 2001.
[281] Section 20, *Constitution of the Federal Republic of Nigeria* (1999).
[282] 'Environmental Law Research Institute',- <http://www.elri-ng.org/newsandrelease2.html> on 6 January 2020.
[283] *National Oil Spill Detection and Response Agency, (Establishment) Act* (Act No. 15of 2006).
[284] *Oil Pipeline Act* (Chapter 07, Laws of the Federation of Nigeria of 2004).
[285] *Petroleum Act* (Chapter P10, Laws of the Federation of Nigeria of 2004).
[286] *The Petroleum Industry Bill* (2012), Federal Republic of Nigeria National House of Assembly,- <http://www.nassnig.org/> on 20 January 2020.
[287] *Environmental Impact Assessment Act* (Chapter E12, Laws of the Federation of Nigeria of 2004).
[288] *Freedom of Information Act*, 2011
[289] 'Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter"), 27* June 1981, CAB/LEG/67/3,1982,- <http://www.refworld.org/docid/3ae6b3630.html> on 12 January 2020.
[290] *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, Chapter A9, Laws of the Federation of Nigeria of 2004).
[291] 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) *I* Nigeria.

(a community in the Niger Delta area of Nigeria) and that ultimately caused damage to their lands and wellbeing.[292]

All substantive laws crafted by the Nigerian parliament to foster environmental protection are designated as an Act,[293] while those delegated by the parliament are referred to as regulations.[294] The reason for regulation is that parliament may not foresee and include all the essentials during legislation. Hence, ministers appointed in petroleum sector sometimes are empowered to make regulations relating to environmental protection.[295]

The National Oil Spills Detection and Response Act was enacted by the Nigerian parliament to implement the National Oil Spill Contingency Plan.[296] National Oil Spill Contingency Plan is a document designed by the Nigerian federal government specifying the role of the federal government to curtail oil spill incidents and for the protection of the environment.[297] Section 7(d) of the National Oil Spills Detection and Response Act empowers the National Oil Spill Detection and Response Agency[298] an established body under the Act to oversee the prevention, control, combating and mitigation of marine pollution.[299] The National Oil Spills Detection and Response Act penalizes a polluter who refuses to report oil spill incidences,[300] while refusal to clean up spills attracts penalties.[301]

Section 17(4) of the Oil Pipeline Act[302] states that an operator who is granted a licence to operate pipelines is under an obligation to prevent pollution on the land and the water. The Oil Navigation Act[303] was specifically enacted to prevent pollution in the sea.[304] Section 1 of the Act, specifically prohibits pollution of the environment by crude oil, it criminalizes a vessel owner who discharges

[292] 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) *I* Nigeria, 9.
[293] 'Restoring Nigeria's law to Nigeria's people one by one' Centre for laws of the Federation of Nigeria,- <http://lawnigeria.com/Federationlaws.html > on 3 January, 2020.
[294] 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) *I* Nigeria.
[295] Section 33(c), *Oil Pipeline Act* (1956) empowers the minister to make subsidiary regulations to prevent pollution of the land and the water.Based on this power the minister in 1995 established the *Oil and Gas Pipelines Regulation*; Section 14 of *Oil and gas pipelines regulation* Chapter 07 Law of Federal Republic of Nigeria, 2004.
[296] *The National Oil Spill Contingency Plan* [NOSCP], (Revised May 2009).
[297] *The National Oil Spill Contingency Plan* [NOSCP] (Revised May 2009) Paragraph 2.1.
[298] Section 1 (1-2), *National Oil Spill Detection and Response Agency, (Establishment) Act* (2006).
[299] Section 7 (c) and (d), *National Oil Spill Detection and Response Agency, (Establishment) Act* (2006).
[300] Section 6(2), *National Oil Spill Detection and Response Agency, (Establishment) Act* (2006).
[301] Section 6(3), *National Oil Spill Detection and Response Agency, (Establishment) Act* (2006); Section 245 and 247 (a) of the *Criminal Code*, (Chapter C38, Laws of the Federation of Nigeria of 2004) and Section 243-248 which forbids any person from contaminating the atmosphere that will be detrimental to the health of the general public.
[302] *Oil Pipeline Act*, (Chapter 07, Laws of the Federation of Nigeria of 2004).
[303] *Oil in Navigable Waters Act*, (Chapter 06, Laws of the Federation of Nigeria of 2004).
[304] Preamble of the *Oil Navigation Act*, (Chapter 06, Laws of the Federation of Nigeria of 2004).

crude oil into the waters and prohibited area of the sea. Failure to comply with the provision of the Oil Navigation Act attracts fines.[305]

The Environmental Impact Assessment Act[306] provides that construction of projects in relation to pipelines exceeding 50 kilometres in length should only be carried out if authorized by the authority responsible for environmental impact assessment.[307] The Freedom of Information Act in a bid to protect the environment demands public institutions to make disclosure of public information.[308] This includes oil pollution records which will enable the public especially, those who might be affected by oil activities to institute an action in Court to protect the environment.[309]

3.3.3 Subsidiary Laws made by Ministers to Protect the Environment

As earlier stated, the parliament most times delegates its primary obligation of making laws to ministers to make specific laws aimed at environmental protection. Section 33(c) of the Oil Pipeline Act bestows the onus on the minister to enact subsidiary regulations to prevent land and water pollution. Based on this power, the minister in 1995 established the Oil and Gas Pipelines Regulation.[310] This regulation imposes Oil Corporations to design a contingency plan to prevent pollution,[311] and failure to comply with the regulation is bound to attract a fine and/or an imprisonment term of six months."[312]

The Petroleum Refining Regulation under Section 27 prohibits disposal of petroleum product in any other manner than places approved under the law. Failure of an operator to comply with this regulation is liable to a fine or six months imprisonment on conviction.[313] The provisions is also reflected in the Oil in the Navigable Waters Regulations 1968,[314] Petroleum

[305] Section 7 (5) a, (Chapter 06, Laws of the Federation of Nigeria of 2004).
[306] *Environmental Impact Assessment Act*, (Chapter E12, Laws of the Federation of Nigeria of 2004).
[307] Section 13, *Environmental Impact Assessment Act*, (Chapter E12, Laws of the Federation of Nigeria of 2004) and First Schedule Mandatory Study Activities item 12.
[308] Section 1, *Freedom of Information Act* (2011).
[309] Section 1, *Freedom of Information Act* (2011).
[310] *Oil and Gas Pipelines Regulation*, (Chapter 07, Laws of the Federation of Nigeria of 2004).
[311] Section 9 (1) (b), *Oil and Gas Pipelines Regulation*, (Chapter 07, Laws of the Federation of Nigeria of 2004).
[312] Section 26, *Oil and Gas Pipelines Regulation*, (Chapter 07, Laws of the Federation of Nigeria of 2004).
[313] Section 45 (1) and (2), *Petroleum Refining Regulation;* also, *The Associated Gas Re-Injection Act*, (Chapter 26, L Laws of the Federation of Nigeria of 1990; Chapter A25 Laws of the Federation of Nigeria of 2004; also, Section 1 *The Associated Gas Re-Injection (Continued Flaring of Gas) Regulations* (SI 43 of 1984), and (Chapter A25 Laws of the Federation of Nigeria of 2004).
[314] Section 2 and 5 of the *Oil in the Navigable Waters Regulations* (1968), in (Chapter 06 Laws of the Federation of Nigeria of 2004.

(Drilling and Production Regulations 1969,[315] Petroleum Drilling and Production (Amendment) Regulations 1973,[316] and Petroleum Refining Regulations 1974.[317]

Most specific and comprehensive regulation is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Part VI, A, 2.0 of EGASPIN provides that the Oil Corporations should report oil spills and control such spill "to minimize impacts on human health, other living organisms, and properties."[318] It further instructs the Oil Corporations to take precautionary measures to prevent pollution.[319]

While a detailed discussion of the legal and regulatory arrangements for Nigeria's oil spills is beyond the scope of this thesis, it is worth emphasizing that Nigeria has a plethora of laws dealing with environmental matters including onshore oil pollution prevention as will be highlighted below.

3.3.4 The Petroleum Act and Related Regulations

The Petroleum Act of 1969[320] was one of first legislation tailormade for regulating the Nigeria's O&G activities post-independence. Subsequently, Pre-independence laws such as the Mineral Oil Ordinance of 1914[321] regulated the right to prospect for mineral oils but had nothing do with environmental protection. However, the provision of the 1914 Mineral Oil Ordinance Act, under Section 9, did empower the Governor-General in Council to craft regulations on matters relating to or connected with effecting the ordinance. This led to the making of the Mineral Oils (Safety) Regulations 1952[322] pursuant to Section 9 hereinabove.

However, a critical review of the Regulations reveals that the main concern of these regulations was with regards to project site safety issues and had little or nothing to do with environmental protection. Regulation 7, that deals with drilling operations it states that: "all operations of drilling shall conform with good oil field practice."[323] However, what concocts 'good oil field practice' is vague and was not conclusively defined.[324]

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[315] Section 25, Oil *in the Navigable Waters Regulations* (1968), establishes that reasonable measures be taken to prevent water pollution.
[316] *Petroleum Drilling and Production (Amendment) Regulations,* 1 (973) in (Chapter. P10, Laws of the Federation of Nigeria of 2004).
[317] Section 43 (3) of *Petroleum Refining Regulations* (1974), in (Chapter P10 Laws of the Federation of Nigeria of 2004).
[318] *Environmental Guidelines and Standards for the Petroleum Industry 2002 Revised*; Part VIII, A, 1.1.
[319] *Environmental Guidelines and Standards for the Petroleum Industry 2002 Revised*, Part VIII, N 1.1.1.
[320] *Petroleum Act* (Chapter, P10 Laws of the Federation of Nigeria of 2004).
[321] *Mineral Ordinance (Colonial Mineral Ordinance No.17)*, [1914].
[322] *Mineral Oils (Safety) Regulations*, (1952).
[323] Regulation 7, *Mineral Oils (Safety) Regulations,* (1952).
[324] However, Regulation 7 of the *Mineral Oils (Safety) Regulations*, 1963, which was made under the pre independence Mineral Oils Act, states that good oil field practice ''shall be considered to be adequately covered

Under Regulation 18 of the 1952 Mineral Oils (Safety) Regulations, it was stipulated that: "no person was allowed to accumulate or permit the accumulation of inflammable site." It would seem that the focus of Regulation 18 was on the well site with a view to containing oil field fire outbreaks. It was not until 1963 that the Nigerian government amended these regulations, which was at this time no longer a British colony. However, there was still no mentions of provisions that were directly aimed at environmental protection.[325] Neither did the 1967 regulations that preceded the 1963 amendments, save for regulation 13 that prohibited the discharge of petroleum into the waters of the port.[326]

Nigeria's Petroleum Act is by far the most relevant piece of legislation. The Act remains the foundation upon which the Nigerian O&G legal and regulatory system is hinged on. Nevertheless, like its contemporaries, the Petroleum Act made no comprehensive provisions on environmental protection. The Act was to purposively control the exploitation of O&G from exploration to production to a limited extent, and thus did not address environmental pollution implications.[327] That notwithstanding, Section 9(1) of the Act bestows regulatory powers on the Minister with respect to various aspects of O&G operations. In this regard, Section 9(1)(b) empowers the Minister to make regulations aimed at pollution control and prevention to prevent the contamination of water courses and the atmosphere.

Additionally, the Petroleum (Drilling and Production) Regulations of 1969 were made pursuant to Section 9 of the Act.[328] While the 1969 regulations contain some environmental protection provisions, there were no significant differences from earlier ineffective regulations in substance. For instance, Regulation 25 of the 1969 Regulations makes it mandatory for a licensee or lessee to adopt all practicable precautionary measures including the provision of up to date (modern) equipment approved by the Regulator, in order to prevent the pollution of inland waters, rivers, water causes, and territorial waters of Nigeria or the high seas by oil, or related substances.

Another important provision under the 1969 Regulations is regulation 37(e) which enjoins the licensee or lessee to take all necessary steps practicable to cause minimal harm to the earth's surface including vegetation, fixtures and other properties thereon. Perhaps most importantly, at best these provisions were merely academic as no one could tell what exactly the implications of these terms were.[329] It requires IOCs to undertake the requisite precautionary measures to avert pollution and to act in

by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes''. Thus, going by the 1963 Regulations, the standard of practice in the Nigerian oil industry should be the same as that prescribed by the above-named codes in the United States.

[325] *Petroleum Regulations* (1963).

[326] *Petroleum Regulations* (LN 71 of 1967); Akpan S George, 'The failure of environmental governance and implications for foreign investors and host states - A study of the Niger Delta Region of Nigeria' 2006, IELTR 1, 4-5.

[327] Ebeku K, 'Oil and the Niger Delta people in international law: Resource rights, environmental and equity issues' Rudiger Koppe Verlag, 2006,195.

[328] *Petroleum (Drilling and Production) Regulations* [LN 69 of 1969].

[329] This was due to the fact that these terms were not defined in the 1969 Regulations.

accordance with good oilfield practice. The Environmental Guidelines and Standards for Petroleum Industries in Nigeria ("EGASPIN") made by the Department of Petroleum Resources ("DPR") also provides comprehensive guidelines for regulating oil pollution in Nigeria.

However, despite the convenience of laws and regulations, some commentators have argued that the existing oil pollution laws appear to favour the oil industry, and have failed to prevent and control the negative environmental impacts of oil operations in Nigeria, specifically the Niger Delta region.[330] One commentator, Odoeme opines that the laws and policies that have been created by the Nigerian government over the years have been "ineffective, inchoate and incomprehensive".[331] Similarly, Edu argues that the existing oil pollution laws are unsatisfactory in that they place too much burden on oil spill claimants.[332]

Despite the dominance of its domestic laws, Nigeria is party to some international environmental treaties like the 1954 International Convention for the Prevention of Pollution of the Sea (amended in 1962); the 1969 International Convention on Civil Liability for Oil Pollution Damage (the 1992 Civil Liability Convention (CLC))[333], the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND)[334], the 1972 International Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matters (London Convention)[335], the 1982 United Nations Convention of the Law of the Sea (UNCLOS)[336], the 1985 Vienna Convention on the Protection of the Ozone Layer[337], the 1987 Montreal Protocol on Substances that deplete the Ozone Layer[338], the 1973 Washington Convention on International Trade in Endangered Species of

[330] Orji U, 'An appraisal of the legal frameworks for the control of environmental pollution in Nigeria', *Commonwealth Law Bulletin 321*, 2012, 38.
[331] Odoeme V, 'Corporate accountability in the Nigerian oil and gas sector: Coping with uncertainties', *Commonwealth Law Bulletin*, 2013.
[332] Edu K, 'A Review of the Existing Legal Regime on Exploitation of Oil and the Protection of the Environment in Nigeria', *37 Commonwealth Law Bulletin*, 2011, 307.
[333]International Maritime Organization, *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, London: International Maritime Organization, 1996.
[334] International Maritime Organization, *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1996, Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, consolidated texts of the International Convention on Civil Liability for Oil Pollution Damage, 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, London: International Maritime Organization, 1996.
[335] International Maritime Organization, *London Convention 1972: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and 1996 Protocol*, 3rd ed., London: International Maritime Organization, 2003.
[336] United Nations, *United Nations Convention on the Law of the Sea: Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea with Index and Excerpts from the Final Act of the 3rd UN Conference on the Law of the Sea*, Bonn, Germany: United Nations, 1997.
[337] United Nations Environment Programme, *Vienna Convention for the Protection of the Ozone Layer: Final Act*, Nairobi, Kenya: United Nations Environment Programme, 1985.
[338] United Nations Environment Programme, *Montreal Protocol on Substances that Deplete the Ozone Layer: Final Act*, Nairobi, Kenya: United Nations Environment Programme, 1987.

Wild Fauna and Flora (CITES)[339], the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[340], the 1992 Convention on Biological Diversity[341], the 1992 Convention on Climate Change[342], the 1997 Kyoto Protocol[343], the 1998 Rotterdam Convention and International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC)[344] amongst a myriad of other international treaties.

These international agreements govern various aspects of petroleum- related pollution by barring certain activities, enforcing liability, creating compensatory mechanisms, controlling pollution and implementing surveillance, reporting and response processes. Some of these conventions prescribe implementation by the enactment of domestic legislation or establishment of national systems, for example the International Convention for the Prevention of Pollution of the Sea by Oil 1954 (as amended in 1962), as implemented in Nigeria as a result of the enactment of the Oil in Navigable Waters Act of 1968.[345]

In addition, the International Convention on Oil Pollution Preparedness, Response and Cooperation gives a prerequisite for State Parties to prepare a national contingency plan for oil spills. The National Oil Spill Detection and Response Agency (NOSDRA) was established by the Federal Republic of Nigeria National Assembly Act of 2006, in conformity with the provisions of the National Oil Spill Contingency Plan. Overall, Nigeria has developed the basic legal and institutional frameworks to support organized national security and management of the environment. Nevertheless, the international treaties are subject to several limitations and the cardinal issue of the enforcement.[346]

A general survey of these national and international laws/legal frameworks reveals that in Nigeria's Niger Delta, there were few provisions governing the so-called 'best practices' for sustainable development of petroleum resources. The legislative and institutional frameworks governing the

[339]IUCN and Wildlife Trade Monitoring Unit Commission of the European Communities, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: EC Annual Report 1987*, Luxembourg: Office for Official Publications of the European Communities, 1989.
[340] United Nations Environment Programme, *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Nairobi, Kenya: United Nations Environment Programme (UNEP) Environmental Law and Institutions Unit, 1990.
[341] United Nations, "United Nations Conference on Environment and Development: Convention on Biological Diversity," *International legal materials,* 31 (4), 1992, 818-841.
[342] United Nations, *United Nations Framework Convention on Climate Change*, United Nations, Bonn, Germany, 1992.
[343] United Nations Environment Programme, *Kyoto Protocol: United Nations Framework Convention on Climate Change*, Bonn, Germany: UNFCCC, 1998.
[344] International Maritime Organization, *OPRC Convention: International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, including final act of the conference and attachment (resolutions 1 to 10)*, London: International Maritime Organization, 1991.
[345] Ite A, Ufot U, Ite, Idongesit I, Udo I, 'Petroleum Industry in Nigeria: Environmental Issues, national environmental legislation and implementation of international environmental law',- <http://pubs.sciepub.com/env/4/1/3/> on 15 January 2020.
[346] Ite A, Ufot U, Ite, Idongesit I, Udo I, 'Petroleum Industry in Nigeria: Environmental Issues, national environmental legislation and implementation of international environmental law'.

petroleum industry in Nigeria intrinsically covers the gamut of laws applicable in the federation, including the CFRN, all the international and regional treaties in force in the country, all the laws enacted by the federal government, local governments, common laws and case laws.[347]

The application of various interrelated national, regional and international legislations and regulations on civil liability and compensation are frequently triggered by oil pollution. For instance, the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention) follows the precautionary and polluter pays principles as stipulated in Article 4(3) and creates a prerequisite for the use of the best available techniques and best environmental practices as seen in Article 4(4) in order to minimize oil pollution related incidences.[348]

The PPP being an acceptable principle in international environmental law, it publicly advocates that the polluter should bear the cost of pollution control, prevention measures and compensation for impairment of the environment. The object of PPP as discussed earlier is to channel the environmental damage prevention and reparation costs to the legal or juristic person who is in the best positioned to prevent such damage and thus 'internalise' the costs of pollution damage.[349] For example, the UNEP Assessment Report on Ogoniland recommended that Shell was bound to set up an Environmental Restoration Fund to facilitate clean-up and restoration in the Niger Delta.[350] The 'Polluter-pays Principle', which has been enshrined in Nigerian domestic legislation under Section 21 of the 1988 FEPA Act, should be considered as an essential element for the National Contingency Plan so as to be a support-system for the maintenance of accurate records on clean-up operations, property damage and relational economic losses resulting from an incident.[351]

3.4 Overview of USA's Regulatory Regime in Light of The Deepwater Horizon Oil Spill

The Deepwater Horizon incident also referred to as the Macondo Oil Spill was as a result of an explosion on the BP America Production Company's (BP) leased Deepwater Horizon oil rig in the Gulf of Mexico (approximately 41 miles off the southeast coast of Louisiana, within the United States' EEZ) on April 20, 2010 resulted in one of the largest unprecedented environmental disasters in U.S.

[347] Ite A, Ufot U, Ite, Idongesit I, Udo I, 'Petroleum Industry in Nigeria: Environmental Issues, national environmental legislation and implementation of international environmental law'.
[348] Raftopoulos E, 'The Barcelona Convention and Protocols: The Mediterranean Action Plan Regime' Simmonds & Hill Publishing Limited, London, 1993.
[349] Bergkamp L, and Goldsmith B, 'The EU Environmental Liability Directive*: A Commentary*' Oxford University Press, UK, 2013.
[350] United Nations Environment Programme, *Environmental Assessment of Ogoniland*, Nairobi, Kenya: United Nations Environment Programme, 2011.
[351] Ite A, Ufot U, Ite, Idongesit I, Udo I, 'Petroleum Industry in Nigeria: Environmental Issues, national environmental legislation and implementation of international environmental law',- <http://pubs.sciepub.com/env/4/1/3/> on 15 January 2020.

history.[352] The Deepwater-Horizon oil spill also negatively impacted on the lives of thousands of people and business entities as well as major catastrophic environmental impacts within Gulf Coast. The total remediation costs of the unimaginable catastrophe, mitigating the relational economic distress and evaluating the potential environmental effects of the affected parties in the region is indeterminate to date but has been estimated to be in the tens of billions of dollars.[353]

The Macondo oil field (Canyon 252 Block) was operated by BP Plc, which held 65% of the stake, and was co-owned by Anadarko Petroleum Corporation (25%) and Mitsui Oil Exploration Company (10%). The Deepwater Horizon semisubmersible drilling rig was owned by Transocean Limited which was a drilling company operating under contract to BP. A United States oil services company, Halliburton which was contracted for the fabrication of the cement plug to temporarily seal the drilled well, pending the production platform commissioning.[354]

However, the cement plug and the 450-ton 15-meter-high blowout preventer (BOP) which was made by Cameron International failed to trap the gas and eventually resulted to the plug being blown out and subsequently igniting causing an explosion and a major fire that resulted in the death of 11 out of the 126 crew-men that were present on the Deepwater Horizon drilling platform. The platform eventually sank and the BOP was reportedly damaged. The riser which was the pipe carrying up oil from the wellhead collapsed and fell, leaving several subsea openings through which there was a massive oil-flow from the well to the water for about three months.[355]

It was established by Admiral Thad Allen, the national incident commander for the Deepwater Horizon Response Team that the oil flow rate into the Gulf of Mexico was approximated at 35,000 to 60,000 barrels per day (bpd).[356] As the oil reservoir gradually depleted itself with the daily flow rate dropping to approximately 53,000 bpd. The collapsed riser was then cut and plugged into the seabed on 3rd June 2010. By the time the Macondo well capping stack (a temporary flow control mechanism) was

[352] BP America Production Company, a subsidiary of BP p.l.c., leased the Deepwater Horizon from Transocean Holdings LLC, a subsidiary of Transocean Limited. Transocean Limited is the world's largest offshore drilling contractor comprising numerous subsidiaries and jointly controlled entities and associates. Unless otherwise referring to specific subsidiaries or affiliates, we refer to Transocean Limited and its components separately or jointly as "Transocean." BP p.l.c. is an international oil and gas company comprising numerous subsidiaries and jointly controlled entities and associates. Unless otherwise referring to specific subsidiaries or affiliates, we refer to BP p.l.c. and its components separately or jointly as "BP." BP was originally incorporated in 1909 in England and Wales as "British Petroleum" and changed its name in 2001.

[353] 'Deepwater Horizon Oil Spill: Actions needed to reduce evolving but uncertain federal financial risks',- <https://www.gao.gov/new.items/d1286.pdf> on 15 January 2020.

[354] 'Deep Water: The Gulf Oil Disaster and the future of offshore drilling', *Report to the President (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, January 2011*. Cleveland C, 'Deepwater Horizon oil spill'- <www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic> on 15 January 2020.

[355] Cleveland C, 'Deepwater Horizon oil spill',- <www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic> on 15 January 2020.

[356] 'The Macondo, Gulf of Mexico, Oil spill: Insurance implications', *RMS, 2*, 2010,- <www.rms.com/publications/2010_Macondo_Oil_Spill_Insurance_Implications.pdf> on 15 January 2020.

successfully put in place of the original BOP in an operation dabbed 'Top Kill' on 15th July 2010, a total estimate of 4.9 million barrels of oil had reportedly spilled into the Mexican Gulf waters.[357] The haemorrhaging well was officially declared "effectively dead" on 19th September 2010 upon the completion of the relief wells to fully seal it.[358]

The U.S. Government brought claims against the Macondo Participants. In *United States v. BP Exploration & Production, Inc*,[359] the state brought an action against BP, Anadarko, Transocean and others claiming damages against them for breaching the Clear Water Act (CWA) by failing to take the necessary precautionary measures to keep the Macondo Well under control and for failing to deploy the best available and safest drilling techniques. BP ultimately ended up paying a startling $65 billion as damages for what has been termed as being the worst oil-spill incident in the US to date.[360]

Although a careful and thorough review of USA's current domestic laws and legislation relating to offshore pollution response and liability has been undertaken within and outside the country in connection with the Macondo accident, far less attention is paid to the international ramifications of the oil spill. It has been opined by some experts that: "there has been little public discussion, at least in the United States, of how to establish a workable international regime to reduce the likelihood of similar environmental disasters in other deep-water oil fields around the world."[361] A plausible explanation is that the environmental impact of the Macondo accident was confined to the United States with no transboundary environmental harm caused by the spill, unlike in the Montara and Ixtoc I oil spills. In combination with this, the U.S. authorities had sufficient resources to initiate and create sustenance in clean-up operations.[362]

After the BP Deepwater Horizon oil spill, many experts have analysed why the oil spill happened, and the oversight leading to it and recommended how offshore drilling and response to accidents can be ameliorated.[363] The January 2011 report by the National Commission on the BP Deepwater Horizon

[357]Cleveland C, 'Deepwater Horizon oil spill',- <www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic> on 15 January 2020.
[358] Cleveland C, 'Deepwater Horizon oil spill',- <www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic> on 15 January 2020.
[359] *United States v. BP Exploration & Production, Inc*, Number 2:10-cv-04536 (ED Los Angeles, Dec. 15,2010)
[360] 'The Guardian: BP's Deepwater Horizon bill tops $65bn',- <https://www.theguardian.com/business/2018/jan/16/bps-deepwater-horizon-bill-tops-65bn> on 24 January 2020.
[361] Kass S, 'International liability for the BP oil plume' *New York Law Journal*, 2010,- <www.clm.com/publication.cfm?ID> ,93 on 15 January 2020.
[362] Vinogradov S, 'The Impact of the Deepwater Horizon: The evolving international legal regime for offshore accidental pollution prevention, preparedness, and response',- <https://doi.org/10.1080/00908320.2013.808938> on 15 January 2020.
[363] 'National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling', *Report to the President, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, [hereinafter National Commission Report], 2011,- <http://www.gpoaccess.gov/deepwater/deepwater.pdf> on 17 January 2020.

Oil Spill and Offshore Drilling offers the most detailed account up to now, demonstrating the systemic regulatory deficiencies that triggered the spill and proposing constructive reforms.

3.5 Overview of the Legal Framework Applicable to the Polluter-pays Principle in USA.s Oil and Gas Industry

The United States has established a clear legal framework for oil spills to cope with disasters such as the Deepwater Horizon incident. The 1990 Oil Pollution Act (OPA)[364] and the Clean Water Act (CWA) are the principal federal statutes regulating the federal response to oil spill incidences.[365] The National Response System is the national response strategy for addressing oil spills and consists of expert individuals, government agencies and oil industry representatives to ensure access to expertise and resources for oil spill control and clean-up.

3.5.1 The Oil Pollution Act of 1990

OPA stands to be USA's primary law concerning liability for oil pollution damages. It was shaped by the 1989 *Exxon Valdez* oil spill in which an oil tanker christened "Exxon valdes" was grounded on Bligh Island, soiling over 11 million gallons of crude oil into Prince William Sound. This tragedy led to litigation that lasted some 19 years and culminated in a landmark case in the Supreme Court of the USA.[366] The *Exxon Valdes* case was litigated under the law preceding OPA 90 and which created a 'polluter-pays' system to place the primary liability burden for spillage costs to a statutory maximum on the "responsible parties" (RPs)- BP and several other corporations in this event.[367]

The Deepwater Horizon litigation discussed earlier marked the first big case under OPA 90 law. Under the OPA, the RP must have proof of financial responsibility for an offshore facility so as to cover the maximum OPA liability.[368] This permits direct action against the RP for any recovery costs and compensation damages. The current amounts needed are US $ 10 million for an offshore landward facility located on a state's maritime boundary, or US $ 35 million for an offshore seaward facility located on a state's maritime boundary.[369]

The OPA liability provisions are applicable to an oil rig spill (oil pollution) in navigable waters, adjacent to the shorelines or the United States' Exclusive Economic Zones (EEZ) which extends to a

[364] *Oil Pollution Act* (1990).
[365] Hagerty C and Ramseur J, 'Deepwater Horizon Oil Spill: Selected issues for congress 'Diane Publishing, 2010, 39.
[366] International Oil Pollution Compensation Fund, <5http://www.iopcfund.org4> on4 July 2020.
[367] The Coast Guard identified the following companies as responsible parties or guarantors for the Deepwater Horizon oil spill: BP Exploration & Production, Incorporation; BP Corporation North America, Incorporation; Anadarko, E&P Company, LP; Anadarko Petroleum Corporation; MOEX Offshore 2007 LLC; Transocean Holdings Incorporated; and QBE Underwriting, LTD. Publication Number 101-380, 104 Stat 484, 18 August 1990.
[368] 2716(c), *Oil Pollution Act* (1990).
[369] Section 2716(c)(1)(B)(i), *Oil Pollution Act* (1990).

distance of 200 nautical miles.[370] OPA imposes strict liability on the RP.[371] Pursuant to the OPA, the US Coast Guard designated BP as being the RP for the oil flow from the subsea well, by virtue that BP was the area leaseholder of the facility where the pollution occurred.[372] The US Coastguard also designated Transocean as the RP for contamination from the rig itself on or above the surface of the water.[373]

The OPA holds operators as being strictly liable for removal costs,[374] and for eccentric damages to the following: natural resources losses,[375] real or personal property destruction,[376] loss of land revenues,[377] profit losses and earning capacity (purely economic loss),[378] and costs for the provision of additional public services during and post-removal activities.[379] Most claims that arose out of the Deepwater Horizon incident were purely economic losses.[380] There is some debate as to whether the OPA will allow recovery for pure economic loss.[381]

Nathan Richardson pointed out that OPA 90 also "channels" accountability for oil spills. Nevertheless, despite allowing for a detailed definition of channelling liability, OPA 90 simply outlines precisely who is to be controlled without specifying the parties exempt from the obligation. According to Section 6-5 of OPA, the responsibility for offshore oil spills is specifically placed on the lessee or the licensor. And in the Deep-water Horizon case, BP being the drilling permit- holder (the lessee of the Macondo Prospect) was held as being the RP.[382]

In addition to the above, OPA 90 established the Oil Spill Liability Trust Fund (OSLTF); which "is a billion-dollar fund established as a funding source to pay removal costs and damages resulting from

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[370] *Oil Pollution Act* (1990) defines "exclusive economic zone" as: "the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983." 33 U.S.C. §2701(8). According to the proclamation "[t]he Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983),- <http://www.archives.gov/federal-register/codification/proclamations/05030.html> on 16 January 2020.

[371] Section 2702(a) *Oil Pollution Act* (1990); responsible parties are defined in *Oil Pollution Act* (1990), 2701(32).

[372] Davies M, 'Liability issues by the Deepwater Horizon Blowout', *Australian and New Zealand Maritime Law Journal*, 2011, 25.

[373] Rachel Giesber Clingman, Acting Co-General Counsel, Transocean (in re Horizon Incident), Testimony to the Committee on the Judiciary United States House of Representatives, Liability Issues Surrounding the Gulf Coast Oil Disaster, May 27 2010, 2,- <http://iudiciary.house.gov/hearings/pdflClingman0 I 0527.pdf>

[374] Section 2701(b)(1), *Oil Pollution Act* (1990).

[375] 33 USC, 2701(b)(2)(A), *Oil Pollution Act* (1990).

[376] 33 USC, 2701(b)(2)(B), *Oil Pollution Act* (1990).

[377] 33 USC, 2701(b)(2)(D), *Oil Pollution Act* (1990).

[378] 33 USC, 2701(b)(2)(E), *Oil Pollution Act* (1990).

[379]Oil rigs defined under 'facility' 2701(9), *Oil Pollution Act* (1990), Courts have interpreted Section 311 of the Clean Water Act 33 USC §§1251-1387 as imposing strict liability on parties responsible for the discharge of oil or other hazardous substances into the waters of the United States, *United States v New York*, 481 F Sup 4 (DNY 1979).

[380] Martin Davies 'Liability Issues by the Deepwater Horizon Blowout', *Australian and New Zealand Maritime Law Journal 12, 2011, 25.*

[381] Thomas J Schoenberg 'The Scope of Liability to Private party Claimants for Maritime Pollution Damages under US Law' (2010) 16 Journal of International Maritime Law 434, 434, 443.

[382] Richardson N, 'Deepwater Horizon and the patchwork of oil spill liability law' *Resources for the future*, 2010,

oil spills… [and] is used for costs not directly paid by the polluter..."[383] The fund which "is available to pay for pollution removal activities, as well as the initiation of natural resource damage assessments"[384]

Of importance to note is that liabilities under the American civil liability regime are relatively limited and can be jeopardized because it is often open for claimants to pursue alternative redress outside OPA 90 notwithstanding the Act's provisions.

3.5.2 The Clean Water Act of 1990

The Clean Water Act (CWA) which was originally enacted in 1948 and referred as the Federal Water Pollution Control Act creates civil penalties for discharge of pollutants into navigable waters resulting to aquatic pollution and further criminalizes such practices.[385] Section 311 of the CWA expressly stipulates that environmental officials may forbid oil discharge that may "be hazardous to the health or welfare of the United States' environment."[386]

3.5.3 The International Framework

The international pollution compensation regime in the US is based on two main treaties: the International Convention on Civil Liability for Oil Pollution Damage 1992 which was amended in 2002 ('CLC 92')[387] and the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992 ('Fund Convention').[388] Both treaties were adopted under the auspices of UN's International Maritime Organization (IMO). The two Conventions have yielded well in practice, with virtually all bills having been paid.[389] Despite these Conventions not extending to oil rigs, it is imperative that they be contextualized in conventions pertaining to oil rigs.[390]

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[383] US Coast Guard, US Department of Homeland Security, NPFCPUB 16465,2, Oil Oil Spill Liability Trust Fund (OSLTF), Funding for oil spills, 2006,1,- <http://www.uscg.mil/npfc/docs/PDFs/OSLTFFunding-forOilSpills.pdf> on 16 January 2020.

[384] Oil spill cost and reimbursement fact sheet, restore the gulf, GOV,- <http://www.restorethegulf.gov/release/2011/07/12/oilspill-cost-and-reimbursement-fact-sheet> (detailing various costs incurred by the Federal Government) on 18 January 2020.

[385] 33 USC, § 1319 (2006).

[386] 33 USC, § 1321(b)(4) (2006 & Supp VI).

[387] Was first enacted by the Commonwealth in the Protection of the Sea (Civil Liability) Act 1981 (Cth). This Act now gives force of law to selected provisions of CLC 92. Although the Act goes beyond the provisions in the CLC; White, above n 23, 122.

[388] Mason, M 'Transnational compensation for oil pollution damage: Examining changing specialities of environmental liability, LSE Research Papers in Environmental and Spatial Analysis (RPESA), No, 69 Department of Geography and Environment, London School of Economics and Political Science, London, 2002,1-3.

[389] Gaskell N, 'Offshore oil and gas catastrophes: Compensation for offshore pollution from ships: Problems and solutions' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 6.

[390] There is also an even higher convention under the Fund Convention 1992 - it is optional as to whether state parties want to be part of it or not in White M, *Australasian Marine Pollution Laws*, Federation Press, 2 ed, 2007, 58.

The CLC 92 sets out the strict liability principle and establishes a strict liability insurance system. In order to provide additional compensation when CLC is insufficient, the International Oil Pollution Compensation Fund is also set out.[391] The strict model of civil liability imposed by CLC 92 and the Fund Convention, has been expanded to include the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HN) OF 1996, and the International Convention on Liability for Bunker Oil Pollution Damage (BOPD) of 2001Convention, covering oil spills from vessels save for tankers, breaks with the CLC 92 liability channelling, by casting compensation claims to operators, charterers and/or registered owners, all with limitation rights. This drastic shift towards a multiple liability system suggests that the US and the European Commission (EU) on IMO are on the move to more accordance with the existing American liability norms in this area of oil related pollution, and is reflective of the need to contrive the absence of a second tier of supplementary compensation provisions as under the Fund Convention.[392]

Although there is a lot of discussion as to the existing mechanisms for liability allocation between parties (contractor, subcontractor and operators) under contract law and the question of contractual liability,[393] the operator's (or licensee's) primary responsibility as imposed by national legislation is that of channelling the provision of liability or by using a technique, that is justified. This is because the operator stands to benefit from the exploitation activities with the facility's knowledge and is best positioned to take the necessary available preventive and control measures.[394]

The US favours the interpretation of the PPP in equity terms, as it delves into the cost-allocation between the polluters and the larger society, and vice versa. Certain provisions of US' Clean Water Act (CWA) of 1977 and the Clean Air Act (CAA) of 1970 that mandate polluters to act in accordance with prescribed environmental standards at their own expense; and in compliance with the Comprehensive Environmental Response, Compensation and Liability Act1 (CERCLA) 1980 which assigns liability for clean-up costs arising out of hazardous wastes contamination. The implementation

[391] Mason, M 'Transnational compensation for oil pollution damage: Examining changing spatiality's of environmental liability, LSE Research Papers in Environmental and Spatial Analysis (RPESA), No, 69 Department of Geography and Environment, London School of Economics and Political Science, London, 2002,1-3.
[392] Mason, M 'Transnational compensation for oil pollution damage: Examining changing specialities of environmental liability, LSE Research Papers in Environmental and Spatial Analysis (RPESA), No, 69 Department of Geography and Environment, London School of Economics and Political Science, London, 2002,1-3.
[393] Shilliday D, Mayer W, Michael J and Slania A, 'Contractual risk-shifting in offshore energy operations, Tulane Law Review, Volume 81, Numbers 5 & 6, June 2007, 1579.
[394] Cameron P, 'Liability for catastrophic risk in the oil and gas industry' *International Energy Law Review,* Volume 6, 2012, 207-219.

of the PPP in the US was notably influenced by CERCLA, with some commentators noting that: "*the polluter-pays principle is one of the central objectives or goals of CERCLA*".[395]

3.6 Strict Liability and the Negligence Rule

Where purpose-built legislation is in place, strict liability usually applies. Strict liability imputes civil liability on the RP for the damage suffered without needing proof of negligence. Shilliday comments that: "The rationale for strict liability is that it shifts the loss from the innocent to the responsible State which, in view of its presumed knowledge of the hazard created, is considered to be in a better position to decide whether or not the benefits of the activity are likely to outweigh its potential costs and provides a powerful incentive for the prevention of accidents."[396] Juxtaposed against the negligence approach, the strict responsibility simplifies the legal procedure and offers a relatively better protection for victims plagued by oil pollution.[397]

Additionally, the rule of reversal of the burden of proof of the injurer's fault is usually applicable to strict liability. In other words, under the comprehensive accountability framework/the burden proof of fault is not relied upon by the claimant which tends to favour the claimant as it simplifies the case somewhat more unlike in the instance where it would have been necessary to adduce proof of negligence or intention on the operator's part.[398]

In US' regulatory regime, subject to Section 2703 of OPA, a party is exonerated from responsibility if the discharge is "solely" attributed to: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee, agent or contracting party of the responsible party; and (4) any combination..." The first two apply in what is considered to be in extremely unusual circumstances while the third is pegged on two circumstance; First, it does not apply where there arises a third-party relationship, for example that of employee, agent or a person whose conduct occurs "in connection with any contractual relationship" with the RP. It has been broadly interpreted in precedent that the term "any contractual relationship" includes any commercial contract, even in dearth of a formal contract.[399]

True to the above, in the Deepwater Horizon catastrophe, despite Cameron International being the manufacturer of the BOP used by and Halliburton being the cement contractor being found negligent,

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[395] Pesnell J, *The Contribution Bar in CERCLA settlements and its effect on the liability of nonsettlors*, 58 Los Angeles Law Review 167, 1997, 190.
[396] Bosma, 'The regulation of marine pollution arising from offshore oil and gas facilities' LLM Thesis, 2011- <https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/view/> on 18 January 2020.
[397] Shilliday D,- <https://www.duo.uio.no/bitstream/handle/10852/38222/MT.pdf?sequence=1> on 18 January 2020.
[398] Parpworth N, 'Enforcing environmental laws: The role of the private prosecution' *Journal of Planning & Environment Law*, 334, 2007, 'Case law analysis' *18 Journal of Environmental Law*, 2006, 119; *Express Ltd (trading as Express Dairies Distribution) v Environment Agency [2005] Env LR 7.*
[399] Int'l Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097, 1105-06 (S.D. Tex. 1994).

and said tortious act being solely attributable to the accident, BP would not be exculpated.[400] Secondly, the third defense stands applicable if proven that the RP exercised due and reasonable care with respect to the E&P activities and took the necessary precautionary measures to avert the foreseeable acts of third parties and their imminent consequences.[401] There is no available defense or legal recourse if the RP failed or blatantly refused to undertake reporting on the incident, provide reasonable assistance and cooperation in connection with clean-up efforts, or comply with such clean-up orders.[402]

3.7 Conclusion

Under this chapter, we have considered carefully, but not exhaustively, the various approaches to environmental enforcement within the O&G industry in Nigeria and the USA. The chapter examined the two incidences of O&G pollution from the lens of the PPP and how various regulatory and institutional mechanisms apply.

It is worthy to note that PPP is applied through varied economic instruments such as taxes, and charges, emissions trading, as in cap and trade, deposit refund schemes, liability and insurance *et cetera*. Implementation of the principle by different states enjoys different status in national legal systems.[403] Based on the application of the principle in this Chapter, USA seems to enjoy one of the most advanced application of the PPP.

Some inherent weaknesses in the enforcement mechanisms have been highlighted in relation to Nigeria's Niger Delta incident and the strengths in US' regulatory regime at the backdrop of the Deepwater Horizon incident. This has therefore expressed aspects of responsibility in a large sense, including any obligation to make the observance of law to pay civil penalties for O&G pollution.

The OECD states that the principal reasons for the formulation of the PPP are (a) "to encourage the rational use of environmental resources" and (b) "to avoid distortions in the international trade and investment".[404] PPP is not solely about environmental protection but is equally for making sure that interests of trade and international investment are not jeopardized. Interests of trade and international investment would be jeopardized if the cost of eradicating pollution is such that foreign investors are scared away and local producers would not be able to export.

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[400] Broder J, 'Panel Says Firms Knew of Cement Flaws Before Spill' NY TIMES, 28 October 2010,- <http://www.nytimes.com/2010/10/29/us/29spill.html>, ("Halliburton officials knew weeks before the fatal explosion of the BP well in the Gulf of Mexico that the cement mixture they planned to use to seal the bottom of the well was unstable but still went ahead with the job."). The National Commission's letter- <http://graphics8.nytimes.com/packages/pdf/science/spilldoc.PDF> on 6 February 2020.
[401] 33 USC § 2703(a)(3), *Oil Pollution Act* (1990).
[402] 33 USC § 2703(a)(3), *Oil Pollution Act* (1990).
[403] Finn R. Førsund. "The polluter-pays principle and transitional period measures in a dynamic setting." *The Swedish Journal of Economics* 77 (1975): 56–68,- < **http://www.jstor.org/stable/3439327**> on 2 November 2020
[404] OECD, 1972 C(72) 128.

The review of the various laws in this chapter is not in any way exhaustive. Neither is it in any way as detailed as the contents of those pieces of legislation would require. However, due to the limitation in size and time associated with this thesis, it is expedient to confine the review of relevant statutes to a cursory analysis. As earlier stated, these statutory reviews are geared towards identifying the 'best' provisions that deal with enforcement and compliance of the PPP and how same is being administered to ensure effective enforcement and compliance within the environmental law facet.

CHAPTER FOUR

IMPLEMENTATION AND ENFORCEMENT GAPS IN THE POLLUTER PAYS PRINCIPLE; A REVIEW OF NIGERIA'S AND USA'S REGIMES

4.1 Introduction

Implementation and enforcement of the PPP lies at the heart of any environmental liability regime. An appropriate liability regime has the potential to decrease the risk of environmental harm by proposing industry safe practices.[405] Fundamentally, the strength of a statutory civil regime depends on the degree to which it guarantees both environmental and human justice and also encourages 'best practice' industry behavior in order to minimise environmental harm likely to arise out of O&G exploration and production.

Despite the efforts made by Nigeria to incorporate some of the international environmental principles into the nation's environmental laws, policies and strategies with the bid to use the principles as a vehicle towards attainment of environmental security, the nation is still plagued with enormous environmental issues due to lack of or failure to implement regulations. USA on the other hand ….

Effective implementation and regulatory enforcement of the PPP relies on four key factors, which are: (1) the rule of law; (2) effective government authority; (3) fiscal systems in place; and (4) a functional property rights administration regime.[406]

4.2 Factors Challenging the Implementation of the PPP

i) Ex-post model of PPP- This is a crucial.[407] This trait carries significant drawbacks.[408] In the ex-post context, the future risk of loss is smaller than the present benefit of pollution because future occurrences are discounted to present values.[409] Therefore polluters have an incentive to defer investment in pollution abatement measures because it is more expensive in the present.[410] If the polluter's present payoff is higher than potential future loss from accidents, there are fewer incentives to invest in preventative measures today.[411]

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[405] Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58 at para 24, [2003] 2 SCR 624 [Imperial Oil].
[406] Omedo G, Muigua K and Mulwa R, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle', 16/1 Law, Environment and Development Journal (2020), p. 1,- <http://www.lead-journal.org/content/al601.pdf.> on 8 Augsut, 2020
[407] Ashutosh Bhagwat, Modes of Regulatory Enforcement and the Problem of Administrative Discretion, 50 HASTINGS L.J. 1275, 1330-31 (1999) (exploring the pros and cons of ex post regulation systems).
[408] Ashutosh Bhagwat, Modes of Regulatory Enforcement and the Problem of Administrative.
[409] Evan Bogart Westerfield, When Less is More: A Significant Risk Threshold for CERCLA Liability, 60 U. CHI. L. REV. 697, 715 (1993) (analyzing the cost/benefit decisions firms make in the context of CERCLA liability when calculating precautionary costs).
[410] Evan Bogart Westerfield, When Less is More: A Significant Risk Threshold for CERCLA Liability.
[411] Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and Individuals in Law and Economics, 92 CAL. L. REV. 75, 92 (2004) (arguing that "rational, self-interested Polluters will underinvest in abatement efforts");

Additionally, due to the tremendous cost of most environmental accidents, agents have little incentive to exercise due care to prevent accidents if they are likely to be judgment-proof due to limited assets.[412] In the most extreme cases, potential liability could dwarf available assets and companies would simply fold due to the inability to pay clean-up costs. As a result of 'judgment proofing' or 'strategic subsidiarization,' in which companies deliberately separate high-risk operations to avoid liability, potential liability can be effectively reduced to zero.[413]

ii) Liability gaps- Because liability is allocated after environmental harm is noticeable or rises to the level of a legally cognizable injury, in some instances, a long period of time lapses and tracing fault or identifying the polluter often becomes difficult.[414] For example, it has proven very difficult to assign liability from massive deforestation due to acid rain, from multiple sources of air pollution and particulate matter (including hybrid pollution effects from the automotive industry, end-users, and coal fired power plants).[415] Allocating liability to parties and determining an appropriate extent is almost impossible in such a complex scenario. Moreover, with respect to greenhouse gas production, it is impossible to relate the cost of the resulting harm to a specific polluter, further complicating the causation analysis.[416]

Another liability predicament is often that facing the petroleum sector is that of oil spill resulting from vandalization of oil pipelines, sabotage of oil installations and illegal oil bunkering. It is often difficult to identify the polluters in these activities because they are done clandestinely. From Chapter 3, it is evident that pipeline vandalization is a big issue in Nigeria's Niger Delta.

See also Richard A. Epstein, Two Fallacies in the Law of Joint Torts, 73 GEO L.J. 1377, 1386 (1985) (addressing the role that joint and several liability plays in "disincentivizing" polluters in light of private and social gain).

[412] *The Case of the Disappearing Defendant*: An Economic Analysis, 132 U. PA. L. REV. 145, 161-63 (1983) (describing the economic incentives for a party to practice or not practice due care).

[413] U.S. Government Accountability Office (Aug. 2005), Environmental Liabilities: EPA Should DO More to Ensure that Liable Parties Meet Their Cleanup Obligations (Pub. No. GAO-05-658), at 1, available at http://www. gao.gov/ new.items/d05658.pdf.

[414] See John H. Davidson, The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands, 39 ENVTL. L. REP. NEWS & ANALYSIS 10368, 10371 (2009) (addressing "[t]he nature of the incremental polluter" and discussing problems with wetland drainage and the tendency of societies to overlook pollution until it manifests into a disaster).

[415] Andrew P. Morriss & Roger E. Meiners, Borders and the Environment, 39 ENVTL. L. 141, 153 (2009) (citing Robert F. Blomquist, The Beauty of Complexity, 39 HASTINGS L.J. 555, 562 (1988)).

[416] Bruce Pardy, Climate Change Charades: False Environmental Pretences of Statist Energy Governance, 26 WINDSOR REV. LEGAL & SOC. ISSUES 179, 196-97 (2009) (relating the difficulty of how to properly internalize costs for pollution when the pollution cannot be traced back to a specific source).

iii) **Inadequacy of Sanctions** - Without real consequences for environmental violations, there is no incentive for multinational corporations to respect the environment in which they operate. For example, the current environmental laws in Nigeria incorporated the principle of PPP; however, they do not contain sanctions stiff enough to deter would be polluters. Under the present regime, it is cheaper to pollute than to adopt pollution abatement practices.

iv) **Long duration of judicial processes-** It is usual for legal instruments for environmental protection to provide for judicial action against a polluter who, without legitimate justification, fails to comply with a measure for actualizing the PPP. The action can be civil or criminal as the case may be. In either of the processes, the frustration engendered by the excessive long period of time that judicial processes take in Nigeria is an obstacle to the actualization of the PPP.

In criminal proceedings the agencies saddled with the duty of enforcing the principle would be frustrated and disillusioned. The long judicial process can be exploited by unscrupulous enforcement agents to resort to settlement with offenders by which they collect money from them and release them. In civil proceedings, the cases might last so long that the victims of environmental pollution may not be alive to receive the award of damages due to them.

Furthermore, like in the case of Nigeria, by the time the cases are finally disposed of, much of the damages awarded to victims would have gone into legal fees. It is to forestall the predicament of the long judicial process that statutes like National Environmental Standards, Regulation Enforcement Agency (NESREA) (Establishment) Act provides for the establishment of mobile Courts for the expeditious disposal of cases of violation of environmental regulations.

v) **Pervasive Ignorance of environmental degradation and pollution**- Apart perhaps from the Niger Delta where there is an appreciable level of awareness as regards the environmental hazards associated with oil exploitation, there is still a widespread ignorance of environmental degradation and pollution in the other parts of the country. The myth that the environment is capable of withstanding any kind of action or treatment is still pervasive in the society. The result is that often the polluter is not aware that he is polluting the

environment and the victim is in no better position as he does not know that he is a victim of pollution. In this environment of ignorance, the polluter-pays principle cannot operate.

4.3 Factors Challenging the Enforcement of the PPP

This is mainly due to:

a) **Inefficient enforcement agencies**- The application of the PPP revolves principally on the public administration; it administers the PPP-embodying statutes and discharges also the PPP-compliant functions assigned to the enforcement agencies like the NESREA and NOSDRA. It is not in all circumstances that a polluter pays directly to the victim of his pollution. In most cases he pays indirectly through payment for the services provided by the public administration towards pollution control and prevention. As already seen above a polluter pays for pollution caused by him through either of the following indirect channels: defraying administration costs borne by public administration in implementing anti-pollution measures, bearing the costs of measures stipulated by public administration for potential polluters towards preventing and controlling accidental pollution, bearing the costs for residual damage resulting from residual pollution from their activities, and bearing the costs for trans-frontier or trans-boundary Pollution caused by them. These payments can only yield the desired result of payment for pollution if there is a competent public administration that stipulates the adequate measures for pollution control and prevention.

b) **Absence of Professionalism-** To adequately enforce the PPP, technical knowledge of what the environmental pollutants are in every sector of the economy is of primary importance. Otherwise there is no way public administrators in the agencies saddled with the duty of enforcing the PPP would be able to, for instance, know the measures to prescribe for pollution control and prevention. This point finds corroboration in the report of Amnesty International where it noted that with regard to getting the polluters pay for the oil spillage in the Niger Delta, the NOSDRA which is saddled with the duty of preventing and seeing to the cleaning up of areas impacted by oil spill did not have the necessary expertise. Instead, it relied on the expertise of the polluting oil companies and their means of transportation for even accessing the areas of the spill. Lack of professionalism is caused partly by the heavy unemployment in the country resulting to employment being based. on extraneous considerations like nepotism, religion, ethnicity, etc. The effect is that many members of staff of the enforcement agencies lack the basic competence for the job they are hired for.

c) **Under-Funding of Enforcement Agencies**- Part of the mechanisms for implementing the PPP is by a polluter defraying the public administration cost for measures implemented towards pollution control and prevention. These costs are defrayed through the payment of administrative fees charged by public administration in this regard. This presupposes that government funds the enforcement agencies adequately for their jobs prior to the actual or potential polluters paying fees for services rendered by public officers. In this way the actualization of the PPP entails cooperation between the enforcement agencies and polluters both actual and potential. But the experience is that often these agencies are not adequately funded for their functions. They lack the facilities for preventing and controlling pollution. The Amnesty International Report seen above points at this predicament with the NOSDRA which did not have the transportation to access the site of an oil spillage but had to rely on the transportation provided by the polluter-oil company. Bearing in mind that such agencies are also agents of the PPP, their failure in discharging their duties results to the failure of the PPP.

d) **Paucity of funds** - No enforcement agency can effectively function without money. Lack of funds affects the enforcement agencies in various degrees ranging from under staffing, lack of qualified staff, inability to effectively prosecute cases in Court etc.[417]

4.4 Conclusion

This Chapter has demonstrated the difficulties that governments and IOCs and institutions face in effective implementation and enforcement of the PPP. In examining how the regulatory frameworks are implemented and enforced, practical solutions are seemingly evolving in real time in addressing complexities or remediating environmental damages and annihilations.

The strengths and weaknesses deduced from both comparative jurisdictions and the possible lessons that might be learnt by Kenya with the aim of establishing the importance of the PPP in environmental safeguards and as a mechanism for regulatory reforms.

[417] Dr. Ngeri Benedo, the Director-General of NESREA stated that the major challenge of the Agency is poor funding which she said has limited the Agency's ability to meet its statutory responsibilities. See. Joseph Chibueze, "After Five Years, it's Time to Bite," http://csrwatchinternationalnigeria.wordpress.com/2012/11/18/nesrea-after-five-year-its-time-to-bite-by-joseph-chibueze/ accessed on 30 April, 2019.

CHAPTER FIVE

FINDINGS, RECOMMEDATIONS AND CONCLUSIONS

5.1 Findings

The comparative analysis of the various legal regulations in the environmental field particularly O&G in terms of the application of the PPP in itself is non-exhaustive hence the expedient confinement to the relevant statutory provisions.

The simple expression of the PPP- that the pollution costs should be borne by the polluter, belied the complexity of implementation and operationalisation of the principle. Inherent in the principle are the hurdles of identifying the polluter, calculating the quantum accruing from the pollution and determining the time for such payments to be made.[418]

Further to the above, the implementation of the PPP requires compromise between policy/regulatory objectives relating to economic and environmental. Effective implementation also means that regulations must be accompanied by not only clear identification of the regulations but also clear liability rules coupled with both oversight and compliance. The following are cursory findings from this thesis:

i) Aside from the environmental assessment process provided for under legislations aegis, the discussion has also delved on the philosophy behind the imposition of compensation and mitigation costs associated with the PPP. It obligates the polluter to bear the expenses of prevention, control, and clean-up of pollution arising from his acts of commissions or omissions. This is aimed at reinforcing the need for environmental protection and establishment of precautionary mechanisms to ensure that operators in the O&G sector are compliant with set environmental standards and guidelines with the aim of minimising ecological hazards, especially in relation to their upstream activities which is the primary focus of this thesis.

ii) Despite the PPP setting the grounds to facilitate the reparation of ecological anomalies, if the regulations governing the upstream O&G sector are not carefully implemented, it will be unwittingly diverted from its original purpose. The responsibility of regulatory control and enforcement succinctly lies with competent national authorities. As discussed in the introductory chapter, international requirements are implemented by national authorities through primary legislation, supported by a raft of regulations and guidelines. It has been

[418] Lawrence H. Goulder and Ian W. H. Parry, Instrument Choice in Environmental Policy (2008) Resources for the Future, Discussion Paper RFF DP08-07,- <http://www.sfu.ca/~wainwrig/Econ400/enviro/goulder-Parry-Choice-enviro-instr-2008.pdf.>

observed that the enactment of a law does not automatically lead to the rectification of problem contours. It takes the enforcement to a regulation for its enforceability as it is natural for blind pursuit of profit to override environmental responsibility.[419] In order to ensure an effective enforcement regime, it takes a well calculated enforcement programme; the establishment of law enforcement authorities, and a robust institutional framework to clearly specifies who is responsible for which function.

iii) It is clear that a major problem that the PPP faces is with regard to the lack of a consistent national legislation in this field or an international convention that would otherwise offer guidance or even obligate operators to adhere to the established O&G industry practice. Also, the systematic failure of most legal systems to protect vulnerable populations in the aftermath of spills is evident. For instance, post-Macondo developments have significantly upset the risk-reward expectations of both operators and contractors. They have failed to recognise the "command and control" structures which have been described in this thesis as shaping the traditional liability approach.

iv) Whilst many lawsuits that have been filed relating to oil pollution damage are purportedly by injured owners and residents have been individual in nature a number of them have been presented in form of putative class suit actions. However, it is often hard to prove a causal link between the operator's activities and the damage. Consequently, it is difficult to ensure that the polluting IOCs are obliged to remediate the environmental damage(s).

v) Further to the above, in some instances, polluters are not always identified, or are insolvent. This renders states *per se* to assume the intrinsic responsibility of providing the requisite reliefs for the victims of environmental pollution.[420] The situation is further convoluted by the trans-boundary nature of O&G pollution where environmental harm of one nation is attributed to another.

vi) While PPP suggests state responsibility towards ensuring pollution regulation, it does not suggest the retributory mechanisms relating to past causations. Ultimately, it renders the polluters to only be responsible for pollution caused 'from here on out.' Polluters are exonerated from past pollution and eludes them from any reparative obligations.[421]

[419] Field B, Field M, 'Environmental Economics: An Introduction', Mc- Graw Hill, Singapore, 2009.
[420] Khan, 'Polluter-Pays-Principle' Barbara Luppia, Francesco Parisib, and Shruti Rajagopal, 'The rise and fall of the polluter-pays principle in developing countries,' *International Review of Law and Economics 32*, 2012.
[421] Zahar A, 'Implementation of the polluter pays principle in China,' *Review of European, Comparative & International Environmental Law*,2018, 3.

5.2 Recommendations

On Regulatory Standards and Enforcement

While the suitability of different policy tools varies depending on a country's circumstances, steadiness in regulatory framework is the key. Hence, in order to sustain the PPP as an environmental concept in Kenya's emerging O&G sector, there is a regulatory need for the following:

5.2.1 Adequate sanctions and penalties

Adequate and effective sanctions and penalties should be applied for environmental pollution in violation of environmental standards in Kenya in order to have a marginal deterrent effect of tort liabilities arising out of future violations by the operators/tortfeasors and protect oil-bearing communities and their environment. While aspects of international environmental laws relevant to the O&G industry reasonably accord for 'best practices', the case of Nigeria for example presents insignificant and ineffective sanctions and penalties for their violations have continuously 'encouraged' the industry operators to continually violate those laws at the detriment of people's livelihoods and the ecology.

In Nigeria, Section 6(2) of the NOSDRA Act, imposes a daily fine of ₦500,000 (roughly $1,250) on an oil spiller for failing to report an oil spill to NOSDRA. Under Section 6(3) stipulates a fine of ₦1,000,000 (roughly US $2,500) if the affected site is not cleaned up 'to all practical extent, including remediation.'

On the other hand, the US' OPA of 1990 created a US $1 billion 'fund' for oil spill supplemental compensation and crafted a comprehensive procedural access for the same. The 'fund' was set up by imposing a 5% tax per receipt of crude oil and petroleum products imports. Ultimately, it placed the clean-up burden on the operator and/or owner of the vessel or facility which is the attributable source of the spill. If the costs and damages exceed the liability cap for the vessel or the facility, then the balance will be recouped in the US $1dollar Oil Spill Liability Trust Fund ('Fund' or OSLTF). This will effectively and accordingly place the secondary responsibility for payment of oil spill clean-up and damages costs on the receivers of the crude oil or petroleum products. The 'Fund' or OSLTF is also available to facilitate payments for clean-ups and consequent damages in the event the spiller raises a valid defence or is unknown.[422]

[422] Oilney A, et al, In India their Supreme Court had moved a step further to develop the absolute liability principle, allowing no exceptions, to apply to any enterprise enjoyed in hazardous or inherently dangerous activity. *MC Mehta v. Union of India (1987) (1) SCC 395.*

From the above impetus, it is clear that the US fund system is better than Nigeria's System[423] and as such, the regime ought to be emulated by both Kenya and Nigeria as form of 'environmental insurance'. It will thus create an obligation for operators to finance the fund for their contribution to the risk for an amount that is proportional to the risk taken, ultimately providing incentives to the contributors to prevent harm.[424]

The same story of ineffective sanctions can be told with regards to gas flaring. In Kenya for instance, Section 59 (k) of The Petroleum Act, 2019[425] obligates the contractor to *"…prevent flaring or venting of oil and natural gas by undertaking all reasonable steps including the harnessing or re-injecting of the gas."* In Nigeria, Section 2 of the 1979 Associated Gas Re-injection Act[426] empowers the relevant Minister with wide discretion to permit oil companies to continue to flare gas subject to such conditions and penalties he may stipulate. For long, the gas flare penalty was set at a paltry ₦10 (equivalent $0.03) per 1000 standard cubic feet flared,[427] compared to the $10 required in some developed countries which has discouraged gas flaring in such countries.[428] Thus, since oil companies, that have consistently been permitted to flare gas, have always found it cheaper to pay the Nigerian penalty and continue gas flaring compared to re-engineering their production process to avoid flaring gas. In 2004, the World Bank clearly demonstrated the inadequacy of the gas flaring penalty: while, as at then, the Nigerian oil companies had been obligated to pay between US $150,000 and US $370,000 annually for gas flaring, each year the country would lose between US $500 million and US $2.5 billion owing to gas flaring.[429]

The polluter-pays principle has fallen short of ensuring environmental management as the existing legislation requires the realization of more robust measures. The penalties issued for individuals and corporate bodies should be significantly different. The differentiation of penalties would ensure that companies feel the 'sting' rather than perceiving the sanction as no more than a mere slap on the wrist.

[423] For example, an attempt by the Nigerian legislature to establish such fund is puerile and indeterminate - Sections 30 and 121, *Nigerian Minerals and Mining Act*, CAP N162, 2007.
[424] Case C–1/03 *Van de Walle and Others v Texaco Belgium SA*, 2004, ECR 1–7613.
[425] *Petroleum (Exploration and Production) Act* (Act No.2 of 2019),- <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/PetroleumAct_No._2of2019.pdf> on 20 January 2020.
[426] Cap A25 Laws of the Federation of Nigeria (2010).
[427] Asu F, 'FG to introduce new penalty for gas flaring', Punch,2016,- <http://punchng.com/fg-introduce-new-penalty-gas-flaring/> on 20 January 2020.
[428] Evoh C, 'Gas flaring, oil companies and politics in Nigeria' 2002,- <http://waado.org/Environment/OilCompanies/GasFlaresPolitics.html> on 20 January 2020. Some developed countries charged at least US$10 for gas flaring. But this was usually in the context of reducing Greenhouse Gas Emissions as a measure to check climate change. Natural Gas or Associated Gas is widely reputed to be a source of Carbon Dioxide (a Greenhouse gas). For instance, the penalty for Carbon emission (including by gas flaring) in British Columbia (Canada) was in the year 2008 placed at US$10 per 1000 Standard Cubic Feet of Gas. This penalty was stringently raised in the year 2012 to US$30. Good J, 'Carbon pricing policy in Canada' Canadian Library of Parliament Publication, 2018, 5,- <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/.../2018-07-e.pdf > on 20 January 2020.
[429] 'Global Gas Flaring Reduction Initiative: Report Number 3: Regulation of associated gas flaring and venting – a global overview and lessons' World Bank, March 2004, 64- <http://documents.worldbank.org/curated/en/590561468765565919/Regulation-of-associated-gas-flaring-andventing-a-global-overview-and-lessons-from-international-experience> on 20 January 2020.

The cost of cleaning up the environment and compensation to victims may act as a deterrent for natural persons, however larger companies would not. In addition, penalties do not match the magnitude of the environmental impact of the pollution. Thus, a proper assessment should be carried out in order to weigh the specific penalty to extent of the pollution on the environment.[430]

5.2.2 Public Participation

Public participation is defined as the integral process by which public concerns, needs and values are incorporated into governmental and corporate decision-making with the overall goal of better decisions that are supported by the public.[431]

Some scholars have however given a broader definition by stating that: "*public participation includes organized processes adopted by elected officials, government agencies or other public or private sector organizations to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation.*"[432]

Public participation is a vital for effective environmental governance, whether in terms of preventing and checking environmental pollution or restoring and rehabilitating an already damaged environment. This is the message carried in Principle 10 of the Rio Declaration on Environment and Development[433]– signed by almost every nation, including Kenya– to the effect that: "*[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level….*"

At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.[434]

While environmental restoration aspects may be scientific in nature, its overall success usually requires support from the community and their participation in an array of areas such as during Environmental

[430] <https://www.thepalmagazine.com/polluter-pays-principle-a-critical-analysis-cynthia-bondi/>
[431] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (John Wiley & Sons, 2005), p.7.
[432] Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making,* (National Academies Press, 2008), p.1; See also Ondrik, R. S., "Participatory approaches to national development planning," *Framework for Mainstreaming Participatory Development Processes into Bank Operations, ADB* (1999): 15-<http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief_ADB.pdf> on 8 August 2020.
[433] Adopted by the UN Conference on Environment and Development (UNCED), 3-14 June 1992, 31 ILM 874.
[434] Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

Impact Assessment (EIA). This in order to provide insights and feedback, assessment of damage, site access and safe passage, as well as local expertise and labour (local content). Most importantly, such 'opportunities for community involvement needs to be legally mandated' to ensure its effectiveness[435] and foster acquisition of a 'social license' for the operationalization of an O&G project.

In the Matter of the Mui Coal Basin Local Community[436] case, the Court summarized what entails public participation as follows:

"From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

> *"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each*

[435] Richardson B, 'The Emerging Age of Ecological Restoration Law' 25 (3) Review of European Community & International Environmental Law 1, 2016, 10 – 12.
[436] *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition43 of 2014) (Consolidated).

case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))"

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another *ex parte* Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will be discussed below.

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out *bona fide* stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

This among many other cases generally capture the current trend in Kenyan courts as far as implementation and promotion of the principle of public participation in environmental matters is concerned.

5.2.3 Adequate Coverage of Environmentally Destructive Oil and Gas Activities

As highlighted in this thesis, the various regulatory regimes are aimed at preventing, and mitigating environmental damages from O&G-related activities as at and when they occur. Unfortunately, in this field, environmental laws are mostly inadequate, especially in terms of their coverage. As Amnesty international puts it: "some underlying provisions in the O&G industry legislations seem to facilitate environmental degradation and are largely associated with human rights violations,"[437] to which there are no corresponding environmental protection measures and/or restoration provisions or laws unlike in cases of environmental harm caused by oil spills.

In order to stem the continued destruction of the environment with no reasonably and effective requirement for remediation, again, Kenya's laws must be amended accordingly to meet international standards and better address the compensation and remediation needs of those who may be affected by the effects of O&G pollution.

5.2.4 Contractual Liability, Indemnity and Insurance

Where risks and barriers exist to having timely application of the polluter pays system, such as economic and/or compliance challenges for reclamation and remediation obligations, financial assurance systems be used to mitigate risks, e.g. up-front financial security and/or insurance.

Contingent liability for environmental damage is and continues to be of great concern for the oil industry. As earlier alluded in this research, environmental liability issues teem with complexity, especially when multiple parties, including state-owned enterprises, like the National Oil Corporation of Kenya (NOCK) who are involved in petroleum production and supply.

Essentially, contracts should inextricably have specific provisions on who is liable for what and to whom. This is where 'who' it is somewhat contingent upon the type of contract, but usually the contractor/ concessionaire (the IOC) is responsible unless a liability is directly attributable to the state or state-owned corporation. If more than one contractor is involved in the project, then it is likely to be stipulated in clauses that they will be held jointly and severally liable. On the other hand, 'what' concerns the types of harms (death or injury or also 'environmental damage'), the period in which the

[437] *Amnesty International* (n 29) 45.

harm was caused (i.e. no liability for pre-emptive environmental damage as set out in the baseline assessment), and the liabilities' legal form.

In a contract there are three adoptable forms of liabilities: fault liability, strict liability, or absolute liability. As regards fault liability, it requires the operator's intention to do harm or is found to be culpably negligent. Absolute liability on the other hand does not require an operator to be at fault and provides him with no possible defence. Strict liability, is in between the two aforementioned extremes; it does not necessarily need proof of negligence or egregious conduct on the operator's part, but provides him with a limited number of defences, the most common being: natural disasters or acts of God; events of war or violent conflicts; and intentional or grossly negligent commissions or omissions by a third party. Most national and international environmental liability regimes impose strict and limited liability forms as they are considered to be most likely to encourage preventative measures and to reduce the onus on environmental damage victims, without placing an unreasonable burden (as absolute liability would) on the liable party.[438]

Lastly, as to the question of 'whom' the contractor is liable to: There are generally two separate existent issues in contracts; liability to the state and to third parties. The latter is not one of a direct tangent of liability contracts and does not affect third party rights under national law but rather one of indemnity. The indemnity provisions, prompts contractors' commitment to compensate states for any costs incurred and attributable to a third-party liability suit.

Most contracts make specific reference to 'pollution' and/or 'environmental damage' in their liability/indemnity clauses and typically follow a strict liability approach.[439] A limited number, however, including the 2004 Vietnam Model PSC, provide for fault liability only. A look at the 2002 Cambodian contract, for example, states that: "Where Petroleum Operations cause pollution of the environment in a manner which is inconsistent with Good Petroleum Industry Practices, Contractor shall be responsible for cleaning up, at Contractor's expense, such pollution and shall be liable for all damage and expense in connection with such pollution to the extent that it results from the negligence, recklessness or wilful misconduct of Contractor or its Subcontractors."[440]

A potential problem that is bound to arise with both liability/indemnity and insurance clauses is that the terms 'pollution' and/or 'environmental damage' are rather narrow and usually do not provide full

[438] *UNEP Secretariat, 2002*, 'Liability and compensation regimes related to environmental damage, UNEP: Nairobi,- <www.unep.org/DEPI/programmes/Liability-compen-papers.pdf> on 22 January 2020.
[439] Even in the absence of explicitly listed exceptions within the liability clause, the extremely common 'force majeure' clause provides a defence for non-compliance.
[440] 'Cambodia Draft Production Sharing Contract', <http://www.eisourcebook.org/cms/Cambodia%20Draft%20Production%20Sharing%20Contract.pdf> on 22 January 2020.

coverage of all the various environmental impacts that are bound to arise in O&G operations. This renders them ambiguous hence subject to interpretation in contracts.

5.2.5 Better Incorporation of Environmental Justice into Decision Making

Environmental justice is the fair treatment and meaningful involvement of all people, regardless of status, ethnicity, race, color, national origin or income, in the development, implementation, and enforcement of environmental laws, regulations and policies.[441]

Most statutes and regulations governing the PPP as previously highlighted, more so in the case of Nigeria are structured around environmental injustice. First, many of the applicable laws provide exceptions or flexibility operating to create unfairness. Secondly, many of the compensation provisions for the vulnerable populations are limited to the creation of unfairness-risks. Law reforms should thus take a trajectory towards the achievement of environmental justice.

Despite the proposition for reforms, it is essential to make such measures politically viable as many of the environmental justice issue in the wake of O&G pollution can be significantly ameliorated through rigorous and effective implementation and harmonization of the existing environmental justice regulations and policies. The problem particularly in relation to oil spill responses is that crosscutting interactions create environmental justice danger zones. In spite of the foregoing, individual agencies need clear integration and implementation of their environmental justice mandates into each step of oil spill related regulations and disaster planning and management.[442]

5.2.6 Treat Environmental Protection as Human Rights

Human rights have been defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.[443]

Environmental protection should be treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.[444]

The environment and its states affect a wide (if not the whole) spectrum of human life, which is protected by human rights. There is, thus, a direct co- relation between the environment and the right

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[441] See United States Environmental Protection Agency, < http//www.epa.gov/envonmentaljustice/> on 22 January 2020.
[442] Osofsky H, Baxter-Kauf K, Hammer B, Mailander A, 'Environmental justice and the BP Deepwater Horizon oil spill' *New York University Environmental Law Journal*, 2012, 20(1), 99-[vi].
[443] <www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx > on 10 August 2020.

[444] Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law,* Vol.23, No. 3, 2012.

to life[445], human dignity[446], the right to reasonable standards of sanitation[447], the right to food[448] and the right to clean and safe water in adequate quantities.[449] The Constitution of Kenya 2010 goes further to expressly state the right to a clean and healthy environment, which effectively lays to rest the question of the question of the environment and human rights in Kenya. On an international plane, however, there is no recognised right to a healthy environment.

Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.[450]

Human rights depend upon having a liveable planet. The right to life as espoused in Article 26 of the CoK would not be fully enjoyed without due consideration being paid to the planet on which such a right is to be enjoyed.

Certain rights highlighted above such as the right to water and food and sanitation show the link between environment protection and sustainable development, as they are necessary for these rights to be achieved.[451]The right to water, for example, is necessary for poverty eradication, empowerment of women and maintenance of human health (which in turn, is an indicator of sustainable development). It is, thus, logical for human rights to be integrated into sustainable development.[452]

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.[453] Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.[454]

[445] Article 26, *Constitution of Kenya* (2010).
[446] Article 28, *Constitution of Kenya* (2010).
[447] Article 43 (b), *Constitution of Kenya* (2010).
[448] Article 43 (c), *Constitution of Kenya* (2010).
[449] Article 43 (d), *Constitution of Kenya* (2010).
[450] 1992 Rio Declaration, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."
[451] Horn, L., 'Reframing Human Rights in Sustainable Development' *Journal of the Australasian Law Teachers Association,* 2013.
[452] Horn, L., 'Reframing Human Rights in Sustainable Development' *Journal of the Australasian Law Teachers Association,* 2013.
[453] Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' *A GI-ESCR Practitioner's Guide*, March 2014.
[454] Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' *A GI-ESCR Practitioner's Guide*, March 2014.

The *Universal Declaration of Human Rights of 1948*[455](UDHR) set the stage for the recognition, protection and promotion of human rights the world over. The *Declaration* places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights.[456]

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights, (*ICCPR) 1966[457] and *International Covenant on Economic, Social and Cultural Rights (*ICESCR) 1966.[458]

The Draft Principles on Human Rights and the Environment of 1994[459] (1994 Draft Principles) comprehensively addresses the linkage between human rights and the environment, and provide for the interdependence between human rights, peace, environment and development.

The *World Summit for Social Development,* held 6-12 March 1995 in Copenhagen, Denmark, saw world Governments adopt a Declaration and Programme of Action which focused on the consensus on the need to put people at the centre of development. The world leaders pledged to make the conquest of poverty, the goal of full employment and the fostering of stable, safe and just societies their overriding objectives.[460]

There is a multiplicity of international instruments on environment protection, dating as far back as the Stockholm Declaration of 1972. While the language of Article 1 of both the Stockholm Declaration

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[455] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),- <*http://www.refworld.org/docid/3ae6b3712c.html*>, on 10 August 2020.

[456] Article 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

[457] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December1966, United Nations, Treaty Series, vol. 999, p. 171. ICCPR on its part provides under Article 47 that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

[458] *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976). ICESCR under Article 1.2 provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[459] Draft Principles on Human Rights and The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

[460] World Summit on Social Development, Copenhagen 1995: A Brief Description, *Gateway to Social Policy and Development*,- <*http://www.un.org/esa/socdev/wssd.htm*> on 15 August 2020. The world's leaders agreed on what are commonly referred to as the ten commitments and these include to *inter alia*: eradicate absolute poverty by a target date to be set by each country; support full employment as a basic policy goal; promote social integration based on the enhancement and protection of all human rights; achieve equality and equity between women and men; accelerate the development of Africa and the least developed countries; ensure that structural adjustment programmes include social development goals; increase resources allocated to social development; create "an economic, political, social, cultural and legal environment that will enable people to achieve social development"; attain universal and equitable access to education and primary health care; and strengthen cooperation for social development through the United Nations.

and the Rio Declaration seem to connote a human right approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected.[461]

5.2.7 Oil Pollution should be made Statutory Absolute Liability Offence

Pollution in the O&G sector should be made a statutory absolute liability offence in Kenya. This will ease compensation for oil pollution victims and compel the polluter to undertake clean-ups and remediation. It is also bound to prompt oil companies to be more careful, responsible and environmentally cautious and conscious. The polluter will be incentivised to adopt due standard of care as financial guarantees are provided.[462] Accordingly, the various defences, exceptions and exemptions used by the O&G sector to favour the polluter should be removed in statute so as to hold the polluter responsible for his actions, inactions and delict of negligence.

Furthermore, our Courts should proactively deal with issues of environmental protection and pollution control, as a third-generation human right that is germane to the attainment of egalitarian norms and the continued sustenance of existence of life upon earth. Like in the US Courts, it has been made possible for all Kenyans including environmental conservationists, civil society organizations and anyone who feels that their right to a clean and healthy environment has been violated to sue oil companies and the respective government agencies on environmental protection and degradation matters. This is based on the underlying fact that one man's environment is everybody's' environment and that which affects one's environment is bound to affect everybody's' environment.

With various a being advanced as against absolute liabilities, the most significant thing is that it negates from the fundamental principles of penal culpability as it is based on assumptions that have not been, and cannot be developed empirically. There is no conclusive proof that a higher standard of care is the result of absolute liability. If a person has already taken all reasonable precautions, is he likely to take additional measures, knowing that no matter how much action he takes, it will not serve as a shield in the event of an infringement? If reasonable care and expertise has been exhibited, can conviction have a deterrent effect on him or others.

5.3 At the Institutional Level

5.3.1 Provision of Adequate Resources and Capacity

[461] Handl, G., 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (United Nations Audiovisual Library of International Law, 2012).
[462] Faure M, Smedt K, 'The ELD's effects in practice', in Bergkamp L, Goldsmith B (eds), 'The EU environmental liability directive: A commentary', Oxford University Press Oxford, 2013, 306–307.

Despite the general laxity of existing environmental regulations relevant to the oil industry, if diligently enforced as they are, they will still help in ensuring a healthier environment. But the matter becomes more obfuscated when one considers that even though there exists various government institutions tasked with responsibilities to enforce environmental standards in the oil industry, these institutions are plagued with inadequate human and material resources to effectively execute their duties of enforcing environmental laws in the oil industry. In the least, this situation is appalling considering billions of dollars made yearly from the industry by the government, a part of which it could easily utilize to quip the relevant agencies.[463]

Kenya's government through EMCA[464] established the National Environment Management Authority (NEMA) as the institutional body tasked with the monitoring and compliance aspects of social and environmental safeguards. But NEMA is seemingly understaffed and underfunded hence does not have adequate monitoring and assessment capabilities with respect to O&G developments.[465]

In Kenya, there are efforts aimed at preventing environmental pollution and environmental damage through the internalization of externalities. Section 108 of EMCA provides for environmental restoration orders which can be issued by NEMA to deal with pollution. Such an order may require the person to whom it is issued to restore the environment, prevent any action that would or is reasonably likely to cause harm to the environment, require payment of compensation and levy a charge for abatement costs. Likewise, a Court can issue an environmental restoration order to address pollution with similar effects.[466] Section 25 (1) establishes the National Environment Restoration Fund consisting of fees or deposit bonds as determined by NEMA, and donations or levies from industries and other project proponents as contributions to the fund.[467] This fund acts as a supplementary insurance for the mitigation of environmental degradation, where the polluter is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation.[468]

Proper environmental law enforcement in the oil industry will remain a mirage until the agencies charged with this responsibility are adequately equipped for the task. This will go a long way in coming

[463] Worika I, Etemire U, and Tamuno P, 'Oil Politics and the Application of Environmental Laws to the Pollution of the Niger Delta: Current Challenges and Prospects' OGEL 1, 2019,- <https://www.ogel.org/article.asp?key=3809> on 24 January 2020.
[464] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coo rdination (Amendment) Act*, 2015).
[465] Vasquez P, 'Kenya at a Crossroads: Hopes and fears concerning the development of oil and gas reserves,' *Revue internationale de politique de développement*, 10.4000/poldev.1646., 2013,- <https://www.researchgate.net/publication/276331341_Kenya_at_a_Crossroads_Hopes_and_Fears_Concerning_the_Development_of_Oil_and_Gas_Reserves/citation/download> on 23 January 2020.
[466] Section 111, *Environmental Management and Coordination Act* (EMCA).
[467] Section 25 (2), *Environmental Management and Coordination Act* (EMCA).
[468] S. 25 (4) of EMCA

up with proper national contingency plans, encourage regional contingency plans development and implementation of common notification and reporting procedures, promote information exchange on new technological developments for pollution control and implement the PPP at an institutional level.

Even though the PPP requires the company to pay the remediation costs, the company does not necessarily undertake site maintenance in perpetuity. The best proposed solution might perhaps be that where the company undertakes to pay a local institution to take up the said responsibility. However, this does not mean that if things do not go according to plan, the company will be absolved of all responsibility. Private companies are now in the making to assume responsibility for ongoing maintenance of the platform at a fee.

5.3.2 Independent Oversight

A critical fact on the ground is that environmental regulations specific to the oil industry are not effectively applied or enforcement due to lack of independent oversight by the relevant government institutions. Most oil businesses for example in Nigeria and Kenya are majorly undertaken via Joint Venture (JV) agreements between the International Oil Companies (IOC's) and the host government, or with a framework of Production Sharing Contracts (PSC's). The implication of this is that the state descends from regulator to player in the production of resources in her territory.[469]

Given that both the government and the IOCs are essentially business partners, it would mean to a large extent that together they should be responsible for the ongoing environmental degradation *per se*. The expected reality has been that the said government agencies have been rendered handicapped with respect to effectively playing their regulatory roles in relation to the oil companies. Indeed, one wonders how the state– holding key responsibilities for regulating environmental pollution in the oil industry– can effectively execute this mandate in relation to oil producing entities when it is under for example in the Kenyan context, the Ministry of Petroleum which is tasked with the responsibility of entering into O&G contracts on behalf of the Kenyan government.

The above is the case in many jurisdictions because effectively holding the IOCs to account for their actions and manner of operation is recalcitrant and may easily sabotage the economic gains that the respective government derive from this industry which constitutes its major economic game-changer. In fact, as alluded to, and quite reasonably so, a major reason why the government has not been able to credibly and effectively penalize oil companies for gas flaring and even abrogate the practice can be linked to the fact that "the failure of the federal government to effect cash payment for its obligations

[469] Campbell B, 'Corporate Social Responsibility and Development in Africa: Redefining the Roles and Responsibilities of Public and Private Actors in the Mining Sector' *Resource Policy Journal 2*, 2011.

in the operations of the joint venture partnership constitutes a major obstacle for the oil firms to focus their attention on curbing gas flaring."[470]

Surely, in a situation, as depicted above, where the regulator and the regulated are 'in bed' together, it is bound to give rise to avarice and conflict of interest.[471]. It is for this reason that agencies and units established to apply and enforce environmental laws and standards in the industry must legally be given sufficient autonomy and properly insulated from inordinate pressure from other public institutions, to enable such agencies dispassionately and effectively carry out their mandate.

As seen from Nigeria's regime where its enforcement approaches require critical amendments, it is imperative that the relevant regulations in the O&G industry should be fortified with provisions that are watertight and which aim to reinforce enforcement techniques. This is majorly because the Nigerian statutes relating to environmental protection in the oil sub-sector are theoretically copious, broad and highly encompassing. However, the critical aspects of ground enforceability and the practicability in the sub-sector is another fundamental matter.

Having identified some striking deficiencies in the frameworks reviewed in the previous chapters, we can safely conclude that Kenya does not currently have sufficient regulatory mechanisms to ensure compliance with the 'polluter-pays' environmental principle in its O&G undertakings. This assumption does not suggest that the existing frameworks in the US is perfect, but rather suggests that some regulatory techniques in place in the US may be incorporated/adopted in Kenya to further strengthen the current situation.

A robust environmental law has been established in the United States and well-equipped agencies responsible for law enforcement and compliance. In view of the OPA and CWA justificatory provisions, it is clear that their environmental enforcement is more stringent and is obtainable in Kenya.

With the increasing concern of serious environmental challenges including global climate change, deforestation, accelerated loss of diverse biodiversity and water and air pollution, it is pivotal for Kenya to apply due diligence in the determination of the environmental impact of its development activities. A solution to avoiding the potentially negative ramifications of the O&G sector for Kenya's developing O&G sector, is adopting EIA legislation as a necessary statutory prerequisite.

[470] Evoh C, 'Gas flaring, oil companies and politics in Nigeria' 18 February, 2002,- <http://waado.org/Environment/OilCompanies/GasFlaresPolitics.html> on 24 January 2020.
[471] Konne B, 'Inadequate monitoring and enforcement in the Nigerian oil industry: The case of Shell and Ogoniland' *47 Cornell International Law Journal*, 2014, 181, 195.

Only through the establishment of good environmental legislation compliance regime for the oil industry, identification of potential dangers, and development of dangerous controls or mitigation mechanisms can those consequences be predicted. The government should assume its role as a regulator, and strengthen the role of civil society organizations.

5.2.1 Environmental regulatory enforcement and compliance

The uncertainties coupled with ambiguities in the articulation of the PPP have allowed states to enter into agreements with IOCs which otherwise they ought not to have signed because the PPP obligations are likely to be vague. It is imperative therefore that, in the future, careful considerations should be given to cases when the polluter might invoke the reasoning of "I pay, therefore I can pollute," especially those operators endowed with vast financial resources, for whom the reparatory costs is a negligible price to pay when compared to the benefits they can accrue after prospecting for O&G.[472]

In order to ensure compliance with its environmental standards, the government should ensure that the best of environmental standards are adhered to by IOCs through the establishment of monitoring and sanctioning mechanisms. It is rife to say that environmental regulations if not enforced are otherwise rendered innocuous. Compliance and enforcement ensures good environmental governance, and fosters respect for the rule of law. Kenya should move beyond national and international legal frameworks by enacting 'real laws' that are backed by efficient and effective institutional frameworks for effective application of the PPP.

It is worth noting that the legal framework in Kenya is not competent enough to provide specialised rules and legislations in the regulation of O&G operations. This means that reliance is pegged on general tort law (civil law) and environmental protection statutes as the main sources as the main sources of upstream pollution. It is thus essential that Government of Kenya ensures enactment and compliance specialised O&G industry legal frameworks to prescribe stern civil and criminal fines, sanctions or penalties for polluters. The framework should however be clear on whether the retributive justice perspective of imposing fines and penalties applies exclusively to operators solely or to contractors as well. The likely result is that contractors will stand a heavy and perhaps fatal exposure in situations for which they inadvertently had no ability to fully mitigate the risk and over which they had not enjoyed full operational control and decision-making powers.

5.2.2 Strengthening institutional capacity

Efforts should be made to strengthen institutional capacity in order to regulate and enforce environmental legislations relating to the O&G sector. This can be done through donor funded

[472] Doniga A, 'The Polluter Pays Principle' *Law Annals from Titu Maiorescu University*, 2016, 79-91.

development mechanisms such as the World Bank and UNEP. Similarly, such intuitions as NEMA which are tasked with the environmental regulatory mandate ought to be adequately funded in in order to function optimally while undertaking their mandates and subsequently spur enforcement of an efficient regulatory system.

The Judiciary should also be empowered to handle lawsuits arising out of alleged environmental and social scourges as a result of IOCs' environmentally deleterious activities. This will also be critical in the crafting of jurisprudence due to interpretation of legal statutes relating to O&G-related environmental violations.

5.2.3 Community involvement

Because O&G Companies operate within communities, they cannot afford to be aloof to the people's social needs. It is therefore important that civic education, formal consultations and public participation forums held.[473] This serves as a way of respecting inhabitants rights and make them aware of their obligations in relation to E&P activities in relation to their environmental future.

Kenya's civil society groups should play a crucial role of redress for example in facilitating group-interest litigation (judicial or administrative recourse) in the event harm is done and should try to have a say in the formulation of hydrocarbon-related regulations and in the development of the institutional framework.

Oil E&P activities must be subjected to detailed environmental and social impact assessment (ESIA) in which the petroleum host communities' views and grievances are duly considered thus guaranteeing the social license and preserve their operationalization legitimacy.

5.2.4 Compensation

To protect subsistence, international environmental law places a duty on the polluter corporation to pay victims of oil pollution adequate compensation for economic and pecuniary losses incurred. For example, in line with this obligation, after the Deepwater Horizon explosion, BP announced a $20 billion escrow fund that would be used to compensate businesses and workers in Louisiana, Mississippi, Alabama, Florida, and Texas, whose financial livelihood suffered as a result of the oil spill.[474]

There should be adequate statutory provisions for indemnification or retribution or appeasement for victims of pollution damages arising out of the operator's E&P activities. Such damages aid in

[473] Article 10, *Constitution of Kenya* (2010), includes public participation as a national value and principle of governance. Clause 2 (a) of the article explicitly mentions 'participation of the people' as such.
[474] 'BP Establishes $20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions' available at https://www.bp.com/genericarticle.do?categoryId=2012968&contentId=706296 (accessed 12 May 2012).

restoring the pre-tort conditions to the victims initially enjoyed (*restitutio in integrum*). The Petroleum Act which governs O&G operations in Kenya has is not clear and does not set a 'financial cap' on issues of compensation as it only speaks of 'adequate' or 'reasonable' compensation. This is likely to occasion some difficulties in the compensation adjudication process in case of harm thus leading to the arbitrary fixing of compensation rates. It is thus essential that a statutory definition of 'adequate' or 'reasonable' compensation should be provided for in regulations, lest they be buoyed down by technical rules of procedures.

Finally, in order to ensure prompt and adequate compensation payment, it is proposed that a 'Compensation Fund' should be created (pursuant to legal provisions) by the IOCs, including the Kenyan- owned National Oil Corporation of Kenya Corporation (NOCK). This kind of 'super fund' (regional cash pools fed by operators) will ensure that prospecting companies contribute a certain percentage of their annual budget in order to defray large compensation claims likely to arise in the course of their operations; fixing the minimum amount for the application of this fund is crucial in responding to urgent and large compensation claims, as a result of a large-scale damage (such as the Macondo incident).Significantly, such a 'fund' will be in accordance with Principle 13 of the 1992 Rio Declaration on Environment and Development (the Declaration has arguably become part of customary international law ratified by Kenya), which states in part: "States shall develop national law regarding liability and compensation for victims of pollution and other environmental damage."

Further to the above, it is essential that IOCs, enterprises and institutions are properly insured or backed by financial guarantees to mitigate civil liabilities likely to arise as a result of pollution damage. On the other hand, funds arising from application of the PPP should be directed toward rectification of the relevant social and environmental costs. In other words, such payments should not be directed in general revenue of the government.

5.3 Conclusion

The intent of the recurring theme in this thesis, that is environmental regulation in the O&G sector is to establish a cognitive framework to ensure environmental protection amidst E&P activities. The 'black swan' incidents like the Deepwater Horizon and Niger Delta spillages along with related case law, provide interesting case studies in the application of the PPP. The principle though deceptively simple is shrouded with complexities regarding implementation and enforcement. However, what is evident from this thesis is that PPP is continuously developing and sometimes in different trajectories.

The national, regional and international regimes have continued applying the principle over time, although most of the governing laws and regulations remain resistant to change as regards to channelling liability and compensation limits for pure environmental damage. It is thus crucial states

transpose robust legislative measures and enforcement techniques coupled with good and responsible industry practice.

Further to the above, if the recommendations set out in the previous chapter are sagaciously considered and progressively implemented, the relationship between governments and that of IOCs, the oil producing communities and the environment, will be adjudicated as a much smoother, productive and a mutually beneficial one for all O&G industry players.

In an ideal world, the precincts of the law would enhance the sustenance and mitigation of natural resource and provide adequate compensation for damage to both the environment and legal persons. In such a world, there would be no compromise on environmental concerns and every responsible party would be responsible for the payment of their fair share of liability accruing from their acts of commission or omission leading to pollution.

This research concludes by adding that the adoption and application of the PPP is a function of a number of variables ranging from regulatory to non-regulatory. Although attention in this thesis has been given to those regulatory issues, nothing prevents an emerging O&G player like Kenya from adopting stringent environmental legislations that are adequate protection of both human and environmental rights amidst anthropocentric activities relating to the O&G industry.

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APPENDICES